



Department of  
**Health**

An Roinn Sláinte

Mánnystrie O Poustie

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# **Legislative options to inform the development of an Adult Protection Bill for Northern Ireland**

Consultation document

17 December 2020

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## **FOREWORD FROM ROBIN SWANN MLA**

### **MINISTER OF HEALTH**



Adult Safeguarding is about protecting an adult's right to live in safety, free from abuse, exploitation and neglect. It involves people and organisations working together to make sure adults who may be at risk of harm are protected, and intervening effectively if abuse is taking place. Importantly, it is also about empowering individuals to be independent and make choices about how they want to live.

Following the widely publicised safeguarding failings at Muckamore Abbey Hospital and Dunmurry Manor Care Home, it has become clear that there is a need to review and improve our Adult Safeguarding policy. In September 2020, following the independent review into the situation at Muckamore, I announced my intention to consult on a range of legislative options on safeguarding before Christmas.

I am therefore delighted to bring forward this consultation into a proposed Adult Protection Bill. Such legislation would give a statutory footing to our policy around Adult Safeguarding, and would bring us in line with other parts of the UK where such legislation already exists.

Following this consultation, my officials will move forward with the development of a draft Bill that will take into account the views of all key stakeholders, interested parties, and all those who take the time to respond to this consultation. I am determined to lead social care into a better place in Northern Ireland, and an Adult Protection Bill will help to make that a reality.

I want to encourage as many people as possible to respond to our consultation, in order that the draft Bill is fit for purpose. Please send us your thoughts and

comments, or take part in one of the socially distanced consultation events we will be organising. We will be grateful for your help in developing robust legislation that will help to protect adults at risk in Northern Ireland.

A handwritten signature in black ink, appearing to read 'Alan Jones', written in a cursive style.

## CONTEXT AND OVERVIEW

### Introduction

- 1.1 Building on the response to the Commissioner for Older People's Home Truths Investigation into Dunmurry Manor Care Home and CPEA's Independent Review into Safeguarding and Care at Dunmurry Manor, the Department of Health ('the Department') is undertaking a public consultation to inform the development of an Adult Protection Bill, subject to the approval of the Northern Ireland Executive.
- 1.2 This consultation offers the public the opportunity to share their views on the broad content of the Bill. The paper also highlights legislative reform which has taken place in Scotland, England and Wales over the years (each having adopted a different approach) and seeks views on whether similar reforms should be introduced in Northern Ireland.

### **'Adult Safeguarding' and 'Adult Protection'**

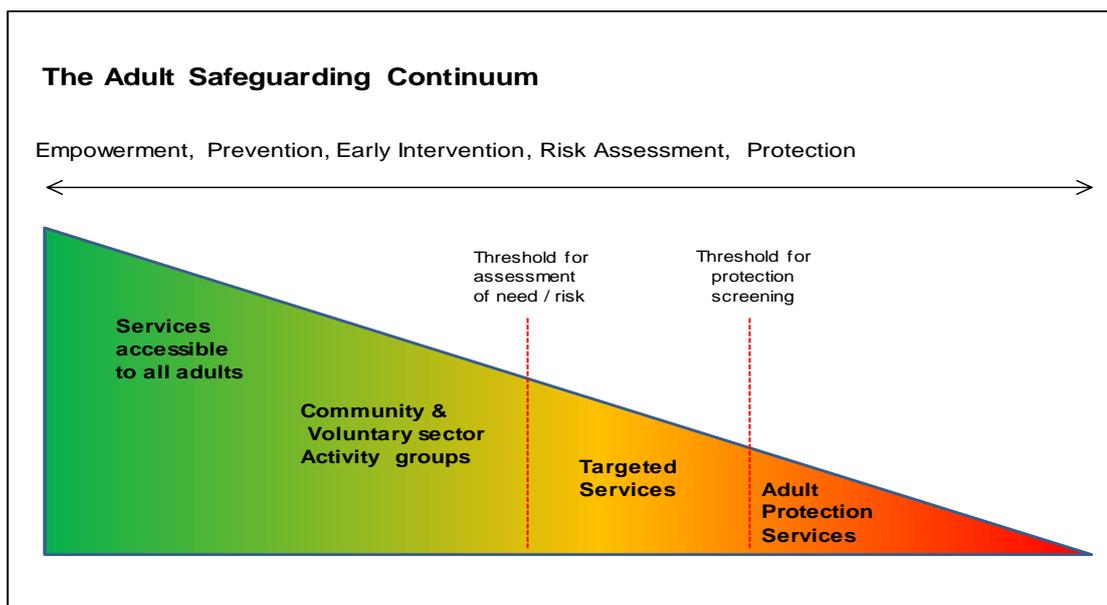
- 1.3 Two important terms, 'adult safeguarding' and 'adult protection', should be clarified at the outset. These terms are often used interchangeably which can sometimes be unhelpful as there is an important difference in the types of arrangements and in the types of risk they describe.
- 1.4 Adult safeguarding is the term used to describe the arrangements put in place to keep adults safe who are at an increased risk of harm from abuse, neglect or exploitation due to their personal characteristics and life circumstances.
- 1.5 For example, some adults may be exposed to such risk due to an underlying health or social care need and because they live with few or no social contacts or in situations where they rely on others for daily support. Other adults may have a greater exposure to risk of abuse due to their level of cognitive ability and because they may lack capacity to be aware of what may

be happening to them or to take action to protect themselves or to seek help to do so.

- 1.6 Safeguarding arrangements range from preventive safeguarding such as training staff to recognise and report abuse, to protection interventions, which may involve criminal investigations as well as statutory interventions by the Police Service of NI ('PSNI') and the Health and Social Care Trusts ('HSC Trusts') in order to protect a named adult or a group of adults from suspected or confirmed abuse, neglect or exploitation.
- 1.7 'Adult safeguarding' is therefore a continuum of activity of which adult protection is a specific part. It is the adult protection process that legislation will strengthen and so for clarity, we are proposing to name the Bill the **'Adult Protection Bill'**.

### Current policy framework

- 1.8 Adult safeguarding as a continuum of activity is set out in the regional Adult Safeguarding Prevention and Protection in Partnership Policy, published jointly by the Departments of Health and Justice in 2015 –



### *Empowerment*

- 1.9 All adult safeguarding activity must be guided by five underpinning principles: a rights-based; empowering; person-centred; consent-driven and collaborative approach.
- 1.10 Throughout the safeguarding continuum it is important to recognise the importance of promoting the empowerment and self-determination of individual adults who are at increased risk of harm or who are in need of protection from abuse, neglect or exploitation; and that all adults as citizens are empowered to make decisions about how they live their lives.
- 1.11 Adult safeguarding will be most effective when it has the full support of the wider public and of safeguarding partners across the statutory, voluntary, community, independent and faith sectors working in partnership.

### *Prevention*

- 1.12 Safeguarding includes a range of preventative measures (practical help, care, and support) designed to promote the safety, well-being and rights of adults at risk of harm which reduce the likelihood of, or opportunities for abuse, neglect or exploitation to occur. It is a responsibility of a wide range of organisations, agencies and HSC professionals. Indeed, it is the responsibility and concern of us all as good citizens and neighbours to where possible, prevent the abuse, neglect or exploitation of adults at increased risk of exposure to these types of harm.
- 1.13 The policy recognises that adults at increased risk will, in the first instance, be supported by their families and friends and by local community involvement. Safe social, recreational and family networks and safe communities can help adults keep themselves safe, to minimise risk and to exercise their rights to live full active and independent lives.

- 1.14 Recognising, responding and reporting risk is key to how community, social and family supports can help adults at risk to stay safe and to mitigate against an increased risk of harm from abuse, neglect or exploitation.
- 1.15 The policy expects organisations providing community based activities to have a culture of zero-tolerance of harm; to take steps to reduce the opportunities for harm to occur; and to know how and when to report concerns, whether in the person's own home, a care setting, in the community or within organised community or voluntary activities.

