



**SAFEGUARDING –**

**THE LEGAL FRAMEWORK  
WITH A FOCUS ON WICKED  
ISSUES**

**Peggy Etiebet**

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● ● ● **cornerstone**  
● ● ● **barristers**

**considered. strong.**



**(1) Who is responsible for the section 42 enquiry?**

1. The responsible local authority is the one whose area the adult is in.
  
2. This is because section 42 of the Care Act 2014 (“CA”) provides, so far as is material:  
*‘(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—(a) has needs for care and support (whether or not the authority is meeting any of those needs), (b) is experiencing, or is at risk of, abuse or neglect, and (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.*  
  
*(2) The local authority 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 (whether under this Part or otherwise) and, if so, what and by whom.’*
  
3. There is no application of the concept of ‘ordinary residence’ when one is determining which local authority is responsible.

**(a) May two (or more) local authorities have a section 42 duty?**

4. It is possible that two or more local authorities may have a section 42 duty.
  
5. The section 42 duty lies where the adult is ‘*in its area*’. There is no case law I’m aware of as to the meaning of ‘*in its area*’ in section 42 CA. The Care and Support Guidance appears to be silent on the issue.
  
6. Guidance may be gleaned from the Children Act 1989 (“the 1989 Act”) on the question of: when is an adult in my area?



7. Pursuant to section 17(1)(a) of the 1989 Act a duty is owed *'to safeguard and promote the welfare of children **within their area** who are in need'*. The court in *R (Stewart) v Wandsworth, Hammersmith & Fulham and Lambeth* (2001) 4 CCLR 467 held that physical presence was required, it was a residual concept, concurrent duties may lie, and where that is the case there is a manifest need for co-operation and sharing the burden. Physical presence includes where a child resides and goes to school (*Stewart*), or lives temporarily (*AM v Haverling* [2015] EWHC 1004 (Admin)).
8. It is arguable that the safeguarding duties have a similar protective function to section 17 1989 Act, are a residual concept (as ordinary residence is expressly excluded) and, and as a matter of [policy, one would not want adults with needs for care and support who are experiencing or at risk of abuse or neglect and unable to protect themselves from it as a result of those needs to fall between two stools. As such, should the matter go to court for determination, it is likely a judge would apply learning from the 1989 Act.

**(b) Why is this of note?**

9. Rough sleepers may move around or reside across local authority boundaries. Which authority will be responsible?
10. An adult resides at the place where, *'he eats and sleeps [which] is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves into a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better*



*accommodation. In a sense it is "shelter" but it is also where he resides (Mohammed v H&F [2001] UKHL 57).*

11. Further, central government is emphasizing the need for a safeguarding adult review ("SAR") where rough sleepers die or are harmed as a result of abuse or neglect. One needs to know which local authority will be in the firing line.
  
12. Commitment 76 of the Ministry of Housing, Communities and Local Government's rough sleeping strategy August 2018 provides, *'[w]e will work with Safeguarding Adult Boards to ensure that Safeguarding Adult Reviews are conducted when a person who sleeps rough dies or is seriously harmed as a result of abuse or neglect, whether known or suspected, and there is concern that partner agencies could have worked more effectively to protect the adult. Lessons learned from these reviews will inform improvements in local systems and services.'*
  
13. Key activity 9 of the rough sleeping strategy delivery plan states, *'Safeguarding Adult Boards have a duty to conduct a Safeguarding Adult Review when a person dies or is seriously harmed as a result of abuse or neglect, whether known or suspected, and there is concern that partner agencies could have worked more effectively to protect the adult. We have begun work with the Safeguarding Adult Boards Chairs Network, Local Government Association and Association of Directors of Adult Social Services to ensure that these reviews are taking place where appropriate, and so that they can consider how lessons currently inform local system improvements and what changes could be made to improve processes.'*
  
14. TO FLAG: in respect of whom does the duty lie? Section 42(1) sets out the three criteria: an adult with needs for care and support, is experiencing or at risk of



abuse/neglect, as a result of the need is unable to protect himself. This is not limited to those that have eligible needs.

15. There is no definition of what a need for care and support is. The House of Lords in *M v Slough* [2008] UKHL 52 determined that the natural and ordinary meaning of "care and attention" in the National Assistance Act 1948 was "looking after", which meant doing something for the person being cared for which he could not, or should not, be expected to do for himself. It might include such things as household tasks that an old person could no longer perform or could only perform with great difficulty; protection from risks which a mentally disabled person could not perceive; or personal care such as feeding, washing or toileting. The looking after had to be of such a character as would be required even were the person wealthy, and it was immaterial that it could be provided in his own home if he had one. This has been applied to the Care Act.
16. As such a rough sleeper would need 'looking after' in order to fall under the duty to make enquiries or undertake a SAR (section 44(1) CA). Presumably, it is not clear from their wording, central government wants authorities to exercise their wellbeing or localism powers to undertake SARS in the case of all rough sleeper deaths/serious harm.

