

Key legislation linked to adult safeguarding

This is a summary of relevant legislation, however, legal advice needs to be sought for a more detailed interpretation of the main requirements of each piece of legislation.

In addition, the Social Care Institute for Excellence (SCIE) provides guidance to practitioners in relation to the law as it applies to safeguarding. This is entitled *Safeguarding Adults at risk of harm: a legal guide for practitioners* and can be found at <http://www.scie.org.uk/publications/reports/report50.pdf>

Data Protection Act 1998

Introduction

Since the 1st March 2000, the key legislation governing the obtaining, protection and use of identifiable personal information has been the Data Protection Act 1998 (DPA) and does not apply to information relating to the deceased.

The key difference between the DPA and the previous legislation is that it applies not only to automatically processed personal data, but also to manual personal data.

Principles

The DPA sets out eight principles, which must be complied with when obtaining and using personal data.

Principle 1

Obtain and process personal data fairly and lawfully

Principle 2

Hold data only for the lawful and specified purposes

Principle 3

Personal data shall be adequate, relevant and not excessive in relation to the purposes for which it is processed

Principle 4

Personal data must be accurate and where necessary, kept up to date

Principle 5

Hold data for no longer than necessary

Principle 6

Personal data shall be processed in accordance with the rights of data subjects under the Act

Principle 7

Measures should be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction or damage to personal data.

Principle 8

Personal data shall not be transferred to a country outside the European Economic Area unless that country ensures an adequate level of protection for the rights of freedoms of data subjects regarding the processing of personal data. The use of personal information by agencies must therefore comply with these principles.

The lawful use of information

When sharing information, compliance with the first DPA principle is crucial to ensuring the sharing of information is carried out lawfully.

To ensure personal information is processed in a lawful manner, one of several specified conditions, which are set out in Schedule 2 of the DPA, must be complied with. These conditions are as follows:

- the individual has given his/her consent to the processing

- the processing is necessary to comply with a legal obligation
- the processing is necessary in order to protect the vital interests of the individual (this is envisaged to be a life and death scenario)
- the processing is necessary in order to pursue the legitimate interest of the organisation or certain third parties (unless prejudicial to the interests of the individual)
- the processing is necessary for the entering into a contract at the request of the individual or performance of a contract to which the individual is a party.

Therefore, as a general rule, if one of the above conditions is satisfied, the processing of information is likely to be lawful. However, if the information to be processed is what is described as “sensitive personal data”, then there are extra conditions that must be satisfied before the processing of information is lawful.

Sensitive personal data is information that relates to:

- the racial or ethnic origin of the individual
- their political opinions
- their religious beliefs
- whether they are a member of a trade union
- their physical or mental health or condition
- their sexual life/preference/orientation
- the commission or alleged commission by them of any offence.

The main conditions are as follows:

- that the individual has given their explicit consent to the processing of the personal information
- that the processing is necessary to perform any legal right or obligations imposed on the organisation in connection with employment
- the processing is necessary to protect the vital interests of the individual or another person, where consent cannot be given by the individual, or the organisation cannot be reasonably expected to obtain consent, or consent is being unreasonably withheld where it is necessary to protect the vital interest of another
- the information contained in the personal information has been made public as a result of steps deliberately taken by the individual
- the processing is necessary in connection with legal proceedings, dealings with legal rights or taking legal advice
- the processing is necessary for the administration of justice or carrying out legal or public functions
- the processing is necessary for medical purposes.

Where information is given to professionals in confidence, then in addition the Common Law Duty of Confidentiality must also be considered.

Individuals’ rights under the Act

The DPA gives seven rights to individuals in respect of their own personal data held by others.

- Right of subject access
- Right to prevent processing likely to cause damage or distress
- Right to prevent processing for the purposes of direct marketing

- Right in relation to automated decision making
- Right to take action for compensation if the individual suffers damage
- Right to make a request to the Commissioner for an assessment to be made as to whether any provisions of the Act have been contravened.

Individuals' right of access to information

Subject to certain exceptions, any living person who is the subject of information held and processed by an organisation, has a right of access to that information. Where access is refused, the individual may appeal. There are certain statutory exemptions, which may limit access rights. These include, for example, where access to a perpetrator's details would prejudice the prevention or detection of crime.

The Common Law Duty of Confidentiality

When information is of a confidential character or nature (or given in confidence), it necessarily gains a quality of confidence. This does not mean that the information need be particularly sensitive, but simply that it must not be publicly or generally available. Information is not confidential if it is in the public domain. To decide whether an obligation of confidence exists, the following must be considered:

- whether the information has a necessary quality of confidence
- whether the circumstances of the disclosure have imposed an obligation on the confidant to respect the confidence; this usually means considering whether the information was imparted for a limited purpose.