#### *Early intervention*

- 1.16 Intervening early is key to preventing escalation of the risk of harm, to help and support adults and families to avoid problems reaching a crisis point. Very often it is the GP who will be the first point of contact when an individual's needs are changing and they require further support.
- 1.17 Where organisations providing community based activities can no longer meet the needs of an adult, or where there are emerging safeguarding concerns, contact should be made with the HSC Trust for a professional assessment of needs and/or risks. More targeted services may then need to be put in place for the individual such as domiciliary based care, supported living, residential or nursing care, or direct payments.
- 1.18 The policy expects all providers of targeted services to be zero-tolerant of harm and to have robust governance and safeguarding procedures in place (this is also expected by commissioners of services as part of service level agreements and contracts). Providers must also nominate an Adult Safeguarding Champion and adhere to relevant standards and regulations, including professional regulation.

#### *Adult Protection*

- 1.19 If there is a clear and immediate risk of harm to an adult from abuse, neglect or exploitation and the adult is unable to protect themselves because of their

personal circumstances, a referral should be made to the relevant HSC Trust or to the PSNI if a crime is alleged or suspected.

- 1.20 This is at the higher end of the continuum, where serious harm from abuse, neglect or exploitation is suspected, has occurred, or is likely to occur without intervention. Each HSC Trust has an Adult Protection Gateway Service and referrals can be made from any source. It will then be a matter for HSC professionals to judge whether the threshold for an adult protection intervention has been met. The seriousness and the degree of risk of harm are key to determining the most appropriate response.
- 1.21 Protection interventions, if required, are led by social workers and/or PSNI officers; the latter primarily where a crime is alleged or suspected. They will engage with the adult and require information and support from other disciplines and organisations to contribute to the development and delivery of a care and protection plan or to assist a criminal investigation.

#### **Purpose of new legislation**

- 1.22 The regional policy will, for the moment, continue to provide the broader framework for adult safeguarding activity. The purpose of new legislation is to introduce additional protections to strengthen and underpin the **adult protection** process.
- 1.23 The law in this area is complex, with a patchwork of legislation having evolved over the years. There are, for example, powers and duties under wider criminal law; regulated services provided under health and social care legislation; and protections under mental health and mental capacity legislation. As evidenced in the Independent Review, the net result is confusion for those providing services and for service users and their families.
- 1.24 The Department did consult (jointly with the Department of Justice) on the need for legislation to underpin the regional policy in 2014/15, following the former Commissioner for Older People's recommendations in A Call for Adult

Safeguarding Legislation. However, no clear consensus emerged at the time on both the need for legislation itself and on what it should contain.

- 1.25 Five years on and, following serious care failings at Dunmurry Manor Care Home and Muckamore Abbey Hospital, there are once again clear recommendations for legislative reform in this area. An announcement from the Health Minister followed, on 10 September 2020, to confirm that a Bill would be brought forward to make lasting improvements in adult safeguarding and to bring Northern Ireland in line with other parts of the UK.
- 1.26 There are very different legal approaches across the UK jurisdictions with variations in the powers and duties afforded to healthcare professionals, which the Department and consultees will wish to consider. Scotland has the largest number of measures having legislated specifically under the Adult Support and Protection (Scotland) Act 2007. In England, provisions are included in the wider Care Act 2014, and in Wales the broader Social Services and Well-being (Wales) Act 2014. There is currently no specific adult protection legislation in the Republic of Ireland.
- 1.27 Significant progress has already been made in Northern Ireland through the enactment of the Mental Capacity Act (Northern Ireland) 2016. When fully commenced, this Act will afford new protections for individuals who lack capacity to make decisions for themselves about their care, treatment or personal welfare. This Act provides a rights-based approach to decision making underpinned by a presumption of capacity and importantly, the right to make an unwise decision.
- 1.28 All adults, including adults at risk of harm from abuse, neglect or exploitation, have the right to make unwise decisions, including the choice not to take action to protect themselves. It will therefore be important that the Adult Protection Bill strikes a balance between empowerment and protection. This is a key difference between safeguarding adults and safeguarding children.

## 2. LEGISLATIVE OPTIONS

2.1 This part of the consultation paper seeks views on the following legislative options:

- Defining the scope of the Bill
- Principles
- Duties to (i) report and (ii) make enquiries
- Power of entry to interview an adult in private
- Independent Advocacy
- Independent Adult Protection Board
- Cooperation and information sharing
- Offences of ill-treatment and wilful neglect
- Statutory Guidance

2.2 These options have been informed by the Commissioner for Older People's recommendations in [Home Truths](#) as well as the proposed actions in the [Independent Review into Safeguarding and Care at Dunmurry Manor Care Home](#). Recommendations presented by the former Commissioner in [A Call for Adult Safeguarding Legislation](#), which the Department consulted on in 2014/15, have also been revisited.

2.3 Other UK legislation is referenced in this section with provisions summarised from:

- Care Act 2014 (England)
- Social Services and Well-being (Wales) Act 2014
- Adult Support and Protection (Scotland) Act 2007

2.4 A number of questions have also been posed throughout and are summarised at paragraph 4.1.

## Defining the scope of the Bill

- 2.5 The Commissioner for Older People highlighted in ‘Home Truths’, that unclear thresholds and definitions have contributed to a lack of clarity about roles and responsibilities in the adult protection process. Similar findings were noted in the Independent Review which concluded that new legislation should “**define an adult at risk of harm**” (an approach taken in other parts of the UK) although the Review did not set out what that definition should look like.
- 2.6 The Department agrees that it will be important to define the scope of the Bill to set out a clear legal framework for how key organisations across health and social care and other parts of the system, should work together and understand the roles they must play in adult protection. There are a number of options set out in this consultation paper on how we could achieve this, such as new duties to report and make enquiries. These provisions would also need to be accompanied by a clear definition of an ‘**adult at risk and in need of protection**’ to enable professionals to decide which adults require support under the legislation.

## Current position

- 2.7 In Northern Ireland, we have already moved away from terms such as ‘vulnerable adult’ towards the concept of ‘risk of harm’ in adulthood. Under the [‘Adult Safeguarding Prevention and Protection in Partnership Policy’](#), an ‘adult at risk and in need of protection’ is:
- a) a person aged 18 or over;
  - b) whose exposure to harm through abuse, neglect or exploitation may be increased by their personal characteristics;<sup>1</sup> and/or life circumstances;<sup>2</sup>
  - c) who is unable to protect their own well-being, property, assets, rights or other interests; and

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<sup>1</sup> Personal characteristics may include, but are not limited to, age, disability, special educational needs, illness, mental or physical frailty or impairment of, or disturbance in, the functioning of the mind or brain.

<sup>2</sup> Life circumstances may include, but are not limited to, isolation, socio-economic factors and environmental living conditions.

- d) where the action or inaction of another person or persons is causing, or is likely to cause, him/her to be harmed.

2.8 It is the whole of an adult’s particular circumstances that combine to make the individual an adult at risk and in need of protection. Importantly, it is not any harm but rather harm that arises from abuse, neglect or exploitation (where there is a relationship of trust) that may warrant an adult protection intervention.

### Legislation in other parts of the UK

2.9 The threshold of abuse and neglect is also used in England and Wales. Both jurisdictions chose not to follow the Scottish route (which focuses on a broader ‘harm’ threshold) when legislating in 2014. Scotland was first to legislate in 2007.