**(c) What may be done?**

17. Co-operate and integrate. Draw up agreed policies to set out on whom the responsibility to carry out the duty will lie.
18. The SAB may set up joint working committees with neighbouring SABs. Schedule 2 paragraph 1(8) CA: the '*SAB may regulate its own procedure*'. Section 43(4): '*A SAB*



*may do anything which appears to it to be necessary or desirable for the purpose of achieving its objective'*

19. Don't go to court: judicial dislike of cases where local authorities are in dispute over areas of responsibility and funding.
  
20. Don't reinvent the wheel: Learning from Children Services e.g. London Safeguarding Children Board's Child Protection Procedures at paragraph 6.14: *'Regardless of the reasons or circumstances of families moving between local authority areas, the Children Act 1989 is clear about where the responsibility for safeguarding and promoting the welfare of such children lies (Section 17 and Section 47): it is with the local authority responsible for the area in which the child is to be "found", i.e. where they are at the time that a concern may arise, which will normally be where they are living.'*
  
21. Learning also from No Recourse to Public Funds teams that in some LAs have drawn up agreements with neighbouring LAs as to who is responsible for a family under section 17 1989 Act where they are not able to leave the UK due to a legal or practical impediment or breach of their human or convention rights.
  
22. TO FLAG: the draft consultation appendix 7 'Safeguarding adults who sleep rough in London' reminds local authorities of the Care and Support (Disputes Between Local Authorities) Regulations 2014. This will not apply to determining what local authority is responsible under safeguarding. Section 40(1) CA limits it to ordinary residence disputes and continuity of care disputes when an adult moves (section 37 CA).



**(3) What is the extent of the enquires the LA has to make (or cause to be made)?**

23. Section 42(2) CA provides, *'The local authority 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 (whether under this Part or otherwise) and, if so, what and by whom'*.
24. No case law on the section I am aware of. Paragraphs 14.76 – 14.78 of the Guidance provides some limited help: *'An enquiry could range from a conversation with the adult...prior to initiating a formal enquiry under section 42, right through to a much more formal multiagency plan or course of action...[t]he purpose of the enquiry is to decide whether or not the local authority or another organisation, or person, should do something to help and protect the adult'*.
25. Learning from Homelessness: section 184(1) of the Housing Act 1996 provides, *'If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves— (a) whether he is eligible for assistance, and (b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part'*.
26. Relevant homelessness case law indicates: it is a matter for the local authority what inquiries they make challengeable only on public law principles. General guidance in homelessness is:
- a. the requirement to enquire into all relevant matters does not, however, mean that a failure to enquire into every matter raised will necessarily make the enquiry process flawed. What is relevant will be different in every case. The duty to make enquiries means enquiries appropriate to the facts known to



the authority, or of which they ought reasonably to have been aware (*R. v Sedgemoor DC Ex p. McCarthy* (1996) 28 H.L.R. 608, QB).

- b. Enquiries can only be attacked as inadequate if they are enquiries that no reasonable authority could have failed to make; the court should not intervene merely because further enquiries would have been sensible or desirable, only if they were such that no reasonable authority could be satisfied had been sufficient (*R. v Nottingham City Council Ex p. Costello* (1989) 21 H.L.R. 301, QB).

**(a) Why is this relevant?**

27. Good practice:

- a. A good base line, in the event a SAR is undertaken, is to have at least acted lawfully. Note that a SAR is not about assigning fault/blame. Section 44(5) CA provides, '*[e]ach member of the SAB must co-operate in and contribute to the carrying out of a review under this section with a view to—(a) identifying the lessons to be learnt from the adult's case, and (b) applying those lessons to future cases*'. But it will likely help to mitigate reputational damage or address a complaint.
- b. Local authorities' duty of care to vulnerable people is being pushed against. See for example the long awaited Supreme Court judgment in *CN v Poole* [2017] EWCA Civ 2185 as to whether local authorities owe a duty of care to looked after children (or children they ought to have looked after).

