‘Adults at Risk’: ‘Vulnerability’ by Any Other Name?

Purpose:
The purpose of this paper is to explore and critique the conceptual and terminological shift – particularly from ‘vulnerability’ to ‘adult at risk’ - in adult safeguarding under the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014.

Design/methodology/approach:
The paper compares the notion of the vulnerable adult in safeguarding, with the notion of an adult at risk under the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014 and questions to what extent such a shift addresses existing criticisms of ‘vulnerability’.

Findings:
The paper criticises the notion of the 'vulnerable adult' for perpetuating the stigma associated with an impairment or disability, and for the types of legal and policy responses deemed appropriate under such an understanding of vulnerability. While efforts to replace the term ‘vulnerable adult’ with ‘adult at risk’ are, to some extent, to be welcomed, ‘adult at risk’ under the legislation relies on the same characteristics for which the ‘vulnerable adult’ has been criticised. Nevertheless, the safeguarding provisions under the two Acts have made some strides forward in comparison to their legal and policy predecessors and the notion of the ‘vulnerable adult’.

Originality/value:
This paper’s originality and value lie in its scrutiny of the notion of ‘vulnerability’ in adult safeguarding, in comparison to the newer terminology of an ‘adult at risk,’ whilst also suggesting that in important respects – in relation to the interventions deemed appropriate where an adult is perceived to be at risk – the two pieces of legislation are a marked improvement on their predecessors. It also offers some thoughts as to how criticisms of the new legislation may be overcome.

Introduction

‘Vulnerability’ is a term that has long been deployed in various laws and policies, from groups considered ‘vulnerable’ in health care research and resource allocation, to witnesses considered ‘vulnerable’ in the criminal justice system. This paper focuses on the term ‘vulnerable adult’ within adult safeguarding law and policy in England and Wales and aims to scrutinise its development. First, the paper criticises the implementation of the notion of vulnerability in adult safeguarding on two fronts: for perpetuating the stigma associated with an impairment or disability, and in addition, for the types of legal and policy responses deemed appropriate under such an understanding of vulnerability.

The paper secondly moves on to a consideration of the terminological shift from 'vulnerable adult' to 'adult at risk' under the Care Act 2014, and the Social Services and Well-being (Wales) Act 2014, and questions to what extent such a shift addresses these criticisms. It is suggested that while these efforts to replace the term 'vulnerable adult' with 'adult at risk' are, to some extent, to be welcomed, 'adult at risk' in both statutes, and the secondary legislation, is reliant on the same characteristics and elements for which 'vulnerability' has previously been criticised in adult safeguarding. Despite this, it is argued that the safeguarding provisions under the Care Act 2014, and the Social Services and Well-being (Wales) Act 2014, have nonetheless made some strides forward in comparison to their legal and policy predecessors. While criticisms of the terms 'vulnerable adult' and 'adult at risk' are not new (Sherwood-Johnson, 2013; Herring, 2016; Keywood, 2017), the originality of this article lies ultimately in its exploration of the definitions of 'adult at risk' under the new statutes, and a comparison of the extent to which such criticisms can be made of the new statutory provisions.

Vulnerable Adults: Origins

Generally speaking, a 'vulnerable adult' for the purposes of adult safeguarding law and policy is an adult who has cognitive or physical impairments and who may be under threat (perceived, or real) from some form of undue influence, coercion, or abuse. The Department of Health's *No Secrets* guidance (Department of Health, 2000) for example, implemented in 2000 to provide a policy framework for local authorities on safeguarding adults from abuse, and recently superseded by the statutory safeguarding provisions contained within the Care Act 2014, defined a vulnerable adult as someone:

> who is or may be in need of community care services by reason of mental or other disability, age or illness, and who is or may be unable to take care of

> him or herself, or unable to protect him or herself against significant harm or exploitation. (Department of Health, 2000, para 2.3)

This understanding drew explicitly on the definition of a vulnerable adult provided in the 1990s by the Law Commission in their review of mental capacity laws (or lack thereof), which stated that:

> Vulnerability is in practice a combination of the characteristics of the person concerned and the risks to which he is exposed by his particular circumstances. For some it will be the result of physical disability, where the people concerned cannot protect themselves from unwanted restraint. For others, a deterioration of memory or alertness prevents them from asking for the services which would enable them to live as independent a life as possible. (Law Commission, 1993, para 2.22)

The report continued, in paragraph 2.29, to adopt the same definition of 'vulnerable adult' as the subsequent *No Secrets* guidance: 'A person is vulnerable if by reason of old age, infirmity or disability (including mental disorder within the meaning of the Mental Health Act 1983) he is unable to take care of himself or to protect himself from others.' (Law Commission, 1993, para 2.29).