(1) ‘ADULT AT RISK’:

England	Wales	Scotland
<p>‘Adult at risk’ is not explicitly defined instead the legislation provides a threshold for making enquiries. That is, where an adult:</p> <ul style="list-style-type: none"> <li>a) has needs for care and support (whether or not the authority is meeting any of those needs);</li> <li>b) is experiencing or is at risk of <b>abuse or neglect</b>; and</li> <li>c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.</li> </ul>	<p>‘Adult at risk’ is defined as an adult who:</p> <ul style="list-style-type: none"> <li>a) is experiencing or is at risk of <b>abuse or neglect</b>;</li> <li>b) has needs for care and support (whether or not the authority is meeting any of those needs); and</li> <li>c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.</li> </ul>	<p>‘Adult at risk’ is defined as an adult who:</p> <ul style="list-style-type: none"> <li>a) is unable to safeguard their own well-being, property, rights or other interests,</li> <li>b) is at risk of <b>harm</b>, and</li> <li>c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.</li> </ul>

(2) RELATED DEFINITIONS:

England	Wales	Scotland
<p>Definitions of abuse etc. are included in Statutory Guidance however legislation does clarify that:</p> <p>Abuse includes <b>financial abuse</b> which includes having money or other property stolen; being defrauded; being put under pressure in relation to money or other property; and having money or other property misused.</p>	<p><b>Abuse</b> means physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place).</p> <p><b>Financial abuse</b> includes having money or other property stolen; being defrauded; being put under pressure in relation to money or other property; and having money or other property misused.</p> <p><b>Neglect</b> means a failure to meet a person’s basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person’s well-being (for example an impairment of the person’s health).</p>	<p>Adult is <b>at risk of harm</b> if:</p> <p>a) another person’s conduct is causing (or is likely to cause) the adult to be harmed, or</p> <p>b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.</p>

## Key considerations

2.10 Defining the scope of the Bill so that it remains targeted on those who require the adult protection process is an important consideration. Our existing definition of ‘adult at risk and in need of protection’ provides a starting point and we would welcome views on the inclusion of the following elements -

### (a) The presence of abuse, neglect or exploitation

2.11 It is the Department’s view that the definition should have a continued focus on harm arising from abuse, neglect or exploitation. Harm (without the

presence of abuse, neglect or exploitation) is a much broader concept, likely to encompass many aspects of risk that may be present in day to day living arrangements which do not require an adult protection response from the HSC Trust or the PSNI.

- 2.12 The existing policy framework also defines other key terms such as ‘harm’ (including serious harm); ‘abuse’ (along with different types of abuse, including financial abuse); and neglect. The Department will consider similar definitions in either the legislation or in Statutory Guidance, mindful that the latter has the advantage of being more flexible and can be reviewed and updated relatively quickly in line with practice developments.

**(b) A threshold of serious harm from abuse, neglect or exploitation**

- 2.13 The Department would welcome views on whether the threshold for adult protection should be ‘serious harm’.
- 2.14 The Independent Review notes that ***“the culture within which safeguarding is operating has resulted in the ‘risk averse’ practice of reporting everything”***. Similar findings were also highlighted in a recent audit undertaken by the Department (see paragraphs 2.33 – 2.41 for further detail, which consider the introduction of a duty to report).
- 2.15 If a duty to report was to be introduced in Northern Ireland, the number of reports could go up significantly, which may not all be justified and which could result in focus being lost on the most critical cases. Setting a higher threshold could be one way to mitigate against this. However, the Department is mindful that this would be a higher threshold than other parts of the UK.
- 2.16 It is important to clarify that the threshold for adult protection is only one part of a continuum (as illustrated at paragraph 1.8). All harm requires a response but that response will vary depending on whether preventative or protective safeguarding is required. The exercise of skilled assessment by HSC professionals in the determination of the appropriate response is crucial in this

context to ensure a proportionate, balanced and rights based approach. Guidance and training will be required in addition to the legislation to ensure that all thresholds at different points of the continuum are understood and assessed at the right level to ensure consistency and better outcomes for all adults.

### **(c) Health and social care needs**

- 2.17 The existing policy definition states that an ‘adult at risk and in need of protection’ is a person whose exposure to harm through abuse, neglect, or exploitation may be increased by personal characteristics and/or life circumstances. Personal characteristics may include, but are not limited to, age, disability, special educational needs, illness, mental or physical frailty or impairment of, or disturbance in, the functioning of the mind or brain. Life circumstances may include, but are not limited to, isolation, socio-economic factors and environmental living conditions. We would welcome views on whether the Bill should adopt a similar approach.
- 2.18 It will be important to consider a future definition of ‘adult at risk and in need of protection’ in the context of the different powers and duties considered throughout this paper, as ultimately the definition will trigger their use. Further detailed drafting work will therefore be required to refine the definition once the results of the consultation on the broader content of the Bill, have been analysed.

### **Consultation Questions**

- 1. Do you agree with the title ‘Adult Protection Bill’?**
- 2. What are your views on a definition of ‘adult at risk and in need of protection’?**

## Principles

- 2.19 The Independent Review recommended that ***“the basic rights and freedoms to which every person is entitled must be given expression in preparing any new... adult safeguarding/adult protection legislation”***.
- 2.20 As outlined previously, the purpose of the Bill is to set out a clear legal framework for how key organisations across health and social care and other parts of the system should work together and understand the roles they must play in adult protection. Principles, whether on the face of the Bill or in Statutory Guidance, could provide those acting under the legislation with a core set of values that must be considered as part of any decision making process.

### Current position

- 2.21 Under the 'Adult Safeguarding Prevention and Protection in Partnership Policy', all adult safeguarding activity must be guided by five principles:
- A Rights-Based Approach: To promote and respect an adult's right to be safe and secure; to freedom from harm and coercion; to equality of treatment; to the protection of the law; to privacy; to confidentiality; and freedom from discrimination... Any intervention to safeguard an adult at risk should be human rights compliant. It should be reasonable, justified, proportionate to the perceived level of risk and perceived impact of harm, carried out appropriately, and be the least restrictive of the individual's rights and freedoms.
  - An Empowering Approach: To empower adults to make informed choices about their lives, to maximise their opportunities to participate in wider society, to keep themselves safe and free from harm and enabled to manage their own decisions in respect of exposure to risk.
  - A Person-Centred Approach: To promote and facilitate full participation of adults in all decisions affecting their lives taking full account of their

views, wishes and feelings and, where appropriate, the views of others who have an interest in his or her safety and well-being.

- A Consent-Driven Approach: To make a presumption that the adult has the ability to give or withhold consent; to make informed choices; to help inform choice through the provision of information, and the identification of options and alternatives; to have particular regard to the needs of individuals who require support with communication, advocacy or who lack the capacity to consent; and intervening in the life of an adult against his or her wishes only in particular circumstances, for very specific purposes and always in accordance with the law.
- A Collaborative Approach: To acknowledge that adult safeguarding will be most effective when it has the full support of the wider public and of safeguarding partners across the statutory, voluntary, community, independent and faith sectors working together and is delivered in a way where roles, responsibilities and lines of accountability are clearly defined and understood. Working in partnership and a person-centred approach will work hand-in-hand.

2.22 It is the Department's view that these existing principles provide a good foundation for new legislation. We also believe they are broadly consistent with the suggestions put forward by the Independent Review -

***“The principles shaping adult safeguarding practice should be set within a human rights based framework and emphasise dignity, fairness, equality, respect and autonomy.”***

***“For example, principles such as:***

- ***Supporting people who have care and support needs to nurture their welfare and well-being and reduce the risk of harm***
- ***Giving people at the heart of service provision an equal say in the support they receive***
- ***Driving service delivery through partnership and co-operation***
- ***Promoting the prevention of escalating need and providing timely assistance***
- ***Encouraging residents, family members and staff to be involved in the design and delivery of services: ‘co-production’***

- ***Being accountable to the public and to statutory agencies from which local partners are drawn***
- ***The principle of proportionality is fundamental to the European Convention on Human Rights.”***

### Legislation in other parts of the UK

2.23 Although some variations, our existing principles are also broadly similar to the approach taken in other UK legislation (or Statutory Guidance in England)

England	Wales	Scotland
<p>Statutory Guidance states that the following principles should underpin all adult safeguarding work:</p> <p><i>Empowerment:</i> people being supported and encouraged to make their own decisions and informed consent.</p> <p><i>Prevention:</i> It is better to take action before harm occurs.</p> <p><i>Proportionality:</i> the least intrusive response appropriate to the risk presented.</p> <p><i>Protection:</i> support and representation for those in greatest need.</p> <p><i>Partnership:</i> Local solutions through services working with their communities. Communities have a part to play in preventing, detecting and reporting neglect and abuse.</p> <p><i>Accountability:</i> Accountability and</p>	<p>Overarching duty (when carrying out functions under the act) to -</p> <p>In so far as reasonably practicable, ascertain and have regard to the adult’s views, wishes and feelings;</p> <p>Have regard to the importance of promoting and respecting the dignity of the individual;</p> <p>Have regard to the characteristics, culture and beliefs of the individual (including e.g. language);</p> <p>Have regard to importance of providing support to enable the adult to participate in decisions particularly where adult’s ability to communicate is limited;</p> <p>Have regard to importance of beginning with the presumption that the adult is best placed to judge their well-being; and the importance of promoting the adult’s</p>	<p>As a general principle, if carrying out functions under the Act, any intervention in an adult’s affairs should benefit the individual and be the least restrictive to the adult’s freedom.</p> <p>Must also have regard to the adult’s ascertainable wishes and feelings (past and present);</p> <p>Any views of the nearest relative, primary carer, guardian or attorney etc.;</p> <p>The importance of the adult participating as fully as possible, providing the adult with information and support to enable their participation;</p> <p>The importance of ensuring the adult is not treated less favourably than the way in which any other adult (not at risk) might be treated in a comparable situation; and</p>