Most of the information used by the parties to this agreement will be of a confidential nature. Therefore, as a general rule this confidential information should not be disclosed without the consent of the subject. However, the law permits the disclosure of confidential information where there is an overriding public interest or justification for doing so. Examples of this might be child protection or the prevention and detection of crime or public safety.

Human Rights Act 1998

Article 8 (1) provides that:

Everyone has the right to respect for his private and family life, his home and his correspondence. However, this is a qualified right and *Article 8 (2)* states that:

“There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the protection of the rights and freedoms of others.”

Therefore, disclosure of information will need to take Article 8 into consideration. The sharing of information may be necessary, for example, for the protection of health or morals, for the prevention of the rights and freedoms of others, or for the protection of disorder and crime.

Freedom of Information Act 2000

The *Freedom of Information Act 2000* grants a right of access to any information held by public authorities, unless there are valid legal reasons why this information should not be disclosed. It is intended to promote a culture of openness and to facilitate a better public understanding of how public authorities carry out their duties, the reasoning behind their decisions, and how public money is spent.

The *Freedom of Information Act 2000* does not interfere with the public authority's obligation to protect personal or confidential data, nor does it inhibit an individual's right to access their own personal information, as prescribed under the Data Protection Act 1998.

Public authorities have an obligation under the *Freedom of Information and Data Protection Acts* to consider requests from any person or organisation for access to any information that they hold. This may include safeguarding adult information, including the minutes of meetings and information shared by any

other party in connection with safeguarding adult investigations.

Public authorities will not release information if any of the exemptions defined in the Freedom of Information Act 2000 or Data Protection Act 1998 apply. The exemptions include personal information, information supplied in confidence, information for which a claim to legal professional privilege can be maintained, and information where disclosure would prejudice the effective conduct of social work.

There may be circumstances where information relating to safeguarding adult investigations is released, but only where it is appropriate to do so. A situation where information may be released would be where a case has been concluded with no concerns regarding the safety of those involved, and where permission has been received from all relevant parties for the disclosure of the information. However, advice should always be sought from the Legal, Data Protection, Information Governance and Caldicott Guardian as appropriate.

Crime and Disorder Act 1998

This Act was introduced to provide measures to prevent crime and disorder and anti-social behaviour in the community.

Section 115 of the Act provides that any person can lawfully disclose information where necessary or expedient for the purposes of any provision of the Act, to a chief officer or police, a police authority, a local authority, a probation service or a health authority, even if they do not otherwise have this power. This power also covers disclosure to people acting on behalf of any of the named bodies. The “purposes” of the Act include a range of measures such as local crime audits, the role of the youth offending team, anti-social behaviour orders, sex offender orders and local child curfew schemes. However, the use of Section 115 must be considered on a case-by-case basis, and must still be compliant with the principles of the DPA.

Children Act 1989

Section 47 of the Children Act 1989 places a duty on local authorities to make enquiries where they have reasonable cause to suspect that a child in their area may be at risk of suffering significant harm. *Section 47* states that unless in all the circumstances it would be unreasonable for them to do so, the following authorities must assist a local authority with these enquiries if requested, in particular by providing relevant information:

- any local authority
- any local education authority
- any housing authority
- any health authority
- any person authorised by the Secretary of State.

A local authority may also request help from those listed above in connection with its functions under *Part 3* of the Act. *Part 3* of the Act, which comprises of *sections 17 - 30*, allows for local authorities to provide various types of support for children and families. In particular, *section 17* places a general duty on local authorities to provide services for children in need in their area. *Section 27* requires that where such an authority could, by taking any specified action, help in the exercise of any of their functions under *Part 3* of the Act, other authorities are required to co-operate with a request for help so far as it is compatible with their own statutory duties and does not unduly prejudice the discharge of any of their functions.

The Children Act 2004

Section 10 of the Act places a duty on each children's services authority to make arrangements to promote co-operation between itself and relevant partner agencies to improve the well-being of children in their area in relation to:

- physical and mental health, and emotional well-being
- protection from harm and neglect
- education, training and recreation
- making a positive contribution to society
- social and economic well-being.

The relevant partners must co-operate with the local authority to make arrangements to improve the well-being of children. The relevant partners are:

- District Councils
- The Police
- The Probation Service
- Youth Offending Teams (YOTs)
- Clinical Commissioning Groups

This statutory guidance for *Section 10* of the Act states good information sharing is key to successful collaborative working and arrangements under this section should ensure information is shared for strategic planning purposes and to support effective service delivery. It also states these arrangements should cover issues such as improving the understanding of the legal framework and developing better information sharing practice between and within organisations.

Section 11 of the Act places a duty on key persons and bodies to make arrangements to ensure their functions are discharged with regard to the need to safeguard and promote the welfare of children. The key people and bodies are:

- Local Authorities (including District Councils)
- The Police
- The Probation Service
- bodies within the National Health Service (NHS)
- National Careers Service
- Youth Offending Teams
- Governors/Directors of Prisons and Young Offender Institutions
- Directors of Secure Training Centres
- The British Transport Police.