A similar approach to the 'vulnerable adult' was also adopted by the equivalent Welsh policy guidance on adult safeguarding, *In Safe Hands* (Welsh Assembly Government, 2000, para 7.2), and the *Wales Interim Policy and Procedures for the Protection of Vulnerable Adults from Abuse* (Adult Protection Fora, 2010, para 6.1). Both of these documents drew on the definition provided in the earlier 1990s Law Commission consultation documents on mental capacity, that a vulnerable adult is someone who:

> is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation.

In the latter document, specific examples are given so that this definition would include someone who has learning disabilities, who has mental health problems including dementia, an older person with support or care needs, someone who is physically frail or has a chronic illness, has a physical or sensory disability, misuses drugs or alcohol, has social or emotional problem, or has an autistic spectrum disorder (Adult Protection Fora, 2010, para 6.1).

A conceptualisation of 'vulnerability' that combines an inherent characteristic with a risk of abuse is also replicated elsewhere in wider adult safeguarding mechanisms. The criminal offence of causing or allowing the death of a vulnerable adult under section 5(6) of the Domestic Violence Crime and Victims Act 2004, for example, applies only to an adult who is 'vulnerable' under its terms; 'a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.' A similar definition can also be found in the Safeguarding Vulnerable Groups Act 2006, which, *inter alia*, provides the legal framework for referral to the Protection of Vulnerable Adults list (POVA), and which states that a person is considered 'vulnerable' if, for example, he 'has particular needs because of his age' (s 56(9)(a)), 'has any form of disability' (s 56(9)(b)) or has a 'physical or mental problem of such prescription as is prescribed' (s 56 (9)(c)).

Furthermore, this approach to vulnerability can be seen in other fora, such as through the invocation of the High Court's inherent jurisdiction[1] when faced with the issue of whether

it is able to intervene in safeguarding those whose decision-making is under threat because they are vulnerable to abuse or coercion, but who do not lack *mental* capacity under the terms of the Mental Capacity Act 2005. The key case in this regard – albeit one that pre-dates the Mental Capacity Act itself – is *Re SA* [2005] EWHC 2942 (Fam). This case involved an application by the local authority to protect an 18-year-old girl who had communication difficulties from an arranged marriage abroad despite the fact that it was agreed that she did in fact have the mental capacity to consent to marriage. In deciding the case, Munby J provided an indication of when the jurisdiction could be deployed, and held that it could be invoked in respect of a vulnerable adult, who:

> even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent (para 77).

Munby J continued with an oft-cited notion of who could be considered a 'vulnerable' adult for the purposes of the jurisdiction – that is, one that is familiar from the definition in the 1990s Law Commission documents, and the Welsh policy documents:

> In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I

> emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive (para 82)[2].

As well as being expressly adopted and approved in recent appellate case law (*DL v A Local Authority* [2012] EWCA Civ 253), this approach is also reflective of how 'vulnerability' has been conceived more broadly by the courts involved in deciding safeguarding issues, (Dunn *et al*., 2008). Despite being a case that was brought under the Mental Capacity Act 2005, such an approach is also evident in *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), which involved a woman, MM, with a number of cognitive impairments including a moderate learning disability, as well as paranoid schizophrenia, and who had also been subjected to sexual abuse as child. The issue for the Court in that case was whether, *inter alia,* she had mental capacity to consent to residence, contact, and marriage with her partner KM, who himself had psychopathic personality disorder and alcohol abuse problems, and had been violent both towards her and professionals, encouraged her to disengage from professional services, and allegedly used MM's benefit money to buy alcohol. If it was held that she did not have capacity, the court had to determine what would be in her best interests in respect of these issues. Again, Munby J adopts a similar approach to vulnerability as that taken in the earlier case – vulnerability as a status - and asserts that 'the appropriate role of the law here is to protect *the vulnerable,* who as such may become easy targets for abuse or who may find themselves in exploitative contexts' (para 130, emphasis added).

As has been noted elsewhere (Pritchard-Jones, 2016), this status-based approach to vulnerability has also been implied in other, more recent decisions invoking both the inherent jurisdiction and the Mental Capacity Act 2005 in an adult safeguarding role. In *LBL v RYJ* [2010] EWHC 2665, for example, a case involving mental capacity determinations in respect

of an 18-year-old, RYJ, Macur J points to the educational psychologist's report which states that '[RYJ] has an extremely low IQ, [is] unlikely to be capable of leading a fully independent adult life and in this respect will need help, support and care for the foreseeable future. Her limitations make her vulnerable' (para 38). Later, the Court refers to the independent social worker's opinion that 'RYJ's vulnerability is assessed by [the independent social worker] as that which is associated with her age and limited intellectual functioning' (para 63). This indicates that, at the very least, the professional opinion admits that her vulnerability arises predominantly from RYJ's inherent characteristics – in other words her age and her impairments.