<p>transparency in delivering safeguarding.</p> <p>The legislation also places a general duty on a local authority to promote an individual's well-being which includes protection from abuse and neglect.</p>	<p>independence where possible.</p> <p>A person exercising functions under the Act must seek to promote the well-being of a person which includes protection from abuse and neglect.</p> <p>They must also have due regard to the UN Principles for Older Persons (Independence, Participation, Care, Self-fulfilment and Dignity).</p>	<p>The adult's abilities, background and characteristics (including the adult's age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage).</p>
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### Key considerations

2.24 The Department can see value in having principles to guide the implementation of the legislation. Having considered the approach taken across the UK and the recommendations of the Independent Review, we would welcome views on the following as an outline approach at this stage:

- **Autonomy:** A presumption that adults have capacity to give or withhold consent.
- **Empowerment:** To empower and support adults to make informed choices about their lives, taking into account their views, to maximise their opportunities to participate in wider society and to keep themselves safe and free from harm from abuse, neglect or exploitation.
- **Dignity:** A rights based approach, promoting and respecting the dignity of adults.
- **Proportionality:** Any intervention in an adult's life should be the least restrictive option.
- **Partnership:** Communities have a part to play in preventing, detecting and reporting abuse, neglect and exploitation.
- **Accountability:** Accountability and transparency with roles and responsibilities clearly understood.

## Consultation Questions

3. Do you agree with the list of principles proposed? If no, what would you suggest as an alternative approach?
4. What are your views on principles being set out on the face of legislation or in Statutory Guidance?

## Duties to (i) report and (ii) make enquiries

- 2.25 The Commissioner for Older People recommended in 'Home Truths', that ***“there should be a clear duty to report to the HSC Trust when there is reasonable cause to suspect that there is an adult in need of protection. The HSC Trust should then have a statutory duty to make enquiries”***. A similar proposal was recommended in the Independent Review.
- 2.26 A statutory duty is something that an individual or organisation **must** do, rather than something they can choose whether to do or not.

### Current position

- 2.27 The 'Adult Safeguarding Prevention and Protection in Partnership Policy' is intended to assist organisations, their staff and volunteers, who are in contact with or providing services to adults across the statutory, voluntary, community, independent and faith sectors, to know how and when to report concerns. It states that if there is a clear and immediate risk of harm from abuse, neglect or exploitation, a referral should be made to the HSC Trust Adult Protection Gateway Service or to the PSNI if a crime is alleged or suspected.
- 2.28 It will be a matter for HSC professionals to judge whether the threshold for an adult protection intervention has been met. Protection interventions, if

required, are led by social workers and/or PSNI officers; the latter primarily where a crime is alleged or suspected. A Protocol for Joint Investigation of cases provides a framework for HSC Trusts and the PSNI to work together.

2.29 There is currently no general legal requirement to report adult protection cases in Northern Ireland. However, there are a number of other duties to report across existing pieces of legislation that may be relevant in such cases. For example:

- Under the Safeguarding Vulnerable Groups (NI) Order 2007, certain individuals/organisations who manage or supply people to work in a 'regulated activity'<sup>3</sup> are required to refer to the Disclosure and Barring Service when they have removed an individual because they have harmed a 'vulnerable person' or put a 'vulnerable person' at risk of harm.
- HSC Trusts, managers of independent hospitals, nursing homes or residential care homes and the Regulation and Quality Improvement Authority (RQIA) must notify the Office of Care and Protection of any person incapable by reason of mental disorder, of managing their property and affairs under the Mental Health (NI) Order 1986, if there are no arrangements in place to protect the person.
- The Criminal Law Act (NI) 1967 places a duty on us all to report information to the police if we suspect a serious offence has been committed.

2.30 There is also an expectation that individuals use their professional judgement and duty of care when it comes to reporting. This is included in Codes of Practice for HSC staff registered with the NI Social Care Council, for example.

2.31 The Public Interest Disclosure (NI) Order 1998 alongside the Employment Rights (NI) Order 1996 protects those who 'make a disclosure in the public interest', commonly referred to as whistleblowing, and who suffer victimisation

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<sup>3</sup> 'Regulated activity' includes providing health care, personal care and social work; assistance with general household matters because of age, illness or disability; assistance in the conduct of an individual's affairs; or conveying.

or unfair dismissal as a result of their actions. It sets out examples of wrongdoing that qualify for an employee to disclose information, such as criminal activity and health and safety compromises.

2.32 The Department is also considering the introduction of a statutory duty of candour to ensure a consistent culture within the health service which allows staff and patients to speak up when things go wrong. This will be taken forward as part of a separate consultation.

2.33 Data collected by the Health and Social Care Board<sup>4</sup> shows that levels of reporting in adult protection were at their highest around the time of the publication of the ‘Adult Safeguarding Prevention and Protection in Partnership Policy’ (2015) with numbers decreasing in recent years. However, on average, only 50% of referrals to the Gateway service met the threshold for adult protection.

Year	Total number of referrals	Number that met protection threshold
2015-16	7090	4167
2016-17	5749	3234
2017-18	3137	2518
2018-19	5707	2666

2.34 The Independent Review, highlights that a **“confusion about what to report”** has meant that **“the culture within which safeguarding is operating has resulted in the ‘risk averse’ practice of reporting everything”**.

2.35 Whilst the Policy recognises that not all issues require an adult protection response, a recent audit undertaken by the Department, identified the reporting of a diverse range of concerns across the system. A wide variety of presenting issues of risks have been referred to adult protection rather than the referrer exercising professional judgement to determine the appropriate

<sup>4</sup> HSCB, Delegated Statutory Functions Reports

response. The audit found that in many instances referrals were made to Adult Protection Officers without a rigorous determination of the need to do so.

- 2.36 Decisions about what steps to take in response to abuse and neglect are not always straightforward. A warning sign may be difficult to spot but it also doesn't automatically mean that there is abuse present.
- 2.37 The Commissioner for Older People's investigation into Dunmurry Manor Care Home also concluded that ***"it is unclear from the policy what the threshold is... to report concerns to the HSC Trust"*** which can equally result in concerns not always being reported.
- 2.38 It is important that we take these findings into account when deciding whether a duty to report is the right approach for adult protection in Northern Ireland. It could bring benefits. It could send a clear message and increase awareness of the importance of reporting, which could lead to more cases of abuse being identified. However, there could also be unintended consequences.
- 2.39 A new duty to report could encourage a culture of reporting and paperwork rather than one that focuses on improving the quality of interventions. The number of reports could go up significantly which may not all be justified and which could result in focus being lost on the most critical cases.
- 2.40 It could also result in cases being reported where an adult has capacity and is refusing consent. This would not only undermine the rights and autonomy of the individual but it could also lead to a loss of trust and therapeutic relationships with healthcare professionals.
- 2.41 Currently, the 'Adult Safeguarding Prevention and Protection in Partnership Policy' adopts a rights based approach to promote and facilitate full participation of adults in decisions affecting their lives taking full account of their views, wishes and feelings.

