THE LEGAL FRAMEWORK (IN ENGLAND) FOR WORKING WITH PEOPLE WITH LEARNING DISABILITIES (NOVEMBER 2003)

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This document attempts to bring together key legislation and policies that affect people, in the main adults, with learning disabilities. The legislative framework is complex as there is no consolidating legislation. In fact, Valuing People offers the most comprehensive and coordinated guidance in this area.

SECTION A provides a summary of various definitions as they are contained in legislation.

SECTION B outlines the legal framework. This is mainly general legislation applying to all user groups but some of it has specificity for people with learning disabilities as well as general application.

SECTION C outlines the Policy Framework specific to people with learning disabilities.

SECTION D outlines the Policy Framework that has a general use but nevertheless highlights the special needs of people with learning disabilities.

SECTION E relates to the general policy as it applies to all service users.

SECTION A: DEFINITIONS OF LEARNING DISABILITY

The Mental Health Act, 1983 has three definitions: mental illness, severe mental impairment and mental impairment.

"Mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind."

'Mental illness' is not defined in the Act or the Mental Health Act Code of Practice.

Learning disability falls under the definition of mental disorder, in that it is 'arrested or incomplete disability of mind'.

?? "Arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct". This covers people with learning disability. The requirement of 'arrested or incomplete development of mind' excludes brain injury to adults whose minds had fully developed.

?? 'Abnormally aggressive behaviour' is defined in the Code of Practice as "outside the usual range of aggressive behaviour, and which cause actual damage and/or real distress occurring recently or persistently or with excessive severity".

?? 'Irresponsible conduct' is defined in the Code of Practice as "behaviour which shows a lack of responsibility, a disregard of the consequences of the action taken, and where the results cause actual damage or real distress, either recently or persistently or with excessive severity".

?? "Arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct" (the distinction between this and 'severe mental impairment' is a matter of degree).

Disabled Person Act, 1986: A state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.

The Children Act, 1989 defines a child as 'disabled' if he is blind, deaf or dumb or suffers from mental disorder of any kind, or is substantially and permanently handicapped by illness, injury or congenital or other such disability as may be prescribed (S17 (11)).

Disability Discrimination Act 1995: A person is defined as having a disability 'if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities'. A condition which results from the arrested or incomplete physical development of the brain, or severe damage to the brain, and which involves severe impairment of intelligence and social functioning.

The Education Act, 1996 refers to somebody with "special educational need".

Valuing People (DoH) 2001 defines learning disability as the presence of a significantly reduced ability to understand new or complex information, and to learn new skills (impaired intelligence) with:

?? a reduced ability to cope independently (impaired social functioning);

?? which started before adulthood, with a lasting effect on development.

There are also various other definitions used by organisations such as MENCAP. These have not been included.

SECTION B: LEGAL FRAMEWORK

National Assistance Act, 1948

This legislation confers powers and duties on the local authority to promote the welfare of people ordinarily resident in their area who are 'blind, deaf or dumb, mentally disordered or substantially and permanently handicapped by illness, injury or congenital deformity.

Chronically Sick and Disabled Persons Act, 1970

The Act empowers local authorities to establish numbers of disabled people in their area to determine their needs and publicise services and to provide services to anyone who is 'disabled' within the meaning of the National Assistance Act 1948 ie. people with a physical, sensory or learning disability or those who are suffering from a mental disorder.

Powers of Attorney Act, 1971 (Enduring Powers Of Attorney)

A person ('the donor') can place their property and financial affairs in the hands of a friend or relative ('the attorney') by granting them power of attorney. This power enables the attorney to make legally binding decisions on behalf of the donor. The donor can revoke the power at any time.

However, if the donor loses mental capacity, the power of attorney is automatically revoked.

The **Enduring Powers of Attorney Act, 1985** enables a donor to appoint an attorney whose powers will not automatically be revoked when the donor loses mental capacity.