In effect, 'vulnerability', or more specifically, the 'vulnerable adult', as traditionally deployed within adult safeguarding law and policy and drawn upon by the courts in invoking both the inherent jurisdiction[3] and the Mental Capacity Act 2005 in a safeguarding role, is a status based on the presence of some form of internal characteristic, such as young or old age, frailty, or a physical or cognitive impairment or disability, coupled with a risk of harm, abuse, coercion, or undue influence. It is a fusion of inherent vulnerability, which 'resides in a person's individual characteristics, defined by...age, gender, or the presence of a particular illness or disability,' (Dunn *et al*., 2008, p.239) with situational vulnerability - or the 'risk of circumstances arising in which the 'vulnerable adult' will be subject to malign intentions or influence' (Dunn *et al*., 2008, 239). More specifically - and more crucially as will be seen later in discussing the shift to 'adult at risk' in the English and Welsh legislation - the situational vulnerability *depends on* the presence of an inherent vulnerability. That is, the impairment or status is a precursor to, and *reason for*, the risk of abuse or neglect. As Sherwood-Johnson succinctly notes in the context of Scottish adult protection policy, notably s.3(1) of the Adult Support and Protection (Scotland) Act 2007[4], the risk of abuse or harm

is seen to be '*caused by* factors inherent to disability, mental disorder, illness or physical or mental frailty' (Sherwood-Johnson, 2013, p.916, emphasis added).

The Critique of the 'Vulnerable' Adult

A number of criticisms have emerged of this conceptualisation of vulnerability and the 'vulnerable adult' that pervades adult safeguarding, and which depends on an inherent characteristic. These criticisms generally fall into two mutually dependent themes. First, the potential of vulnerability as a legal tool to reinforce the stigma associated with physical and cognitive impairments, or other inherent characteristics that may be seen as weaknesses or 'to blame' for the abuse, such as young or old age. Second, because of the reinforcement of this stigma, the interventions envisaged for such vulnerability are considered inappropriate in that they are easier to implement, overly paternalistic, and fail to either listen to the adult's wishes, or fail to consider the vulnerable adult's circumstances in their entirety (Pritchard-Jones, 2016).

As noted above, the first concern regarding the current use of the term vulnerability as it has been deployed by adult safeguarding law and policy is its potential to reinforce the stigma that has traditionally been associated with impairments, to the effect that persons with such impairments are seen as passive, helpless, and incapable, or 'to blame' for their abuse. As both Sherwood-Johnson (2013) and the Department of Health in their consultation into the review of *No Secrets* (Department of Health, 2008a, para 2.18-2.23) note, a particular concern in this area is that while the term 'vulnerable' can mean many things, it draws particular analogies with other 'states' of being, such as the state of childhood, which recent *adult* safeguarding policy has sought to move away from. Indeed, it is indicative of the strength of feeling around this point that during the Department of Health's consultation

process on the reform of *No Secrets* (Department of Health, 2008b), 90% of respondents to the consultation thought the existing definition of vulnerability in *No Secrets* – as noted above - was of little use, and wanted a replacement term for this reason (Department of Health, 2008b, para 8.28).

The principal concern here, as Dunn *et al.* (2008) note in their review of the 'vulnerable adult' case law of the High Court before the implementation of the Mental Capacity Act 2005, is that such an approach to vulnerability 'reawakens the ghost of a 'status approach'' (Dunn *et al.,* p.244) to adult safeguarding, and to safeguarding decision-making where it is threatened by abusive or coercive relationships. In effect, it potentially paves the way for intervention based *solely* on the presence of an impairment, with little or no analysis of other, intersecting factors that contribute to the experience of vulnerability, and is an approach that has been rejected as unsuitable, paternalistic, and stigmatising for persons with such impairments – particularly mental illness or cognitive impairments (Whitelock, 2009; Keywood, 2017). As Brown (2011) summarises, this approach to vulnerability is objectionable because 'calling individuals or groups 'vulnerable' can act to exclude and stigmatise them' (Brown, 2011, p.316), and safeguarding becomes something that is 'done to' such groups (Whitelock, 2009, p.30), rather than a process in which they are actively involved and takes their wishes as the driving force and the principal motivation for action.