## Legislation in other parts of the UK

2.42 England chose not to introduce a statutory duty to report, recognising that the issue was complex and that it could result in an increased number of unsubstantiated referrals (although England did introduce a duty to make enquiries). Scotland and Wales did introduce a statutory duty to report (along with a duty to make enquiries) with key provisions as follows -

### DUTY TO REPORT:

Wales	Scotland
<p>Duty on the police, any other local authority, probation service, young offender teams, local Health Board; NHS Trust</p> <p>The 'relevant partner' organisation must report to the local authority</p> <p>If they have reasonable cause to suspect that a person is an 'adult at risk'</p>	<p>Duty on the Mental Welfare Commission for Scotland; Care Inspectorate; Healthcare Improvement Scotland; Public Guardian; all councils; Police; the relevant Health Board</p> <p>The public body or office holder must report the facts and circumstances of the case to the council</p> <p>If they know or believe that a person is an 'adult at risk' and that action needs to be taken in order to protect that person from harm</p>

### DUTY TO MAKE ENQUIRIES:

England	Wales	Scotland
<p>Where a local authority has <i>reasonable cause to suspect</i> that an adult in its area (whether or not ordinarily resident there) is an 'adult at risk' it must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case and if so, what and by whom.</p>	<p>If a local authority has <i>reasonable cause to suspect</i> that a person in its area (whether or not ordinarily resident there) is an adult at risk, it must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken and, if so, what and by whom; and decide whether action should be taken.</p>	<p>A Council must make enquiries about a person's well-being, property or financial affairs, if it <i>knows or believes</i> that the person is an adult at risk and that it might need to intervene in order to protect the person's well-being, property or financial affairs.</p>

## **Key considerations**

2.43 The Department is considering introducing a new statutory **duty to report** and would welcome views on the following provisions:

### ***(a) Who should be subject to the duty?***

2.44 The Department is considering placing a duty to report on the HSC Trusts, PSNI, HSC Board, Public Health Agency (PHA), RQIA and Independent providers commissioned/contracted to provide health and social care services (at both an organisational and individual level). The Department is also considering the inclusion of a regulatory making power so that additional organisations can be added to the list if required, at a later date.

### ***(b) What must be reported?***

2.45 The Department is considering requiring the organisations listed in (a) above to report cases where they believe there is reasonable cause to suspect that an 'adult is at risk and in need of protection'.

### ***(c) Who must the report be made to?***

2.46 The Department is considering requiring reports to be made to the relevant HSC Trust. Statutory Guidance would also clarify that where a crime is alleged or suspected, that it must also be reported to the PSNI.

2.47 As a follow up to a duty to report, the Department is also considering placing a duty on the HSC Trust **to make enquiries** into an adult's case, as recommended by both the Commissioner for Older People and the Independent Review. Statutory Guidance would also be required to explain the outworking of both duties and any further requirements.

## **Consultation Questions**

**5. Do you agree with mandatory reporting? Should there be a new duty to report to the HSC Trust where there is a reasonable cause to suspect that an 'adult is at risk and in need of protection'?**

**6. Should a new duty be placed on HSC Trusts to make follow up enquiries?**

## Power of entry to interview an adult in private

2.48 This section seeks views on whether a new power of entry should be provided for in the Bill to support a new duty to make enquiries. The scenario we are consulting on is where a HSC professional has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection; and that professional is unable to gain entry to the adult's dwelling (or another premises) to speak with the adult in private to ascertain if they are making decisions freely. This may be because access to the premises is being refused by a third party, such as a family member or carer. In such circumstances, the HSC professional would require a legal power to enter the premises, accompanied by the PSNI.

### Current position

2.49 Legal powers already exist for gaining access in specific circumstances, for example -

- If a person suffering from mental disorder has been, or is being ill-treated, neglected or is living alone and unable to care for themselves, the court may issue a warrant under the Mental Health (NI) Order 1986, giving the PSNI, accompanied by a medical practitioner, power to enter the premises and remove the person to a place of safety with a view to detaining the patient in hospital under the Order.
- Under the Mental Capacity Act (NI) 2016 (when fully commenced), the court may issue a warrant giving the PSNI, accompanied by a medical practitioner and if required an Approved Social Worker, power to enter a premises and remove a person where admission is being refused, if the person is liable to be detained in circumstances amounting to a deprivation of liberty, for the care and treatment of the person.
- If any person is at risk of 'serious bodily injury' or property is at risk of serious damage the PSNI has power under the Police and Criminal Evidence (NI) Order 1989, to enter and search any premises to save 'life or limb' or prevent serious damage to property.

- Where a person with a grave chronic disease, is aged, infirm or physically incapacitated, is living in insanitary conditions; and is unable to properly care for themselves (or be cared for by others living with them or nearby) the court may issue an order under the Health and Personal Social Services (NI) Order 1972, giving a HSC professional power to enter a person’s home and remove them so that they receive necessary care and attention.
- If an adult with mental capacity is at risk of abuse or neglect and is impeded from exercising that capacity freely the High Court may, under its inherent jurisdiction, make an order which could relate to gaining access to an adult.
- The PSNI also has a common law power to enter and arrest a person to prevent a breach of the peace.

## Legislation in other parts of the UK

2.50 Both Wales and Scotland introduced a power of entry but to varying degrees -

Wales	Scotland
<p>An authorised officer<sup>5</sup> may apply to a justice of the peace for an ‘Adult Protection and Support Order’ to enter any premises<sup>6</sup> (if reasonable cause to suspect that a person is an adult at risk, it is necessary to gain access to assess them and doing so will not result in them being at greater risk of abuse or neglect).</p> <p>The Order allows the authorised officer and a police constable (using reasonable force if necessary) to enter; to speak with the adult in private to ascertain whether they are</p>	<p>A council officer may visit/enter any place (or adjacent place) to assist with their enquiries, to decide whether action needs to be taken to protect an adult at risk.</p> <p>The Council may apply to the Sheriff for a warrant to enter any place, including any adjacent place where that visit/entry has been or reasonable expects to be refused.</p> <p>This allows a council officer<sup>7</sup> and a police constable (using reasonable force if necessary) to enter and</p>

<sup>5</sup> An authorised officer is defined as a person who has completed appropriate training and is an officer of the authorising authority (the relevant local authority) subject to minor exceptions.

<sup>6</sup> Statutory guidance clarifies that “premises” includes a domestic premises; a residential care home; a nursing home; a hospital or any other building, structure, mobile home or caravan in which the person is living.

<sup>7</sup> Social workers, occupational therapists and nurses with at least 12 months’ relevant experience.

making decisions freely; and to assess whether the person is an adult at risk and if action needs to be taken.	interview in private any adult found in the place.
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ADDITIONAL POWERS ON ENTRY:

Wales	Scotland
<b>No additional powers</b>	<p>The Council may apply to the Sheriff<sup>8</sup> for:</p> <p>An <b>Assessment Order</b> to take an adult from a premises visited to a more suitable place to interview and/or medically examine in private, to determine if adult is at risk and if further action is needed. There must be reasonable cause to suspect the adult is being, or is likely to be, <b>seriously harmed</b>. <i>There is no power to detain with this order, the adult may chose to leave the place where they are being assessed at any time.</i></p> <p>A <b>Removal order</b> to remove an adult at risk from a premises to another place for up to 7 days if likely to be <b>seriously harmed</b> (if not moved). The Council must also take steps to protect the property of the adult following their removal. <i>There is no power to detain with this order, the adult may chose to leave the place they have been removed to at any time.</i></p> <p>A <b>Banning order</b> can ban a person from being in a specified place for up to 6 months, if the adult is being or is likely to be <b>seriously harmed</b> by that person; and the Sheriff is satisfied that banning the subject of the order from the place will better safeguard the adult at risk's well-being or property than by moving the adult. A power of arrest may be attached. The adult who would be safeguarded by the order; any other person entitled to occupy the property; or the Council may apply for a banning order.</p>

2.51 In Scotland, the Sheriff must not make a protection order if it is known that the adult at risk has refused to consent to the granting of the order. Similarly a person must not take any action to carry out the order if there is no consent.

<sup>8</sup> The Sheriff must not make a protection order if known the adult at risk has refused to consent to the granting of the order. Similarly a person must not take any action to carry out the order if no consent. *However, consent may be ignored if it is reasonably believed that the adult at risk has been unduly pressurised to refuse consent and there are no other steps that could be taken to protect them from harm with consent.*

However, consent may be ignored if it is reasonably believed that the adult at risk has been unduly pressurised to refuse consent and there are no other steps that could be taken to protect them from harm with consent.