While the donor retains capacity, the Enduring Power of Attorney can either be used as a Power of Attorney or remain dormant.

When the donor becomes mentally incapacitated, the attorney must apply to the Court of Protection to register the Enduring Power. The attorney must give the donor and relatives of the donor notice prior to registration, to allow for objections.

Once registered, the instrument gives the attorney full power to act under the terms specified. While registration is in force, the donor may not revoke or amend the power without confirmation of the Court of Protection.

There is currently a draft Mental Incapacity Bill winding its way through which proposes a tightening up of the current Court of Protection arrangements and provides for more rigorous assessments regarding incapacity. The period of consultation has been extended because of lobbying by learning disabled people and advocacy organisations.

The basic principle (re. mental incapacity) underpinning current law and medical practice is that people should be "enabled and encouraged to take for themselves those decisions which they are able to take" (**Law Commission Report No 231 (1995).**

Health Act, 1977

Section 28A gives health authorities powers to transfer money to local authorities for social services functions, education, housing and accommodation for disabled people. It was initially introduced to help provide replacement services as NHS long-stay hospitals closed.

It also encourages alternative and more appropriate models of care for people who might otherwise have to rely on the health service. The emphasis so far has been on social care and related services.

Mental Health Act, 1983

People with learning disabilities can be compulsorily admitted to hospital ('sectioned'), if it appears to two doctors and an Approved Social Worker that they need to be detained in the interests of their health, or safety, or for the protection of other people.

A person must be suffering either from mental illness, mental impairment, severe mental impairment or psychopathic disorder.

Section 2: (for assessment) is to provide an assessment, if necessary followed by treatment. The Section lasts for a maximum of 28 days.

Section 3: (for treatment) when it is necessary for their (the person's) health, or safety, or for the protection of other people. This Section lasts initially for a period of up to 6 months and can be extended.

People with learning disabilities, who also exhibit abnormally aggressive or seriously irresponsible behaviour can fall under this category.

For people with mental impairment, there is an additional 'treatability test'. That is, they can only be placed on Section 3 if 'such treatment is likely to alleviate or prevent a deterioration of his condition'.

Section 7 (Guardianship): The purpose of Guardianship is to enable patients to receive care in the community where it cannot be provided without the use of compulsory powers. It provides an authoritative framework for working with a patient, with a minimum of constraint, to achieve as independent a life as possible within the community. Where it is used, it must be part of the patient's overall care and treatment plan.

<u>Grounds for Guardianship</u>

?? the person must be 16 years or older;
?? he or she must have one or more of the specified categories of mental disorder, "of a nature or degree which warrants his reception into Guardianship";

?? "it must be necessary in the interests of the welfare of the patient or for the protection of other persons".

Effect of Guardianship (and limitations)

a) "To require a person to reside at a place specified by the Guardian".
   ?? This does not provide the legal authority to detain a person physically or to remove them against their wishes.
b) To require the patient to attend at specific places and times for medical treatment, occupation, education or training.
   ?? If the person refuses to attend, the Guardian does not have authority to use force to take them; neither does it provide authority to administer medical treatment against the person's wishes.
c) To require access to the person by specific people at the place where the person is living.
   ?? A refusal to allow an authorised person access is an offence under S129 but there is no authority to use force to enter. A warrant under S135(2) would provide such authority, if necessary.

Duration

The initial period of Guardianship is 6 months. The authority for Guardianship may be renewed for a further period of 6 months, followed by subsequent periods of 12 months.

Guardianship is not often used, due to the limitations of its powers. Where Guardianship is used, it is most commonly used with people with impaired capacity, such as people with dementia or learning disabilities, in order to protect them from exploitation, or to provide a formal structure in which to execute a plan of care.

Section 135: a warrant may be issued by a magistrate on application by an approved social worker (ASW), authorising police accompanied by the ASW and a doctor, to gain entry and if thought appropriate to remove, for up to 72 hours, a person to a place of safety.