Furthermore, as will be shown later in this section, such a regressive interpretation of 'vulnerability' is out of step with the progress made in other areas of welfare law whose jurisdiction overlaps with adult safeguarding, or may be used in an adult safeguarding role, notably by the Mental Capacity Act 2005. The Mental Capacity Act, although retaining a diagnostic element in the assessment of mental capacity in requiring 'an impairment or

disturbance in the functioning of the mind or the brain' under section 2(1), now places greater emphasis on a functional assessment of capacity. In order to be deemed to lack capacity, under section 3(1)(a)-(d), a person must be unable to understand information relevant to the decision, retain that information, use or weigh the information in the decision-making process, or communicate their decision. In effect, while an impairment of some kind does form part of the mental incapacity assessment process, it is not, of itself, determinative of incapacity, and failure to meet one or more of the functional skills must also be evidenced to assert that a person lacks capacity.[5]

The second key concern for those who reject – or at least partially reject – the notion of vulnerability as it has been deployed thus far in the law and policy, is the fact that such a status-based approach provides an easy option (Donnelly, 2010, p.127) for those seeking to intervene. It is not difficult to see why commentators have made this argument given the wording used by Munby J in *Re SA,* the leading authority on this in relation to 'vulnerable adults' for the purposes of deploying of the inherent jurisdiction:

> The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. *So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable* (*Re SA,* para 85, emphasis added).

In effect, it is more likely that the court *would* be persuaded and willing to intervene using the inherent jurisdiction in suspected abuse, coercion, or undue influence, where the adult in question is vulnerable under the description provided earlier – unable to take care of or protect him or herself against significant harm or exploitation, or is deaf, blind or dumb, or is substantially handicapped by illness, injury or congenital deformity – than when a person is *not* deemed vulnerable by these criteria. This line of reasoning has been criticised for the ease with which responses might be invoked if someone is deemed 'vulnerable' by virtue of the fact that they have an impairment or are old, compared to someone who is not considered 'vulnerable' on such a basis (Dunn *et al.*, 2008, p.241). Moreover, it has also been criticised for the fact that it focuses too heavily on the presence or fact of an impairment, and thus may – as with the first criticism outlined above - lead to a failure to engage with more difficult questions in respect of how abuse intersects with impairments, as well as distracting attention away from broader structural forces that disadvantage those with impairments more generally (Wishart, 2003; Brown, 2011; Clough, 2014; Keywood, 2017). As Nedelsky (2012) argues from a theoretical perspective, '...when a "syndrome" is recognized it invites individual psychological analysis – rather than systematic relational analysis' (Nedelsky, 2012, p.312).

In addition to criticising this conceptualisation of the 'vulnerable adult' on the basis that it singles out persons as being 'easier targets' due to age or an impairment - as noted above - critics have also emphasised that such an approach also casts doubt and concern on the *types* of responses that may be envisaged in such circumstances. Concerns have emerged that the types of responses envisaged by this approach to the 'vulnerable adult' may be more akin to those deployed in child safeguarding, or, as Herring (2009, p.506-507) notes in his discussion of *B Borough Council v S* [2006] EWHC 2584 (Fam) - which involved the decision to

remove a man who lacked capacity from the home he had shared with his wife for 70 years - that the responses invoked may involve even *less* scrutiny than in cases involving children.[6] As Sherwood-Johnson (2013) surmises, the concern here is that responses to status based conceptualisations of vulnerability may '…[legitimate] more powers for professionals to override considerations of consent than exist for other adults…' (Sherwood-Johnson, 2013, p.916), and which insufficiently listen to the voice of the adult considered 'vulnerable' (Keeling, 2017). In effect, rather than listening to the adult, and recognising their individual circumstances, a status-based conceptualisation of the 'vulnerable adult' risks a 'one size fits all' approach in terms of responses and interventions, and a carte blanche to override the individual's wishes. Moreover, and as Keywood (2017, p.90) notes, it may not pay sufficient attention to broader social, or cultural factors, which exacerbate the abuse.

This concern regarding the types of safeguarding responses when someone is deemed 'vulnerable' can also be evidenced from recent case law. *NCC v PB and TB* [2014] EWCOP 14 involved an application under both the Mental Capacity Act and the inherent jurisdiction (in the event that PB was deemed not to lack capacity under the Mental Capacity Act), concerning, *inter alia*, the residence of PB, a 79-year-old woman, with both physical impairments and psychiatric conditions. PB had been married to her husband, TB, for a number of years, who also suffered from physical and mental impairments. The local authority had raised a number of safeguarding concerns over the lifestyle that PB shared with TB, which included living in unsanitary and neglectful conditions, being abandoned on 'road trips' and subsequently rescued in poor health, and abusive behaviour by TB towards PB. This ultimately led to PB's placement in a residential unit, F House, to which she objected.