The Section 11 duty does not give agencies any new functions, nor does it override their existing ones, it simply requires them to:

- carry out their existing functions in a way that takes into account the need to safeguard and promote the welfare of children
- ensure services they contract out to others are provided having regard to this need (to safeguard and promote the welfare of children).

In order to safeguard and promote the welfare of children, arrangements should ensure that:

- all staff in contact with children understand what to do and are aware of the most effective ways of sharing information if they believe a child and family may require targeted or specialist services in order to achieve their optimal outcomes;

- all staff in contact with children understand what to do and when to share information if they believe that a child may be in need, including those children suffering or at risk of significant harm.

Education Act 2002

The duty laid out in *Section 11 of the Children Act 2004* mirrors the duty imposed by *Section 175 of the Education Act 2002* on LEAs and the governing bodies of both maintained schools and further education institutions. This duty is to make arrangements to carry out their functions with a view to safeguarding and promoting the welfare of children and follows the guidance in *Safeguarding Children in Education (DfES 2004)*.

The guidance applies to proprietors of independent schools by virtue of *Section 157 of the Education Act 2002* and the *Education (Independent Schools Standards) Regulations 2003*.

Section 21 of the Act, as amended by *Section 38 of the Education and Inspections Act 2006*, places a duty on the governing body of a maintained school to promote the well-being of pupils at the school. Well-being in this section is defined with reference to *Section 10 of the Children Act 2004*. The Act adds that this duty has to be considered with regard to any relevant Children and Young Person's Plan.

This duty extends the responsibility of the governing body and maintained schools beyond that of educational achievement and highlights the role of a school in all aspects of the child's life. Involvement of other services may be required in order to fulfil this duty so there may be an implied power to work collaboratively and share information for this purpose.

Children (Leaving Care) Act 2000

The main purpose of the Act is to help young people who have been looked after by a local authority, move from care into living independently in as stable a fashion as possible. To do this it amends the *Children Act 1989 (c.41)* to place a duty on local authorities to assess and meet need. The responsible local authority is under a duty to assess and meet the care and support needs of **eligible** and **relevant** children and young people and to assist **former relevant children**, in particular in respect of their employment, education and training.

Sharing information with other agencies will enable the local authority to fulfil the statutory duty to provide after care services to young people leaving public care.

Care Standards Act 2000

This Act established the National Care Standards Commission. *Part V11* is specifically concerned with the protection of children and persons at risk. *Section 81* of the Act obliges the Secretary of State to keep a list of individuals, who are considered unsuitable to work with persons at risk. *Section 82* provides that a person who provides care for persons at risk shall refer a care worker to the Secretary of State for the following reasons:

- that the provider has dismissed the worker on the grounds of misconduct (whether or not in the course of his employment), which harmed or placed at risk of harm persons at risk
- that the worker has resigned, retired or been made redundant in circumstances such that the provider would have dismissed him, or would have considered dismissing him, on such ground if he had not resigned, retired or been made redundant
- that the provider has, on such grounds, transferred the worker to a position which is not a care position
- that the provider has, on such grounds suspended the worker or provisionally transferred him to a position which is not a care position but has not yet decided whether to dismiss him or to confirm the transfer.

Caldicott Principles

The *Caldicott Principles* laid down by the NHS Executive must also be followed by those employed by any NHS Trust or body. The principles are as follows:

Principle 1 – Justified purpose

Every proposed use or transfer of patient identifiable information within or from an organisation should be clearly defined and scrutinized, with continuing uses regularly reviewed by an appropriate guardian.

Principle 2 – Don't use patient identifiable information unless it is absolutely necessary

Patient identifiable information items should not be used unless there is no alternative.

Principle 3 – Use the minimum necessary patient identifiable information

When use of patient identifiable information is considered to be essential, individual items of information should be justified with the aim of reducing identifiability if possible.

Principle 4 – Access to patient identifiable information should be on the strict 'need to know basis'

Only those individuals who need access to patient identifiable information should have access to it, and they should only have access to the information items that they need to see.

Principle 5 – Everyone should be aware of their responsibilities

Action should be taken to ensure that those handling patient identifiable information, both clinical and non-clinical staff, are aware of their responsibilities and obligations to respect patient confidentiality.

Principle 6 – Understand and comply with the law

Every use of patient identifiable information must be lawful. Someone in each of these organisations should be responsible for ensuring the organisation complies with relevant legal requirements.

Immigration and Asylum Act 1999

Section 20 provides for a range of information sharing for the purposes of the Secretary of State:

- to undertake the administration of immigration controls to detect or prevent criminal offences under the *Immigration Act*
- to undertake the provision of support for asylum seekers and their dependents.