Section 136: This section gives the Police powers to remove a person, who appears to be mentally disordered and in immediate need of care and control, to a place of safety for up to 72 hours.

Admission to hospital for people lacking capacity (The Bournewood Case)

In 1997 a man with learning disabilities ('L') was admitted to psychiatric hospital within the Bournewood Community and Mental Health NHS Trust following an incident at the day centre where L attended regularly. L had lived with carers for some time, who asked for him to be discharged back to their care. The psychiatrist in charge of L's care decided that in his opinion it was in L's best interests to remain in hospital.

L was not detained under the Mental Health Act but did not have capacity to decide whether to remain in hospital voluntarily, or to discharge himself.

The carers issued a writ of *habeus corpus* which went to the High Court and the Court of Appeal.

Pre-Bournewood

The previous position had assumed that people who lacked mental capacity (eg. people with dementia or severe learning disabilities) could be deemed to be content with their admission provided they did not show signs of wanting to leave. Only if there was clear evidence of them wanting to leave hospital was formal detention under a section of the Mental Health Act needed.

Court of Appeal decision

The Court of Appeal made a decision, which meant that patients who lacked capacity to consent to admission, but who did not show any objection, could not be admitted and effectively detained unless "sectioned" under the Mental Health Act 1983.

In other words, the Court of Appeal saw hospital admission as something, which a person must have the mental capacity to choose in an informed manner. Anyone without mental capacity to actively choose to remain in hospital must be detained under the Mental Health Act 1983.

Current situation

The case went to the House of Lords (The Law Lords). The Law Lords looked at two main questions:

1. was the person involved (known as 'L') actually detained, and
2. if he was detained, was that detention lawful.

On a majority decision, they disagreed with the Court of Appeal and overturned their decision. Therefore the previous position described above has been restored.

Two of the five Law Lords pointed out that in any sensible understanding of the word he was detained - one said that the suggestion he was free to go was "a fairy tale".

All the Law Lords however agreed that what had taken place was justified by the common law principle of "necessity", with the hospital staff acting in the best interests of someone who would have experienced significant suffering had they not done so.

They were also aware that if they agreed with the Court of Appeal's approach, then many more people, who were not actively objecting to being in hospital but who could not give proper informed consent, would have to be detained under the Act.

Following the House of Lords decision, there is now a semantic difference between the two categories of psychiatric in-patients who are not formally detained under the Mental Health Act:

?? 'Voluntary' patients who have mental capacity and choose to remain in hospital, having given consent to the admission.
?? 'Informal' patients who lack capacity and therefore have not given informed consent to remain in hospital, but who do not actively attempt to leave.

The Code of Practice (para 19.27) states that if such a patient indicates either verbally or by their actions that they want to leave, consideration should be given to making an application for detention under the Mental Health Act 1983.

Management of property and affairs of people lacking mental capacity

The Court of Protection: The Court of Protection is an office of the Supreme Court based in Central London, and deals with the management of the property and affairs of mentally disordered people.

The Public Trust Office carries out the administrative functions of the Court of Protection, which are covered by Part VII of the Mental Health Act 1983. The Court of Protection becomes involved when the court is satisfied after considering medical evidence, "**that a person is incapable by reason of mental disorder, of managing and administering his property and affairs**".

Proceedings are normally started following a formal application from a person's nearest relative, although other people may make an application, such as another relative, social worker, doctor, solicitor, etc.

The use of the Court of Protection is usually only worthwhile when a person has significant assets, as the Court levies a charge and there is no legal aid available.

The Court can appoint a Receiver to act for the person under the directions of the Court of Protection. The majority of Receivers are relatives or friends, although a significant number are professionals such as solicitors or local authority staff.