The issue to be determined by the Court was whether she lacked capacity to decide where to live under the Mental Capacity Act and whether it would therefore be in her best interests to continue to live permanently at F House. In the alternative, if she did not lack capacity under the Mental Capacity Act, the local authority sought a declaration that the Court could invoke the inherent jurisdiction because of the abusive and neglectful nature of her relationship with TB. PB was ultimately found to lack capacity under the Mental Capacity Act – albeit with some disagreement between the expert witnesses on this issue – and remedies were granted under this statutory scheme. However, the Court did provide some interesting *obiter* comments on the remedy Parker J felt should be available under the inherent jurisdiction had PB not been found to lack capacity under the Mental Capacity Act. Based on PB's vulnerability, which she suggested 'results from her psychiatric condition' (para. 119), Parker J held that had PB not been deemed to lack mental capacity under the Mental Capacity Act 2005, the inherent jurisdiction could nonetheless have been invoked to authorise PB's residence against her will at F House.[7] In effect, even had she not lacked capacity, her vulnerability from her psychiatric condition warranted a decision that it would be appropriate to force PB to be deprived of her liberty in the care home without her husband, and have only controlled and regulated contact with TB. Moreover, in the context of the use of the jurisdiction in safeguarding cases where remedies are *not* available under the Mental Capacity Act 2005, it has also been suggested that in invoking the inherent jurisdiction there is no need to adopt a least restrictive alternative approach (*X County Council v AA* [2012] EWHC 2183, para 77) – a safeguard that *is* provided to those who lack capacity under the Mental Capacity Act 2005 (s.1(6)).

Such decisions, while naturally responding to a desire to protect individuals such as PB from abuse and neglect, epitomise both the first, but particularly the second critique of

vulnerability. They respond to a perceived 'status' in PB – her mental illness and physical impairments – in order to generate a (legally questionable) response, with little weight given to the particularity of PB's circumstances or own wishes, which were to continue to reside with TB. Moreover, and as Kong (2017, p.240) notes, this does so in a way that is particularly restrictive of PB's rights. Recent calls for the Law Commission to clarify the use of the inherent jurisdiction in adult safeguarding cases through a 'Vulnerable Adults Bill' may therefore, in this regard, be welcomed (Ruck Keene, 2017).

'Adult at Risk': Vulnerability by Any Other Name?

The shifts evident in more recent adult safeguarding law and policy in England and Wales betray an acknowledgment both of the concerns outlined above in relation to the stigmatising effect of the status-based approach to vulnerability, and its potential for inadequate, inappropriate, or overly restrictive responses. The adult safeguarding policy issued by the Office of the Public Guardian (OPG) in 2015 notes, for example, that the stigmatising properties inherent within the term vulnerable adult is one of the reasons for the shift from 'vulnerable' to 'adult at risk': 'The term 'adult at risk' is used in this policy to replace 'vulnerable adult'. This is because the term 'vulnerable adult' may wrongly imply that some of the fault for the abuse lies with the victim of abuse' (Office of the Public Guardian, para 5.2). Moreover, it was precisely because of the uncertainty over where the powers and duties to intervene lay at local level, as well as the legal provisions that comprised those powers to intervene being 'neither systematic nor coordinated' (Commission for Social Care Inspection, 2008, para. 2.1), that specific adult safeguarding interventions were put on a *statutory* footing under the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014, and extensively elaborated upon in the statutory guidance. The 2011 Law Commission report on the consultation into adult social care emphasised, for example, that:

> the statute should provide clearly that local social services authorities have the lead co-ordinating responsibility for safeguarding. This would place strategic responsibility on authorities to ensure that local policies and procedures are in place so that the roles and responsibilities are clear between and within local agencies at different levels... (Law Commission, 2011, para. 9.15)

Moreover, it had been noted in a number of Serious Case Reviews (pre-dating the implementation of the Care Act 2014, and which are now termed Safeguarding Adults Reviews), that in many instances of abuse, authorities felt paralysed to act, or acted improperly or with uncertainty by failing to share information (Brown, 2009; Stevens, 2013).

Concern was also voiced during the *No Secrets* consultation process regarding the types of interventions considered suitable in adult safeguarding. More specifically one of the key messages to emerge was the need to move away from adult safeguarding simply mirroring child safeguarding measures. As the Government's response to the consultation notes:

> Adults with capacity, however, do have a fundamental right to choose their own actions and their own safeguarding plans, though they may need to be assisted and empowered to make their own informed choices. This impacts on the values underpinning service design, procedures for intervention, prevention strategies and staff competencies and training. (Department of Health, 2008b, para. 2.22.1)

Such was the rationale behind extensive statutory guidance elaborating on the need to ensure the adult being abused or neglected was put at the centre of the safeguarding process, and it is also such concerns that have led to sector-led initiatives in adult safeguarding such as Making Safeguarding Personal (Local Government Association, 2013).

