

North Lincolnshire Safeguarding Adults Board



Consent and section 42 safeguarding enquiries

Introduction

There is a common assumption that enquiries under section 42 of the Care Act 2014 require the consent of the adult. This is false and is a misunderstanding of the law.

This briefing is aimed at practitioners who work with adults with care and support needs and provides information around what our statutory duties are in relation to undertaking section 42 safeguarding enquiries. It has been adapted from James Codling's¹ briefing for Community Care published in January 2024.

What does the statutory guidance say?

Section 42 of the Care Act 2014 sets out local authorities' duty to make safeguarding enquiries:

- '(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'.*

Where the requirements of section 42 (1) are met, the local authority **must** make (or cause to be made) whatever enquiries it thinks necessary. At no point is section 42 saying that an enquiry may only be undertaken with the person's consent or, if the person lacks capacity to consent, if it is seen to be in their best interests.

The key misinterpretation is often due to the Care and Support Statutory Guidance which states that:

'The adult should always be involved from the beginning of the enquiry unless there are exceptional circumstances that would increase the risk of abuse. If the adult has substantial difficulty in being involved, and where there is no one appropriate to support them, then the local authority must arrange for an independent advocate to represent them for the purpose of facilitating their involvement'.

Involving the person in the safeguarding adults enquiry is not the same as requiring the person's consent to undertake the enquiry.

¹ James Codling is Mental Capacity Act and Deprivation and Liberty Safeguards training and development manager at Cambridgeshire County Council

This is because local authorities '**must**' undertake a safeguarding enquiry where the requirements of section 42(1) of the Care Act are met.

We do not require the person's consent, but we do, of course, want to do everything we can to involve the person in the process.

Undertaking enquiries

Whilst we **do not** require the person's consent to undertake the enquiry, there are a number of things that we must still do including:

- We **must** take steps to facilitate the person's involvement at the beginning of the enquiry and throughout the safeguarding adults process. The person may require the support of an appropriate person, such as a relative, or, if unavailable, an independent advocate, because it appears that the person would have '*substantial difficulty*' in '*being involved*'.

In such cases, a person may not be regarded as 'appropriate' unless the adult consents to being represented by them or, where they lack capacity to consent, '*the local authority is satisfied that being represented and supported by that person would be in the adult's best interests*'.

- We should take steps to find out what outcomes the person would like to achieve, in line with the principle of empowerment set out in the [care and support statutory guidance](#).

This is **not** a consent/capacity question as, at this stage, no 'act' is being carried out for which we require the person's consent. This is about gathering the person's views and wishes, which either the person can do independently or, if not, would be achieved with the support of an appropriate person or an independent advocate. So, it is still about facilitating involvement in the enquiry.

Considerations

The [care and support statutory guidance](#) states that what happens as a result of an enquiry should reflect the adult's wishes wherever possible, as stated by them or by their representative or advocate. If they lack capacity, what happens as a result of an enquiry should be in their best interests and be proportionate to the level of concern.

There might be some actions taken as a result of a safeguarding adults enquiry for which we **do not require** a person's consent and the Mental Capacity Act would also not apply. This is by no means an exhaustive list but examples include:

- the police investigating the abuse of a person
- the local authority or Care Quality Commission taking contractual/regulatory action against an organisation

In other cases, we would need to consider whether the person has consented, for example, when asking the person if they would like to change care setting or agency or have support with financial management, managing their online safety or limiting their contact with another person.

Should the person refuse any action being taken, it would be helpful to reflect on this very important section from 39 Essex Chambers' [Mental Capacity Guidance Note: Assessment and Recording of Capacity](#) which states that:

'...If you have proper reason to think that the person may lack capacity to take a relevant decision, especially if the consequence of what they are wanting to do is likely to lead to serious consequences for them, it would be simply inadequate for you simply to record (for instance) "as there is a presumption of capacity, [X] decision was the person's choice." Indeed, the more serious the issue, the more one should document the risks that have been discussed with P and the reasons why it is considered that P is able and willing to take those risks.'

Should there be a reason to doubt the person's capacity to make the relevant decision about the action being taken, then the Mental Capacity Act would apply.

We should also consider whether there may be issues around a person's decision making that sit outside the Mental Capacity Act.

One example might be where there is coercion or undue influence that limits a person's ability to make decisions for themselves, but the MCA test isn't met, i.e. they are not unable to make the decision because of a mental impairment/disturbance.

In these situations, you may need to call on the inherent jurisdiction of the High Court, through which it can make declarations and orders to protect adults who have mental capacity to make relevant decisions, but are vulnerable and at risk from the actions or inactions of other people (see 39 Essex Chambers' [Mental Capacity Guidance Note – Inherent Jurisdiction](#) for further guidance).

Further reading

- [NL SAB Consent and information sharing briefing](#)
- [Care and Support Statutory Guidance \(2024\) Department of Health and Social Care](#)
- [Safeguarding adults enquiries – do you need consent \(2024\) James Coding for Community Care](#)
- [Podcast: An introduction to safeguarding adults \(2023\) Katie Scott and Nyasha Weinburg](#)
- [Mental Capacity Guidance Note – Inherent Jurisdiction \(2024\) Essex Chambers](#)