The powers of the Court of Protection are to do **"all things as appear necessary or expedient:**

a) for the maintenance or other benefit of the patient;
b) for the maintenance or other benefit of members of the patient's family;
c) for [providing for] purposes which the patient might be expected to provide if he were not mentally disordered;
d) otherwise for administering the patient's affairs" *(Mental Health Act 1983, s95(1)).*

The Enduring Powers of Attorney Act, 1985
See **Powers of Attorney Act, 1971**

Appointeeship Under Social Security Regulations, 1987 (Reg 33)

When a person lacks capacity, has little or no capital and is reliant on state benefits, an appointee can be appointed under the Social Security regulations to act on behalf of the claimant.

An appointment can be made when:

?? "a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf; and
?? that person is for the time being unable to act; and

?? no receiver has been appointed by the Court of Protection with power to claim or, as the case may be, receive benefit on his behalf".

The Department of Social Security (DSS) may ask for medical evidence, but this is not required in all cases. There is no prescribed form for a medical report.

The DSS will investigate the circumstances of the claimant and also the proposed appointee, normally by visiting both. There has been some concern expressed about the effectiveness of enquiries before an appointment is made.

The appointee has no power to deal with the claimant's capital but can:
?? exercise any rights and duties that the claimant has under the Social Security Acts and Regulations;
?? receive any benefits payable to the claimant, and
?? deal with the money received on the claimant's behalf in the interests of the claimant and his or her dependents".

The DSS policy is to always seek a friend or relative to act as appointee in the first instance, although where there are no such people available, it is not uncommon for an officer of the local authority Social Services Department to act as such.

It is government guidance that residential and nursing home proprietors and staff should not act as appointees for residents of their homes.

Children Act, 1989

Under Section 17 a child is considered to be 'in need' if:
?? 'Child is unlikely to achieve or maintain a reasonable standard of health or development without the provision of services.'
?? 'Child's health or development is likely to be significantly impaired without provision of services.'
?? 'Child is disabled.'

NHS and Community Care Act, 1990

This legislation requires Social Services to carry out a needs assessment of a person to determine the level of provision of community care services. The local authority can then provide services to meet the assessed need.

Disability Discrimination Act, 1995

Section 21 of the Act requires authorities to ensure that services and buildings are accessible.

The Act also places a duty on employers to make reasonable adjustments if their employment arrangements or premises substantially disadvantage a disabled employee or applicant.

Carers (Recognition and Services) Act, 1995

This Act provides for the assessment of the ability of the carer, including young carers, to provide care for a vulnerable person.

Community Care (Direct Payments) Act, 1996

Section 57 deals with direct payments in respect of adults. Direct Payments applies to people the local authority has decided (under the National Assistance Act 1948) need a particular community care service. It also applies to people for whom the local authority has decided to provide a service under the Carers and Disabled Children Act 2000. This includes people with learning disabilities: the DoH has issued specific accessible information for people with learning disabilities.

Housing Grants, Construction & Regeneration Act, 1996

Disabled Facilities Grants are available under this Act. This allows owners to carry out works of adaptation for the benefit of disabled people.

Health Act, 1999

Section 29 amends the current Section 28a by extending the ability of health authorities to make payments to a local authority beyond social services functions (and certain other functions) to allow payments to be made in respect of **any** local authority function that is health-related. It also allows Primary Care Trusts to make similar payments to local authorities.

Section 30 introduces a reciprocal power for local authorities to make payments to Health Authorities or Primary Care Trusts. It is intended that payments may only be made if they will improve the health of the people in the local authority's area.

Section 31 *(*Arrangements between NHS bodies and local authorities): allows the NHS and local authorities to work together to:

?? **pool resources** so that the resources lose their health and local authority identity; and allowing staff from either agency to develop packages of care suited to particular individuals irrespective of whether health or local authority money is used;
?? Health Authorities or Primary Care Trust and local authority departments to **delegate functions** to one another. For example, one of the partner bodies to commission all mental health or learning disability services locally. Economies of scale apply and the section allows for the creation of lead commissioner arrangements;
?? create **integrated provider** arrangements.

Local Government Act, 2000 (well being powers)

This Act allows local authorities to promote the welfare of residents of its area.