Local Government Act 2000

Part 1 of the *Local Government Act 2000* gives local authorities powers to take any steps which they consider are likely to promote the well-being of their area or the inhabitants of it.

Section 2 gives local authorities 'a power to do anything which they consider is likely to achieve any one or more of the following objectives':

- the promotion or improvement of the economic well-being of their area
- the promotion or improvement of the social well-being of their area
- the promotion or improvement of the environmental well-being of their area.

Section 2 (5) makes it clear that a local authority may do anything for the benefit of a person or an area outside their authority, if the local authority considers that it is likely to achieve one of the objectives in *Section 2(1)*.

Section 3 is clear that local authorities are unable to do anything (including sharing information) for the purposes of the well-being of people - including children and young people - where they are restricted or prevented from doing so on the face of any relevant legislation, for example, the *Human Rights Act*, the *Data Protection Act* or by the *Common Law Duty of Confidentiality*.

Criminal Justice Act 2003

Section 325 of this Act details the arrangements for assessing risk posed by different offenders. The “responsible authority” in relation to any area, means the Chief Officer of Police, the local Probation Board and the Minister of the Crown exercising functions in relation to prisons, acting jointly. The responsible authority must establish arrangements for the purpose of assessing and managing the risks posed in that area by:

- a) relevant sexual and violent offenders
- b) other persons who, by reason of offences committed by them, are considered by the responsible authority to be persons who may cause serious harm to the public (this includes children). In establishing those arrangements, the responsible authority must act in co-operation with the persons identified below and co-operation may include the exchange of information.

The following agencies have a duty to co-operate with these arrangements:

- every youth offending team established for an area
- the Ministers of the Crown, exercising functions in relation to social security, child support, war pensions, employment and training
- every local education authority
- every local housing authority or social services authority
- every registered social landlord who provides or manages residential accommodation
- every health authority or strategic health authority
- every primary care trust or local health board
- every NHS trust
- every person who is designated by the Secretary of State as a provider of electronic monitoring services.

National Health Service Act 1977

The *National Health Service Act 1977 Act* provides for a comprehensive health service for England and Wales to improve the physical and mental health of the population and to prevent, diagnose and treat illness.

Section 2 of the Act provides for sharing information with other NHS professionals and practitioners from other agencies carrying out health service functions that would otherwise be carried out by the NHS.

National Health Service Act 2006

Section 82 of the *National Health Service Act 2006* places a duty on NHS bodies and local authorities to co-operate with one another in order to secure and advance the health and welfare of the people of England and Wales.

Mental Capacity Act 2005

There will be circumstances where an individual adult appears not to be able to make a decision about whether to consent to information being shared with others.

The *Mental Capacity Act* and the associated code of practice contain guidance about the consideration of a person’s capacity, or lack of capacity, to give consent to sharing information. The starting assumption must be that the person has capacity unless it is established that they do not, and only then after all practical

steps to help the person make the relevant decision have been taken but have been unsuccessful. An unwise decision taken by the relevant person does not mean they lack capacity. Where a decision is made on behalf of the person who lacks capacity to share personal information, it must still comply with the requirements of the Data Protection Act and be in their best interests.

Sharing health information can be a contentious area. There is guidance from professional health bodies, which NHS staff refer to, as well as local health trust policies. Local practice agreements need to be in place to ensure consistency across health and social care agencies and it is advisable to find out what these arrangements are when seeking the co-operation of health care staff. In general terms there are two pieces of relevant legislation, outlined briefly below.

Safeguarding Vulnerable Groups 2006

The purpose of the Safeguarding Vulnerable Groups Act 2006 is to restrict contact between children and persons at risk and those who might do them harm.

While the 2006 Act itself is very complex, its key principles are straightforward and they are as follows:

- unsuitable persons should be barred from working with children or persons at risk;
- employers should have a straightforward means of checking that a person is not barred from working with children or persons at risk;
- suitability checks should not be one-offs: they should be an element of ongoing assessment of suitability to catch those who commit wrongs following a suitability check.

Protection of Freedoms Act 2012

The Protection of Freedoms Bill gained royal assent on 1 May 2012 and includes a reform of the vetting and barring and criminal records regime and a change in the law to allow people who were prosecuted for consensual sex with a person aged 16 or over, at a time when this was illegal, to apply to have their convictions removed from the Police National Computer and other police records if they meet the conditions laid down in the Protection of Freedoms Act 2012.

As a result, if the individual has successfully applied to have them removed, these historical convictions will no longer be released as part of a DBS check. The Disclosure and Barring Service was introduced in December 2012 and brought together the Independent Safeguarding Authority and the Criminal Records Bureau and more information can be found at <http://www.homeoffice.gov.uk/agencies-public-bodies/dbs/services/>