Both the Care Act 2014, and the Social Services and Well-being (Wales) Act 2014 represent the culmination of consultations and reports into the critiques of vulnerability outlined above. In the first instance, they have replaced the term 'vulnerable adult' used by their policy predecessors *No Secrets* and *In Safe Hands* with the term 'adult at risk'. Both Acts state that an adult is to be considered 'at risk' if they have needs for care and support (regardless of whether or not the local authority is meeting any of those needs), they are experiencing or at risk of abuse or neglect, and as a result of those needs is unable to protect themselves against the abuse, neglect, or risk of it (section 42(1)(a)-(c) of the Care Act 2014 and section 127(1)(a)-(c) of the Social Services and Well-being (Wales) Act 2014). This is, to some extent, in contrast to the Scottish legislation, the Adult Support and Protection (Scotland) Act 2007, which retains *both* the terminology 'adult at risk' *and* 'vulnerability'. More specifically, in the Scottish Act, vulnerability is deemed *part of* being an adult at risk. Section 3(1)(a)-(c) of the Scottish Act states that an adult at risk is someone who is unable to safeguard their own well-being, property, rights, or other interests, are at risk of harm, *because* they are affected by disability, mental disorder, illness or physical or mental infirmity, and are more vulnerable to being harmed than adults who are not so affected. In effect, and as Sherwood-Johnson (2013) rightly notes, in the Scottish legislation, it still explicitly links the inability to protect oneself from harm because of an impairment – in other words, the status-based approach to vulnerability outlined earlier.

At first blush, the English and Welsh legislation seem progressive, and appear to move away from linking the risk of abuse to an impairment *per se* as their predecessors did, and as the Scottish legislation does. The English and Welsh Acts instead tie being at risk to a need for care and support, and therefore seem to migrate from the status-based approach to

vulnerability critiqued above towards one that focuses on needs for care and support. Yet an analysis of the Acts and their supporting statutory instruments demonstrates that the essential characteristics of this approach – the risk of abuse or neglect being grounded in an impairment of some sort – remains in both pieces of legislation, perhaps even more explicitly than the notion of adult at risk in the Scottish Act, or the notion of vulnerability present in the inherent jurisdiction. The Care and Support (Eligibility Criteria) Regulations 2014 illustrate this point. Under these Regulations, an adult with needs for care and support for the purposes of the Care Act 2014 is defined as an adult whose needs arise from, or are related to, a physical or mental impairment or illness (regulation 2(1)(a)), and *as a result of the adult's needs* the adult is unable to achieve two or more of the outcomes specified in paragraph 2 of the Regulations (regulation 2(1)(b), emphasis added), the result of which means there is, or is likely to be, a significant impact on the adult's well-being (regulation 2(1)(c)). In effect, needs for care and support in the Regulations are explicitly linked to a need arising from a physical or mental impairment of some sort. The same definition of a 'need for care and support' is also present in the Statutory Guidance to the Care Act 2014 (Department of Health, 2016, paras 6.103 and 6.104). Similar – albeit significantly broader - provisions are also to be found in the Care and Support (Eligibility) (Wales) Regulations 2015, one of the pieces of secondary legislation that supports the Welsh Act. Regulation 3(a) states that needs for care and support meet the eligibility criteria under the Social Services and Well-being (Wales) Act 2014 if the need arises from the adult's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances. While these are significantly broader than the Care Act 2014 – by encompassing age, dependency on drugs or alcohol, or any other 'similar circumstances' – again, these Regulations tie a need for care and support to some sort of impairment or disability.

Within both pieces of legislation and their supporting documents and instruments, the first conceptual criticism of vulnerability – the idea that the inability to protect oneself from abuse *because of* a need, which is generated by an impairment or a disability - therefore remains, despite the terminological shift to 'adult at risk'. Moreover, the fact that the adult has a disability or impairment which generates needs, which *then* means they are unable to protect themselves, does nothing to remove the idea that the adult themselves is 'to blame' for their abuse, which, as identified above, was a key concern of the terminology 'vulnerable adult.' As the Older People's Commissioner for Wales identified in her response to the Welsh Government's consultation on the Social Services and Well-being (Wales) Bill:

> [T]he definition of 'adult at risk'...currently reads that because a person has care and support needs they cannot protect themselves from harm; whereas the true situation is that because a person cannot protect themselves from harm they have care and support needs. (National Assembly for Wales Health and Social Care Committee, 2013, p.189, as cited in Williams, 2017, p.3).