Care Standards Act, 2000

Applies to people in care homes in need of nursing or personal care by reason of disability**,** infirmity, past or present illness, mental disorder or dependence on alcohol or drugs.

Carers and Disabled Children Act, 2000

Allows for the provision of services to carers of disabled children and to carers of adults who need or receive community services.

Disabled Persons (Services, Consultation and Representation) Act, 1986 (c.33) and the Learning and Skills Act, 2000

Section 5(9) the legislation refers to disabled people over 19 years who are leaving special education.

Education authorities can provide full time or part time education including:
?? training (vocational, social, physical and recreational);
?? organised leisure time occupation .

This includes people from other areas.

The local education authority has to bear in mind the needs of people with **learning difficulties** (within the meaning of section 13 (5) and (6) of the Learning and Skills Act 2000), and need to attend to:
?? information;
?? equity of access;
?? equitable standards;
?? transport needs and costs;
?? choice;
?? religious needs (Parental wishes), and to
?? consult the Passenger Transport Authority for the area.

This does not apply to higher education. Through this Act an annual report is produced in Parliament, which details information about the development of health and social services for people with a learning disability.

Special Educational Needs And Disability Act, 2001

Makes provision for the education of children with special needs.

Health and Social Care Act 2001

The legislation allows for Care Trusts to be formed (*The powers are not mandatory to allow for different interpretations for different client groups).*

Child And Adolescent Mental Health Service (CAMHS) Grant Guidance, 2003/04 HSC 2003/003: LAC (2003) 2.

This guidance details what a comprehensive **CAMHS** service should look like. There are specialist CAMHS for learning disability but coordination between this and mainstream CAMHS should be through partnership.

The National Service Framework (NSF) for Children "Getting the Right Start"

The NSF has a section specific to children with learning disabilities and encourages commissioning for children first rather than as part of learning disabilities services.

PLUS

?? Race Relations Act 1976.
?? Health and Social Services Adjudicators Act 1983 (charges).
?? Human Rights Act 1998 (general piece of legislation which applies to all citizens).
?? Race Relations (Amendment) Act 2000.
?? Immigration and Asylum Act (Section 54), 2002.

SECTION C: THE POLICY FRAMEWORK FOR PEOPLE WITH LEARNING DISABILITIES

Policy and Guidance which focuses on Learning Disabilities (in ascending order)

GUIDANCE

Moving Into The Mainstream, 1998 (C1 (98) 6)
Provides useful checklists for delivery and commissioning of services. Also criteria for:

?? responsive services;
?? assessment and care management;
?? information, communication and consultation;
?? equal opportunities;
?? organisational structures.

Learning Disability Strategy, 1999 (DoH)
See Valuing People

NHS Cancer Screening Programmes, 2000
Good Practice In Breast And Cervical Screening For Women With Learning Disabilities

Nothing About Us Without Us, 2001 (DoH)
This White Paper sets out the Government's commitment to improving the life chances of people with learning disabilities by providing new opportunities for people with learning disabilities to lead a full and active life. There is an emphasis on consultation and working with people with learning disabilities to hear what they want.

Planning With People Towards Person Centred Approaches: Guidance For Partnership Boards, 2001 (DoH)

Valuing People: A new strategy for learning disability for the 21st century, 2001 (replaces the Learning Disability Strategy, 1999).

Learning Disability Joint Investment Plan Workbook, 2002
Provides a format for the JIP – based on the Valuing People principles.

Best Value Review Framework for the Learning Disability Area (no date).
This is based on the DOH Learning Disability Joint Investment Plan workbook.

Guidance On Restrictive Physical Interventions, 2002 (DoH)
This is specifically for people with learning disability and autistic spectrum disorder in health education and social care settings. There is also an accessible version.

Health Action Plans, 2002
Detailed good practice for Partnership Boards. Every person with a learning disability should have a plan – provides information on how to stay healthy and the help that can be obtained.

Handy Hints "Ensuring All Means All: Improvement, Expansion And Reform" DOH (Valuing People Support Team), 2002
Guidance to help ensure Local Delivery Plans benefits people with learning disabilities.