- 2.52 Wales provides a balance between England's minimalist approach and Scotland's more intrusive model. However, it has been questioned whether a right of entry is beneficial without further supporting powers (to remove an adult at risk from their home, for example) or if it could in reality expose individuals to further harm.
- 2.53 In England, the UK Government consulted specifically on whether or not to introduce a power of entry but concluded that responses did not provide a compelling case to legislate: *"it was a very sensitive and complex issue which divided opinion... we particularly noted the strength of feeling from members of the public who were against such a power and the risk of unintended consequences."* The consultation raised concerns that, in some cases, the power could result in the risk of abuse escalating for individuals. It was also felt that there were only a small number of cases where the power would be used.
- 2.54 There is limited data available on the implementation of powers of entry in other parts of the UK. It would appear that the powers of entry and additional protection orders in Scotland are rarely used and act mainly as a preventative measure. The Department understands that the Adult Support and Protection (Scotland) Act 2007 is under review and will take account of any findings available to inform legislative developments in Northern Ireland.

### **Key considerations**

- 2.55 The Department recognises that a power of entry is a sensitive issue and that many individuals and organisations will have strong views on this subject. We do not want to intervene in people's lives unnecessarily. Everyone has the right to a private life and a home life. Any new legislation needs to be

compatible with the European Convention on Human Rights and any interventions need to be justified and proportionate with adequate safeguards.

2.56 As an alternative approach, we could raise awareness of the range of existing powers of entry available by developing clearer guidelines on what organisations have the legal powers to do. However, the Department is mindful that some have questioned whether there is a gap where a person's ability to make a choice is thought to be restricted by the behaviour of another person (as demonstrated in the case study below). We would welcome your views.

2.57 The following extract is taken from the report, 'A Call for Adult Safeguarding Legislation' by the former Commissioner for Older People -

**Case scenario:**

*An older person's relative contacted the Commissioner's office and outlined a catalogue of safeguarding concerns. This older person, who had a learning disability, was residing at a care home, where they had married another resident. The older person's family had serious concerns about this marriage and contacted social services who were unable to stop the wedding. The older person was discharged from the care home by a relative of the new husband and the older person's family was prevented from contacting them. This older person's relative managed to locate them after prolonged investigations and discovered the older person in a serious state of neglect, after which the relative contacted the police and local Health Trust. The older person was deemed to have mental capacity at the time and remained in the care of the new husband's relative, despite the concerns of the family that this person was a malign influence on their relative. The family of the older person at risk were later contacted by a neighbour and advised that this older person was in hospital due to dehydration and malnourishment. The family obtained a court injunction preventing this older person's 'carer' contacting them.*

**How a power of access for private interview could have helped:** *When the older person's concerned family contacted social services, a power of access for private interview would have allowed practitioners to conduct a private interview to assess whether the older person was making decisions freely.*

- *In this case, a power of access for private interview would have revealed the level of abuse and neglect of the individual at an earlier stage.*

## Consultation questions

7. What are your views on a power of entry to allow a HSC professional access to interview an adult in private? Do you think any additional powers should be available on entry?
8. How many times in the last 12 months, have you been aware of a situation where, had a power of entry existed, it would have been appropriate to use it? What were the circumstances?

## Independent Advocacy

- 2.58 The former Commissioner for Older People recommended, in 'A Call for Adult Safeguarding Legislation', that there should be a duty to provide appropriate services to an adult at risk, such as independent advocacy. Advocacy involves enabling people to say what they want, to have their views heard, and empowering them to speak up for themselves. It informs the person about their options and helps them to take action when necessary to have their voice heard and secure their rights.<sup>9</sup>

### Current position

- 2.59 The 'Adult Safeguarding Prevention and Protection in Partnership Policy' recognises that -

*The use of independent advocacy services to support the adult at risk in making their choices may be appropriate, particularly for those who have difficulty being heard or expressing their views, or where there are conflicting interests. This is particularly the case where HSC staff, professionals or family are of the opinion that what the person wants is not in their best interests.*

*Advocacy can assist adults to be involved in, and influence, decisions taken about their care. It helps to ensure that the adult at risk remains central to the decision making process. Advocacy should not make decisions on behalf of*

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<sup>9</sup> Adult Safeguarding Prevention and Protection in Partnership Policy 2015

*the adult at risk, but always work in partnership with the adult they are supporting.*

### Legislation in other parts of the UK

2.60 England, Wales and Scotland have gone a step further and reflected the importance of advocacy support in legislation –

England	Wales	Scotland
Where a local authority is making an enquiry or carrying out a review of a case (re a living person) it must arrange for an independent advocate to be available to facilitate the adult's involvement if the adult has substantial difficulty in understanding, retaining, using/weighing information or communicating their views wishes or feelings. <sup>10</sup>	There is a power to make regulations to require a local authority to arrange for advocacy services. To date, the statutory Code of Practice states that local authorities must arrange an independent advocate when a person can only overcome the barrier(s) to participate fully in the safeguarding processes with assistance from an appropriate individual.	If after making enquiries a council considers that it needs to intervene to protect an adult at risk, the council must have regard to the importance of the provision of appropriate services including, in particular, independent advocacy services, to the adult concerned.

### Key considerations

2.61 The Mental Capacity Act (NI) 2016 when fully commenced, will require an independent mental capacity advocate to be appointed to represent and support a person who **lacks capacity** during the best interest determination, when certain serious interventions are required in that person's life and they lack capacity to make that decision for themselves.

2.62 It is important that we take this into account when deciding on any additional advocacy requirements as part of the adult protection process, as there will be

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<sup>10</sup> This duty does not apply if another appropriate person to support the adult or the adult has capacity and has not consented. If an adult lacks capacity appointing an advocate must be in their best interests.

similarities. The Department believes that it would be prudent (pending commencement of the relevant Mental Capacity Act provisions), to include a regulatory making power in the Bill to set out any future requirements in respect of Independent Advocacy including any eligibility criteria. This would facilitate further consideration of the interface with the Mental Capacity Act.

### Consultation question

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9. What are your views on statutory provision for independent advocacy in the context of adult protection?

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## Independent Adult Protection Board for NI

2.63 On 10 September 2020, the Health Minister confirmed plans to stand down the Northern Ireland Adult Safeguarding Partnership (also known as ‘NIASP’) in a move towards the establishment of an Independent Adult Safeguarding/Protection Board, at arms-length from the Department. This was a key recommendation of the Independent Review:

***“Replace the NIASP with a Northern Ireland Independent Safeguarding Board (Adults) with clearly defined duties, such as making an annual report (for example, reporting on trends and topics and identifying best practice and areas for improvement or for greater scrutiny in the coming year) to the Permanent Secretary and Ministers. The Northern Ireland Independent Safeguarding Board (Adults) should publish annual plans and reports to inform the HSC system’s annual reporting cycle.*”**

### Current position

2.64 The move to an independent structure will take time as it requires a statutory footing. As an interim arrangement, the Health and Social Care Board will set up and chair a new interim Adult Protection Board to replace NIASP, which will report to the Department pending the enactment of new legislation.

## Legislation in other parts of the UK

2.65 England, Wales and Scotland have already established statutory inter-agency Boards or Committees as they are referred to in Scotland.

2.66 There are variations across the three jurisdictions, however, the Boards/Committees have some key functions in common which have been set out in legislation and statutory guidance. They have a role to play in preventative safeguarding (raising awareness, education and training) as well as adult protection.

### CORE FUNCTIONS:

England	Wales	Scotland
<p><b>Safeguarding Adults Boards must:</b></p> <p>(a) arrange for a Safeguarding Adult Review to be carried out if it knows or suspects that an adult has experienced serious abuse or neglect or has died as a result</p> <p>(b) to publish a strategic plan each year</p> <p>(c) to publish an annual report</p>	<p><b>The National Independent Safeguarding Board must:</b></p> <p>(a) provide support and advice to Safeguarding Boards with a view to ensuring they are effective</p> <p>(b) report on the adequacy and effectiveness of arrangements to safeguard adults in Wales</p> <p>(c) make recommendations to Ministers on how those arrangements could be improved</p>	<p><b>Adult Protection Committees must:</b></p> <p>(a) keep under review safeguarding procedures and practices of public bodies</p> <p>(b) give (safeguarding) information or advice, or make proposals, to any public body</p> <p>(c) make, or assist in, or encourage the making of, arrangements for improving the skills and knowledge of officers or employees of public bodies who have safeguarding responsibilities</p> <p>(d) any other function as specified in regulations</p>

2.67 Structures across the UK are similar with a main Board/Committee and a number of sub-groups which vary based on subject. There is also a common core membership including the local authority (which established the Board), the chief officer of Police for the area and the local Health Board or equivalent body.