A full analysis of whether the analysis of the Older Peron's Commissioner for Wales is accurate, or how this particular criticism may have been avoided – or even whether it is, in fact, desirable to avoid linking being at risk to an impairment - is beyond the scope of this paper. However, one possibility may have been to remove the causal nexus in the definition of an 'adult at risk'. In effect, remove the requirement that the adult is unable to protect themselves against the abuse or neglect as a result of those needs, as appears in section 42(1)(c) of the Care Act 2014 and section 127(1)(c) of the Social Services and Well-being (Wales) Act 2014. This would have the effect of simply identifying an adult at risk as first being someone with needs for care and support, and second, that the local authority (or another agency) has reasonable cause to suspect that the adult is experiencing, or at risk of

experiencing, abuse or neglect. Although such an approach would still invite criticism in that it still relies on needs for care and support arising from a status, and potentially encapsulate more adults than the current definition, it does have the advantage of removing any suggestion of 'blame' from the adult at risk that it is their needs for care that have generated the risk of abuse. Such an approach – one that demonstrates the importance of considering first and foremost external factors without apportioning blame on or pathologising the behavior the particular adult at risk - also accords with central ideas within progressive and critical social work practice. As Duffy notes, '[a] critical social worker would be less likely to see resistance to services in pathological terms, as a problem residing within the older person, and instead would look to external factors...' (Duffy, 2016, p.10). Moreover, for the law to take such an approach would still reflect the empirical reality that Keywood highlights (2017, p.90) - that those with a need for care and support resulting from a disability or impairment *are* statistically more likely to be at risk of violence, abuse, or neglect (Hughes *et al.*, 2012; Khalifeh *et al.*, 2013; Emerson and Roulstone, 2014; Krnjacki *et al.*, 2016).

Notwithstanding the critique of 'adult at risk' offered above, this paper suggests that both the Care Act 2014, and the Social Services and Well-being (Wales) Act 2014 *do* make important progress in relation to the criticisms that were previously made of vulnerability, particularly in relation to the clarification of the actions local authorities (and other agencies) may – and indeed *must* - now take in relation to 'adults at risk'. In effect, it is in relation to the second critique of 'vulnerability' enunciated above – the traditional inappropriateness or poorly defined responses to 'vulnerability' or where an adult is perceived to be an 'adult at risk' – that the two pieces of legislation make clear strides forward.

First, both Acts place duties on local authorities to make enquiries – or cause these enquiries to be made - where they have reasonable cause to suspect that a person within its area is an adult at risk (s42(2) Care Act 2014; s126(2) Social Services and Well-being (Wales) Act 2014). Yet in both Acts' supporting guidance, there is additional detail about how such enquiries, and measures implemented as a result of these enquires, should be conducted. In the statutory guidance to the Care Act, for example, any safeguarding response should be based on the six principles; empowerment, prevention, proportionality, protection, partnership, and accountability (Department of Health, 2016, para.14.12). Moreover, the guidance also makes clear that any adult safeguarding enquiry and response should be person-focused, take into consideration the circumstances of that particular adult, and driven by the outcomes desired by the adult at risk themselves. Paragraph 14.8, for example, states that:

> People have complex lives and being safe is only one of the things they want for themselves. Professionals should work with the adult to establish what being safe means to them and how that can be best achieved. Professionals and other staff should not be advocating 'safety' measures that do not take account of individual well-being, as defined in Section 1 of the Care Act (Department of Health, 2016, para 14.8).

This person-centred approach to adult safeguarding is also a key feature, and success, of Making Safeguarding Personal (Butler and Manthorpe, 2016), which is also now a requirement under the Care Act Statutory Guidance (Department of Health, 2016, para.14.14-14.15). Likewise, paragraph 14.11 of the Care and Support Statutory Guidance (Department of Health, 2016), for example, states that one of the aims of the adult safeguarding provisions

is to ‘safeguard adults in a way that supports them in making choices and having control about how they want to live’, and furthermore, at paragraph 14.39-14.40, that:

> It is important to understand the circumstances of abuse, including the wider context such as whether others may be at risk of abuse, whether there is any emerging pattern of abuse, whether others have witnessed abuse and the role of family members and paid staff or professionals...The circumstances surrounding any actual or suspected case of abuse or neglect will inform the response.