Quality And Choice: A Decent Home For All: The Way Forward For Housing, 2002 (DETR)

Supported Housing And Care Homes: Guidance On Registration, 2002 (DoH)

Learning Disability Development Fund 2003 LAC (2002) 23
Relates to grants available to be used as pooled budgets to support the implementation of Valuing People.

REPORTS

Opportunities or Knocks, 1995
Report on the national inspection of recreation and leisure in day services for people with learning disabilities.

Residential Provision for People with Learning Disabilities, 1996
Evaluation of different types of residential care

Signposts for Success in Commissioning and Providing Health Services for People with Learning Disabilities 1998
Sets out good practice for improving access and covers the quality and range of services that people with learning disabilities can expect. Produced as result of extensive consultation including people with learning disabilities.

Quality And Costs Of Residential Provision For People With Learning Disabilities (HSC 1999/162: LAC (99) 28)
Helps with reconfiguration of services. Quality, costs and outcomes of different types of provision. Based on Hester Adrian Research Centre project.

Facing The Facts: Services For People With Learning Disabilities: Policy Impact Study Of Social Care And Health Services, 1999 (DoH)
Results of surveys in 24 local authorities comparing quality, quantity and costs of service provision.

Learning Disability Award Framework
A brief guide to understanding the framework and NVQs including advice on Induction and Foundation, the 50% rule, Development Plans and funding issues. Basically, implementation of aspect of Care Standards Act.

Learning Difficulties and Ethnicity, 2001 (DoH)
Report to the Department of Health by Ghazala Mir, Andrew Nocon and Waqar Ahmad, with Lesley Jones.

Making Change Happen, 2003
The first Annual Report on Learning Disabilities under that Health and Social Care Act 2001.

Fulfilling Lives, 2003
This report details an inspection carried out on services for people with learning disabilities by nine councils. The inspection identified great enthusiasm for Valuing People and good progress was being made in promoting its values and in establishing partnership boards. The inspection also confirmed that a step-change in the quality of services would be required if the objectives of Valuing People were to be met.

SECTION D: POLICY AND GUIDANCE WHICH SPECIFICALLY MENTIONS LEARNING DISABILITY BUT DOES NOT FOCUS ON IT

GUIDANCE

Healthy Living Centres (HSC 1999/008)

Continuing Care: NHS And Local Councils Responsibilities (LAC (2001) 18)
Considers people with learning disability but expects Strategic Health Authorities to agree criteria which covers all user groups.

Working Together: Connexions and Social Services, 2001
Linking the Connexions services for young people with disabilities (up to age 25 for some) with adult services.

Good Practice In Consent (To Treatment) Patient Centred Consent Practice. (HSC 2001/023)
Helps move this aspect of the NHS Plan forward. Stresses patient-focused consent procedures and provision of information leaflets.

Policy And Practice Guidance For Adult Placement Schemes, 2002
A consultation document.

Working With Drug And Alcohol Misusing Offenders (C1 (97) 15)
This is a Home Office training pack which has specific references to people with learning disabilities.

Achieving Best Evidence
Provides guidance mainly to the police, for interviewing vulnerable witnesses.

Provision Of Therapy For Vulnerable Or Intimidated Adult Witnesses Prior To Criminal Trial Practise Guidance
Guidance from the Youth Justice and Criminal Evidence Act.

REPORTS

Making It Work – Inspection Of Welfare To Work For Disabled People (C1 (2001) 19)
A report detailing the results of welfare to work initiatives in a selection of authorities.

Reference should also be made to Neighbourhood Renewal and Community Safety which makes reference to ‘hard to reach groups’.

SECTION E: GENERAL POLICY

?? Partnership In Action, 1998 (DoH)
?? Supporting People, 2001
?? Better Care Higher Standards: A Charter For Long Term Care.
?? Modernising Social Services, 1998 (promoting independence)