**(3) What may a local authority do?**

28. The safeguarding provisions in the Care Act do not give a local authority substantive powers to 'do something' (save for the section 47 CA duty to protect the property of



adults being cared for away from home). Instead the local authority needs to look to existing legislation to find a duty or power to 'do something' (or seek co-operation from another body using their legislative powers/duties).

29. Homelessness provisions: Part VII Housing Act 1996. Likely the most relevant is the initial duty to help secure suitable accommodation pursuant to section 189B where the adult is homeless and eligible: *'Unless the authority refer the application to another local housing authority in England (see section 198(A1)), the authority must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation for at least— (a) 6 months, or (b) such longer period not exceeding 12 months as may be prescribed'*.
30. TO FLAG: the draft consultation appendix 7 'Safeguarding adults who sleep rough in London' suggests that if a person has a connection with a local authority then the individual should seek advice from the Housing Options service in that local authority. Individuals are entitled to approach any local authority for homelessness assistance. The structure of Part VII is that an application should be taken by the presented to authority and enquires made by that authority as to eligibility and homelessness to determine if the initial duty is triggered and if so, whether the applicant may be referred to another local authority due to their local connection there (and no local connection with the initial borough).
31. Allocation of accommodation: Part VI Housing Act 1996. Allocation policies likely address the needs of vulnerable people.
32. Care Act 2014: if the adult has (eligible) needs for care and support these may be met through the provision of specialised accommodation. Section 8(1)(a) CA provides, *'(1) The following are examples of what may be provided to meet needs under*



sections 18 to 20 - (a) accommodation in a care home or in premises of some other type.’ However, this refers to specialised accommodation not ‘bare’ accommodation. The adult must have accommodation related care and support needs – the need for accommodation itself is not a need for care and support.

33. For the duty (or power to lie), *‘(a) the services provided by the council must be accommodation-related for accommodation to be potentially a duty; (b) in most cases the matter is best left to the good judgment and common sense of the local authority; (c) ‘accommodation-related care and attention’ means care and attention of a sort which is normally provided in the home or will be ‘effectively useless’ if the Claimant has no home’ (GS v Camden [2016] EWHC 1762 (Admin)).*

34. TO FLAG: the draft consultation appendix 7 ‘Safeguarding adults who sleep rough in London’ suggests that rough sleepers who are non UK nationals may not be able to evidence ordinary residence. First, it is right that the *Shah* case indicates that if one is unlawfully in the UK then one may not establish ordinary residence but of course non UK nationals may be lawfully in the UK. Secondly, it does not really matter as section 39(1)(b) states that if a person is of no settled residence then the authority responsible is the area in which he was present at that time.

35. NB: draft up a London wide agreement as to what is ‘settled’ for a rough sleeper and what is the area he was considered to be ‘present’ in to reduce disputes.

36. Children Act/Leaving Care duties/powers: For example:

- a. in relation to a relevant child, section 23B (8) CA provides that, *‘The responsible local authority shall safeguard and promote the child’s welfare and, unless they are satisfied that his welfare does not require it, support him*



*by—(a) maintaining him; (b) providing him with or maintaining him in suitable accommodation; and (c) providing support of such other descriptions as may be prescribed’.*

- b. In relation to a former relevant child, sections 23C (4) and 24B provide that the local authority may contribute to living expenses near work/education to the extent their welfare requires it.

37. Section 17 Children Act: families with children in need may be provided with accommodation. The parents may have no recourse to public funds, be awaiting a DWP decision, be a Zambrano carer, be unable to return to country of origin for a number of reasons (human rights claim, practical impediment/lack of travel documents).

38. Localism Act section 1: a local authority may not provide accommodation pursuant to section 1 Localism Act where it is prohibited from providing it under the Housing Act 1996.

39. However, the judge left open consideration of whether the provision of funds to secure accommodation was prohibited under the Housing Act. For prudence sake continue to address the power and determine whether or not to exercise it (relating to the provision of funds for accommodation) (*AR v H&F* [2018] EWHC 3453 (Admin)).