Similar provisions can be found in the supporting guidance to the Welsh Act (Welsh Government, 2015). Paragraph 38, for example, states that in making its enquiries, the local authority must consider, among other factors, the right of the person thought to be an adult at risk to refuse to participate, and the wishes and feelings of the adult at risk. The Welsh Act, itself, however, goes one step further than its English counterpart, and provides for Adult Protection and Support Orders (s.127) where an authorised officer can apply to a justice of the peace for a power to enter premises where an adult at risk is thought to be living. Yet these orders do not provide for a power of removal or barring, which, as Williams (2017) notes, may leave the adult at a greater risk than if no power of entry existed in the first place. A full discussion and review of the scope and effectiveness of adult safeguarding powers under either the Care Act, or the Social Services and Well-being (Wales) Act, are, again, outside the scope of this paper, although literature is beginning to emerge on the implementation and effectiveness of these provisions (Anka *et al.,* 2017; Cooper and Bruin, 2017), and adult safeguarding more generally (Keeling, 2017). While such literature is to be welcomed, more research is needed on how well the positive changes to adult safeguarding identified in this paper are being embedded into social work practice, or whether the negative

features that remain in the terminology ‘adult at risk’ continue to have a bearing on adult safeguarding practice. Yet - from the perspective of the critique of the responses traditionally implemented in relation to ‘vulnerable adults’ in adult safeguarding outlined above - both pieces of legislation, as well as their supporting documentation, are to be welcomed for placing greater emphasis on ensuring that the adult themselves is at the centre of the safeguarding process. Moreover, the detail that they go into regarding the importance of professionals involved in adult safeguarding paying close attention to the particular circumstances of the individual adult at risk in any given case – as is a central feature of Making Safeguarding Personal - is also to be welcomed. These provisions may – depending on how they continue to be implemented - go some way towards tackling the second critique of vulnerability presented earlier in this paper; notably, the inadequacy of responses when an adult is considered ‘vulnerable’.

Conclusion

This paper has sought to consider the terminological shift from ‘vulnerable adult’ to ‘adult at risk’ in the new adult safeguarding mechanisms under the Care Act 2014, and the Social Services and Well-being (Wales) Act 2014. The notion of a ‘vulnerable adult’ can be criticised on two fronts; first as it tethers vulnerability to a status, and second, the inadequacy of responses to perceived vulnerability. Yet this paper has suggested that while safeguarding provisions under the two Acts make headway in relation to the second critique, the notion of an adult at risk remains nevertheless tied to a status. In effect, while both Acts and their supporting guidance do make progress in situating the voice of the abused at the centre of the responses, the first critique of ‘vulnerable adult’ remains, even in the new legislation. It is therefore arguable that while there is progress in relation to the responses available to, and

required, by local authorities in implementing adult safeguarding, the terminological shift from 'vulnerable adult' to 'adult at risk' may well be merely etymological and illusory.

Notes

1. The inherent jurisdiction is the power of the High Court to intervene where its jurisdiction has not been displaced by statutory authority, for example, the authority of the Court of Protection to act pursuant to the Mental Capacity Act 2005.

2. Interestingly, and somewhat tellingly, this wording replicates the wording of the National Assistance Act 1948, s 29(1): A local authority may…make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged eighteen or over who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities…'.

3. It is possible that a line of jurisprudence is beginning to emerge which moves away from this, at least in relation to the use of the inherent jurisdiction. One example is *Al-Jeffery v Al-Jeffery* [2016] EWHC 2151 (Fam) where the jurisdiction was used to order that a young woman *without* any form of disability, who was ostensibly being kept hostage in Saudi Arabia, should be allowed to return to the UK.

4. S.3(1) "Adults at risk" are adults who—
(a) are unable to safeguard their own well-being, property, rights or other interests,
(b) are at risk of harm, and
(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.

5. A further possibility in remedying some of the concerns around *both* the notion of an 'adult at risk', and 'vulnerability' as highlighted in this paper, may be to adopt a 'functional' approach to either vulnerability or 'adult at risk', in much the same way as section 3(1) of the Mental Capacity Act 2005 adopts a functional approach to capacity. A full discussion of this option is outside the scope of this article. I would like to thank Paul Skowron for this interesting point.

6. *B Borough Council v S* at para. 132: 'On the substantive aspects I accept that the orders amounted to a significant and substantial interference with the family life of both Mr and Mrs S, but I do not accept that a close analogy with the position with cases concerning the removal of a new born child from its mother...is appropriate. Thus I do not accept that by analogy "extraordinarily compelling" evidence was needed to found the relief sought.'

7. 'In my view the inherent jurisdiction does extend to orders for residence at a particular place...Assuming that it would not constitute an unlawful deprivation of liberty in my view I would be entitled to make an order for placement against her will pursuant to the inherent jurisdiction. There are serious risks to PB if she is not properly cared for or if she is not protected against TB' (*NCC v PB and TB*, para. 121-122).

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