2.68 Boards/Committees also have the **power to request the supply of information** for the purpose of enabling or assisting the Boards/Committees to carry out their functions.

### **Key considerations**

2.69 The Department intends to establish a statutory Independent Adult Protection Board for Northern Ireland, through the Adult Protection Bill, with the following core functions set out in the primary legislation:

- **To publish a strategic plan each year;**
- **To publish an annual report; and**
- **Make arrangements and have responsibility for Serious Case Reviews**

Serious Case Reviews will be new to adult protection in Northern Ireland. These are multi-agency reviews that look into the circumstances surrounding the death of, or serious harm to, an adult at risk and in need of protection. Their purpose is to establish whether there are lessons to be learned from a case about the way in which agencies and professionals work together; and to action change as a result. Statutory guidance supporting the legislation will be required to provide further details on eligibility criteria and to consider the interface with other review mechanisms such as Domestic Homicide Reviews.

2.70 It is also the Department's view that the new Adult Protection Board for Northern Ireland should be given the power to request the supply of information relevant to the exercise of its functions, similar to provisions included in other UK legislation.

2.71 The Department also intends to include a regulatory making power to set out further operational details around the Board's membership and procedures.

## Consultation questions

10. Do you agree that an Independent Adult Protection Board should be established and placed on a statutory footing?

11. Do you agree with the introduction of Serious Case Reviews?

## Cooperation and information sharing

2.72 Adult protection is not the responsibility of one organisation alone, nor can it be seen solely as a health and social care responsibility. There are many different agencies involved, each bringing different skills and perspectives.

2.73 The Independent Review highlights ***“the need for improved information communication across the system”***. The Department agrees with this statement and is considering further provisions that will require organisations to work more effectively to share information. One option is to introduce a duty on specific organisations to cooperate with each other, as introduced in other UK jurisdictions.

### Current position

2.74 Currently, the ‘Adult Safeguarding Prevention and Protection in Partnership Policy’ promotes multi-disciplinary, multi-agency and interagency cooperation, including the sharing of learning and best practice. The [Protocol for Joint Investigation](#) also provides a framework within which the HSC Trusts, PSNI and RQIA can work in partnership.

2.75 The sharing of information between organisations is covered under other existing laws such as the common law duty of confidentiality, the Data Protection Act 2018 and the General Data Protection Regulation (GDPR). However, it is clear from the Independent Review that the question of information sharing raises complex issues in adult protection and that

interagency protocols or memorandums of understanding may not be providing sufficient clarity. It may also be necessary to introduce a specific duty to place an onus on certain organisations to cooperate where an adult is at risk and in need of protection.

### Legislation in other parts of the UK

2.76 Other UK jurisdictions have placed a duty on local authorities/councils to make enquiries where an ‘adult is at risk’ (and a similar duty is being considered for HSC Trusts in Northern Ireland). To assist with these enquiries, a duty is also placed on relevant organisations (listed below) to **cooperate** with the local authority/council and vice versa.

#### DUTY TO COOPERATE:

England	Wales	Scotland
All local authorities NHS England Clinical Commissioning Groups NHS trusts Department for Work and Pensions Police Prison service Probation service	All local authorities Police Probation service Local Health Board NHS Trust	All councils Mental Welfare Commission Care Inspectorate (similar to RQIA) Health Improvement Scotland Public Guardian Police Relevant Health Board

2.77 Provisions around compliance are included in the English and Welsh legislation. The duty to cooperate must be complied with unless it would be incompatible with the duties of the local authority or relevant organisation, or would otherwise have an adverse effect on the exercise of its functions (such as being bound by the duty of confidentiality). Furthermore, if either the local authority or relevant organisation decide not to cooperate they must provide a reason (in writing) for not doing so.

2.78 Legislation in Wales also clarifies that the local authority and relevant organisations **may share information** with each other.

- 2.79 Scotland goes further again by providing councils with a **power to examine records** relating to an adult at risk:

*A council officer may require any person holding health,<sup>11</sup> financial or other records relating to an individual whom the officer knows or believes to be an adult at risk to give the records, or copies of them, to the officer. Such a requirement may be made during a visit [to the adult] or at any other time... Records may be inspected for the purposes of enabling or assisting the council to decide whether it needs to do anything in order to protect an adult at risk.*

*In Scotland an adult at risk is defined as an adult who is unable to safeguard their own well-being, property, rights or other interests, is at risk of **harm**, and because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.*

### **Key considerations**

- 2.80 The Department is considering placing a **new statutory duty** on the following organisations to cooperate with the relevant HSC Trust (and vice versa), when the Trust is making enquiries into a case where there is reasonable cause to suspect that an ‘adult is at risk and in need of protection’ and it does not conflict with the exercise of its functions -

HSC Trusts, PSNI, Probation Board for NI, HSC Board, PHA, RQIA and Independent providers commissioned/contracted to provide health and social care services.

- 2.81 This duty could also include a provision to clarify that organisations may share information with each other and a provision requiring organisations to explain in writing any reasons for not complying with the duty (similar to the approach taken in England and Wales).

- 2.82 The Department would also welcome views on whether there should be a new **power to access financial records** where there is reasonable cause to suspect that an adult is at risk of financial abuse and in need of protection.

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<sup>11</sup> Health records are relating to an individual’s physical or mental health which have been made by or on behalf of a health professional in connection with the care of the individual. Only a health professional may inspect health records.

- 2.83 The former Commissioner for Older People considered that there may be merit in providing “a relevant, identified organisation” with such a power in cases where an adult ***“has mental capacity, but perhaps does not ‘possess all the facts relating to the spending’ in order for them to make an informed decision... If adult safeguarding practitioners could access relevant financial records when there is reasonable suspicion of financial abuse, it would allow an assessment of the level of risk to the... person of whether financial abuse is occurring and any appropriate interventions required.”*** Consultees may wish to again consider in light of the case scenario presented at paragraph 2.57.
- 2.84 The Department recognises that accessing a person’s financial records is a sensitive matter, which indeed the former Commissioner also acknowledged: ***“The issue of ‘autonomy’ over an adult’s own finances and the impact that this power would have on an individual’s human right to ‘respect for his private and family life’ remains an area of concern.”***
- 2.85 The introduction of such a power therefore requires careful consideration and it is important that we hear from consultees so that all views can be taken into account.

#### **Consultation Questions**

- 12. Do you agree with the proposal to introduce a duty to cooperate? Are there any aspects of the duty that you would change?**
- 13. Do you think there should be a new power to access an adult’s financial records as part of an adult protection enquiry? If yes, which organisation(s) should be given this power?**

## Offences of ill-treatment and wilful neglect

2.86 Actions which amount to abuse, neglect or exploitation may constitute a criminal offence under various pieces of existing legislation. This section seeks views on whether any new offences should be considered.

### Current position

2.87 The Mental Capacity Act (NI) 2016, as currently commenced, provides an offence of ill-treatment and wilful neglect in respect of a person who **lacks capacity** in relation to a deprivation of liberty. When fully commenced the offence will extend to situations where a person lacks capacity and where there are care arrangements, detentions or attorney or deputies appointed. Currently, an offence of ill-treatment and wilful neglect only applies in relation to patients in mental health hospitals or who are under guardianship under the Mental Health (NI) Order 1986 and the offender is a member of staff or in management of the facility.

2.88 The Mental Capacity Act (NI) 2016 also clarifies that if the offence is committed by a **body corporate** (e.g. private healthcare company, HSC trust), any director, manager, secretary, or other similar officer of that body is also guilty of the offence if it was done with their consent; they connived in the offence; or the offence can be attributed to neglect on their part. Such persons can have proceedings issued against them in addition to those which may be issued against the body corporate.

2.89 There is no equivalent specific offence, in Northern Ireland, in relation to those being cared for with capacity.

### Legislation in other parts of the UK

2.90 Offences of ill-treatment and wilful neglect of people who lack capacity are already operational in England and Wales under the Mental Capacity Act 2005, and in Scotland, under the Adults with Incapacity Act (Scotland) 2000.

Similar offences are also set out in their separate mental health legislation in respect of people being treated for mental disorder.