40. Further in relation to the section 17 Children Act duty – that is not a prohibition within the meaning of section 3(1) Localism Act so it may still be considered. &&&

**(4) What happens if a third party does not assist?**



41. Paragraph 14.110 of the Guidance states that once the plan has been agreed then it is the responsibility of the relevant agencies to implement. Paragraph 14.214 states that to ensure effective partnership working each organisation must recognise and accept its role and functions in relation to adult safeguarding. These should be set out in the plan and communication channels. As such there should be agreed protocols, procedures, communications to aid co-operation.
42. Use sections 6 and 7 of the CA. Section 6 is the general duty to co-operate: Section 6(1) provides, *‘a local authority must co-operate with each of its relevant partners, and each relevant partner must co-operate with the authority, in the exercise of—(a) their respective functions relating to adults with needs for care and support, (b) their respective functions relating to carers, and (c) functions of theirs the exercise of which is relevant to functions referred to in paragraph (a) or (b).’*
43. Section 7 is the specific duty to co-operate. Section 7(1) provides, *‘where a local authority requests the co-operation of a relevant partner, or of a local authority which is not one of its relevant partners, in the exercise of a function under this Part in the case of an individual with needs for care and support or in the case of a carer, a carer of a child or a young carer, the partner or authority must comply with the request unless it considers that doing so—(a) would be incompatible with its own duties, or (b) would otherwise have an adverse effect on the exercise of its functions’.*
44. Last resort: pre-action letter?
45. To note: if the relevant partner/another local authority may lawfully not co-operate then any plan will need to be reviewed. The lead authority is ultimately responsible for deciding what action should be taken and by whom.



**(5) What happens if the individual (or friends/family members) do not co-operate?**

46. Always try and persuade, build trust, negotiate, mediate first. Bear in mind the principles of safeguarding. The use of legal powers should be proportionate, necessary, and a last resort.
47. Mental Capacity: determine whether the adult has capacity to make the relevant decision in accordance with the Mental Capacity Act 2005 (“MCA”). If the adult lacks capacity, then undertake a best interests decision again in accordance with the MCA.
48. If there is dispute over best interests (or capacity) and/or the decision is a complex one and/or for example control over finances or health decisions may mitigate financial or elder abuse then seek a section 16(2) MCA welfare order and/or deputyship for health and welfare and/or property and affairs from the Court of Protection.
49. TO FLAG: the draft Appendix 7 refers to *‘determining the individuals’ capacity to make decisions to live on the street’*. This is a ‘big’ question. It may be profitably broken down to address each actual intervention that is proposed and available – ‘an option on the table’.
50. Decisions made under duress, undue influence or coercion: consider, where the adult does have capacity to make decisions, her decision making power is impaired as a result of duress, undue influence or coercion. If yes, consider whether an application to the High Court under the inherent jurisdiction is needed to e.g. prevent financial abuse, stop obstructed access to the adult by a family member by way, e.g. of an injunction.
51. Mental Health: there are various provisions that may assist with safeguarding:



- a. Section 115 MHA 1983: an AMHP may at all reasonable times enter and inspect premises in which a mentally disordered person is living if there is reasonable cause to believe the person is not receiving proper care.
- b. Section 135 MHA: obtain a warrant to force entry by the police, and if thought fit, remove to a place of safety, where the adult is believed to be suffering from mental disorder (a) has been, or is being, ill-treated, neglected or not kept under proper control, or (b) is unable to care for himself or herself and is living alone.
- c. Section 2 MHA admission for assessment where the adult is suffering from a mental disorder of a nature or degree which warrants detention in a hospital for assessment and she ought to be detained in the interest of her own health/safety or the protection of others.
- d. Section 3 MHA admission for treatment where the adult is suffering from a mental disorder of a nature or degree which makes it appropriate to receive treatment in hospital, and it is necessary for health/safety/protection of others and it cannot be provided unless detained and appropriate treatment is available.
- e. Section 7 guardianship order made in respect of a person suffering from mental disorder of a nature or degree which warrants his reception into guardianship under this section; and it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received. It gives the guardian the power to require the person to reside at a certain place; require the person to attend a certain



place for medical treatment, occupation, education or training; or require access to the person by any doctor or other mental health professional.

52. There are other bodies that may assist depending on the facts of the case. For example, the police also have powers to effect entry under PACE, as well as investigate possible crimes and environmental health has powers to e.g. require premises to be cleansed in a hoarding type case under the various public health acts.
53. A capacitous decision to refuse help (or some forms of help): Key principles of safeguarding are that this is a person centred process – adults are to be supported and encouraged to make their own decision and give informed consent.
54. The decision may be an unwise decision Section 1(4) MCA: *'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.'*
55. Paragraph 14.95 of the Guidance: where a competent adult refuses intervention this should normally be respected. But where an adult initially refuses the offer of assistance he should not be lost or abandoned by relevant services. The situation should be monitored and the individual informed that she can take up the offer of assistance at any time.
56. In CA terms a duty to meet eligible needs for care and support subsists notwithstanding a capacitous refusal to take up the support offered. Don't close the case!

Peggy Etiebet  
Cornerstone Barristers  
peggye@cornerstonebarristers.com  
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