2.91 Other parts of the UK have legislated further in respect of the ill-treatment or wilful neglect of those with mental capacity, to recognise the particular vulnerabilities of those receiving health and social care as well as the level of trust placed in those providing that care. The Criminal Justice and Courts Act 2015 (in England and Wales) and the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 introduced two new offences known as -

**‘Care worker offence’**

2.92 In all three jurisdictions, it is an offence for an individual who has the care of another individual by virtue of being a ‘care worker’ to ill-treat or wilfully neglect that individual. “Care worker” generally means an individual who, as paid work, provides health or social care for an adult. It also includes an individual who, as paid work, supervises or manages individuals providing such care or is a director or similar officer of an organisation which provides such care. Scottish legislation also makes it clear that this includes volunteers.

**‘Care provider offence’**

2.93 In all three jurisdictions, a care provider commits an offence if:

- a) an individual who has the care of another individual by virtue of being part of the care provider’s arrangements ill-treats or wilfully neglects that individual,
- b) the care provider’s activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care owed by the care provider to the individual who is ill-treated or neglected, and
- c) in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur.

2.94 ‘Care provider’ generally means a body corporate or unincorporated association which provides or arranges for the provision of health care or social care for an adult; or an individual who provides such care and employs,

or has otherwise made arrangements with, other persons to assist him or her in providing such care.

### **Key considerations**

- 2.95 Many people receive high quality health and social care from a variety of dedicated professionals across a number of settings in Northern Ireland who work in a manner that respects and protects the dignity and rights of individuals. However, as we know from events at Dunmurry Manor Care Home and Muckamore Abbey Hospital, there can be instances where individuals are deliberately mistreated or neglected by those who have been trusted to look after them.
- 2.96 There are existing offences of ill treatment and wilful neglect in respect of patients in mental health hospitals and under guardianship, persons who lack capacity who are subject to a deprivation of liberty and, when the Mental Capacity Act (NI) 2016 is fully commenced, this will be widened to include all persons who lack capacity. However, the Department believes that this leaves a gap in the law in relation to people who are being cared for with capacity. We are therefore considering introducing new ‘care worker’ and ‘care provider’ offences in Northern Ireland, similar to those already introduced in other parts of the UK.
- 2.97 Consultees may also wish to note that a Domestic Abuse and Family Proceedings Bill is being considered by the NI Assembly. The Bill will create a new domestic abuse offence for Northern Ireland which will capture patterns of controlling and coercive behaviour, as well as physical abuse, against a partner, former partner or family member.

### **Consultation questions**

- 14. Do you agree that new offences of ill treatment and wilful neglect should be introduced?**
- 15. Are there any other new offences that should be considered?**

## Statutory Guidance

- 2.98 In addition to new legislation, the Independent Review has recommended ***“setting out and consulting on the contents of Statutory Guidance”***.
- 2.99 The Department recognises that adult protection is complex and agrees that statutory guidance will be necessary to provide further clarity on the specific provisions contained in the Bill and on where the adult protection process sits with wider preventative safeguarding work.
- 2.100 It is our intention to include a general provision in the Bill to allow the Department of Health to issue statutory guidance, to make the legislation more accessible, so that individuals/organisations are clear on what they must do to comply with the law. Provision would also be included to allow the Department to revise the guidance and to publish any revisions.

### Consultation question

**16. Are there any other provisions that you would like to see included in the Adult Protection Bill?**

### **3. IMPACT SCREENING**

#### **Equality**

- 3.1 In accordance with guidance produced by the Equality Commission for NI and in keeping with Section 75 of the Northern Ireland Act 1998, this consultation on legislative options to inform the development of an Adult Protection Bill has been equality screened and a preliminary decision has been taken that a full equality impact assessment is not required at this stage. The preliminary decision is subject to change following analysis of feedback received during this consultation.

#### **Rural proofing**

- 3.2 Rural proofing is a process that aims to make sure that Government policies are carefully and objectively examined to make sure they treat those in rural areas fairly and to make public services available in a fair way, no matter where people live in NI. Where necessary, policy adjustments might be made to reflect rural needs and in particular to ensure that as far as possible public services are accessible on a fair basis to the rural community. Throughout the consultation process, careful consideration will be given to the needs of rural communities.

#### **Regulatory**

- 3.3 A draft Regulatory Impact Assessment has been developed for these proposals. This draft Regulatory Impact Assessment will be revisited following analysis of feedback received during this consultation.

#### **Data Protection**

- 3.4 This policy has been screened out from the need to undertake a full data protection impact assessment at this time.

## **4. GET INVOLVED**

4.1 A summary of the consultation questions is provided below:

1. Do you agree with the title 'Adult Protection Bill'?
2. What are your views on a definition of 'adult at risk and in need of protection'?
3. Do you agree with the list of principles proposed? If no, what would you suggest as an alternative approach?
4. What are your views on principles being set out on the face of legislation or in Statutory Guidance?
5. Do you agree with mandatory reporting? Should there be a new duty to report to the HSC Trust where there is a reasonable cause to suspect that an 'adult is at risk and in need of protection'?
6. Should a new duty be placed on HSC Trusts to make follow up enquiries?
7. What are your views on a new power of entry to allow a HSC professional access to interview an adult in private? Do you think any additional powers should be available on entry?
8. How many times in the last 12 months, have you been aware of a situation where, had a power of entry existed, it would have been appropriate to use it? What were the circumstances?
9. What are your views on statutory provision for independent advocacy in the context of adult protection?
10. Do you agree that an Independent Adult Protection Board should be established and placed on a statutory footing?
11. Do you agree with the introduction of Serious Case Reviews?
12. Do you agree with the proposal to introduce a duty to cooperate? Are there any aspects of the duty that you would change?
13. Do you think there should be a new power to access an adult's financial records as part of an adult protection enquiry? If yes, which organisation(s) should be given this power?
14. Do you agree that new offences of ill treatment and wilful neglect should be introduced?
15. Are there any other new offences that should be considered?
16. Finally, are there any other provisions that you would like to see included in the Adult Protection Bill?

## **HOW TO RESPOND**

- 4.2 This consultation has been launched using Citizen Space. Citizen Space is the Northern Ireland Civil Service (NICS) recommended online Consultation tool and preferred surveying tool.
- 4.3 You can also share your views on this consultation in a number of other ways.
- 4.4 In addition a separate questionnaire is available to help you record your comments and views. This can be completed and submitted in the following ways:
- Download and Email us at: [AdultSafeguardingUnit@health-ni.gov.uk](mailto:AdultSafeguardingUnit@health-ni.gov.uk)
  - Download, print and post to:       Adult Safeguarding Unit,  
  Castle Buildings, Stormont,  
  Belfast, Northern Ireland, BT4 3SQ
- 4.5 This document is also available in alternative formats on request. Please contact the Department, at the address above or email, to make your request.
- 4.6 The consultation closes at 11.59 pm on 8 April 2021.

## **CONFIDENTIALITY AND ACCESS TO INFORMATION**

- 4.7 In line with the principles within the Fresh Start Agreement to place greater emphasis on innovation, the use of social media, the digital platform and online consultation, this public consultation is being undertaken using Citizen Space. It is accredited for use in Northern Ireland Civil Service.
- 4.8 The Department may publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be published or disclosed on request in accordance with information legislation; these chiefly being the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR), the Data

Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR) (EU) 2016/679. The Department can only refuse to disclose information in exceptional circumstances. Before you submit your response, please read the paragraphs below on the confidentiality of consultations and they will give you guidance on the legal position about any information given by you in response to this consultation.

- 4.9 The FOIA gives the public a right of access to any information held by a public authority, namely, the Department in this case. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identity should be made public or be treated as confidential.
- 4.10 If you do not wish information about your identity to be made public please include an explanation in your response. Being transparent and providing accessible information to individuals about how we may use personal data is a key element of the DPA and the General Data Protection Regulation (EU) 2016/679. The Department is committed to building trust and confidence in our ability to process personal information. This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances. For further information about confidentiality of responses please contact the Information Commissioner's Office on 0303 123 1113 or via <https://ico.org.uk/global/contact-us/>
- 4.11 **NB.** Please note that the Department is unable to respond individually to responses; however, a summary of all consultation responses will be published after the close of the consultation period.