



Consultation on New Safeguarding Power

Introduction

1. The draft Care and Support Bill includes a proposed duty on local authorities to make enquiries where there is a safeguarding concern. It states that local authorities “must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken.”
2. This consultation seeks your views on whether or not there should be a new power to support this duty. This could be in the form of a power of entry, enabling the local authority to speak to someone with mental capacity who they think could be at risk of abuse and neglect, in order to ascertain that they are making their decisions freely.¹
3. The draft Bill contains a number of firm proposals, including a duty of co-operation and partnership working between local authorities, police and health services. It is not our intention to introduce further powers of entry unless a compelling case can be made.

Background

4. In 2009, the Government consulted on a wide range of adult safeguarding issues as part of the review of the statutory guidance *No Secrets*. Of the 212 respondents on this particular issue, 60% agreed that there should “be a power to enter premises where it is suspected that a vulnerable adult is being abused.” 27% did not support this. The consultation question did not distinguish between people with mental capacity and those without.
5. In relation to new compulsory powers, the Law Commission’s review of adult social care law in 2011 concluded that it was an issue outside the scope of its consideration. The Law Commission’s recommendation was that the statute should not include any new compulsory or emergency powers, unless the Government identified the need for such powers.² We are responding to that point through this consultation.
6. The Law Commission recommended placing a duty on local social services authorities to investigate or make enquiries about adult protection concerns. The purpose of the enquiry is to establish what action (if any) is required, and to establish who should take such action. The draft Care and Support Bill contains a clause to this effect.
7. As recommended by the Law Commission³, the draft Bill also proposes repealing Section 47 of the 1948 National Assistance Act. Section 47 gives a power to remove someone from his or her home in certain circumstances. Enacted in a very different era, its language and intentions are not compatible with our current approach to community-based support that promotes and protects people’s human rights.
8. With the proposed repeal of Section 47, and the new duty to make enquiries, we want to explore whether Local Authorities have sufficient power to gain access to a person who may be at risk of abuse where this is appropriate and not already provided for in existing legislation.

¹ For people who lack capacity alternative provision is made under the Mental Capacity Act 2005.

² Recommendation 41, *Adult Social Care*, Law Com No 326, page 122

³ Recommendation 42, *Ibid*, page 130

Scenario

9. The proposal on which we are consulting applies where a local authority has reasonable cause for concern that a person with capacity is experiencing abuse or neglect, and someone else in the property is preventing the local authority from speaking with that person.
10. In such circumstances, we are seeking your views on whether the local authority should be able to apply for a warrant to enter the premises and speak with that person alone. This power would support local authorities' to carry out the new duty to make enquiries, which is in the draft Bill.

What is the current position?

11. Protection in law does exist in cases of coercion and undue pressure, including for those with the mental capacity to make their own decisions. Even where there are no formal statutory powers, the High Court has inherent jurisdiction to act.
12. This was confirmed by the Court of Appeal in March 2012 in a case where a local authority took legal action to protect a couple in old age from their son, even though the couple said they did not want to take action and at the time both had mental capacity to make that decision.⁴ The local authority was able to call upon the High Court's inherent jurisdiction and the Court issued a detailed injunction to protect the couple.
13. However, we do not believe leaving such cases to be resolved on a case-by-case basis using the Court's inherent jurisdiction is a satisfactory solution. Resorting to the courts in every instance could increase the caseload of courts, result in differing outcomes, be expensive for local authorities and is likely to be extremely disempowering for individuals. If we establish that a proportionate and effective legislative solution could help resolve this issue, it would not be necessary to rely on case law to settle the matter.

Scope

14. This is a very complex issue. The legislation we are considering is at the interface between issues of protection and civil liberties. We are not looking to over-ride the choices of people with capacity who make decisions professionals may disagree with – this is about circumstances where the ability to make a choice is believed to be restricted by the behaviour of another person.
15. Local authorities are not without powers in this area. They currently undertake a range of measures to deal with safeguarding situations. The majority of these interventions do not require statutory powers, and where they do, the alternative options such as the Mental Capacity Act 2005 are available and more appropriate. Other existing legislation that can and is being used to safeguard adults includes the Police and Criminal Evidence Act 1984, Criminal Justice Act 1988, the Mental Capacity Act 2005, the Fraud Act 2006, the Mental Health Act 1983, the Domestic Violence, Crime and Victims Act 2004, the Protection of

⁴ *DL v Local Authority* [2012] EWCA Civ 253

Freedoms Act 2012, and health and safety at work legislation. However, there is a view that these options do not cover all eventualities and leave a gap in the legislative framework.

16. We are not seeking views on the content of clauses in the draft Care and Support Bill, for which there is a separate consultation.
17. We do not want to intervene in people's lives unnecessarily. This proposal is about giving people a voice and empowering them to make decisions without coercion. It aims to empower local authorities to effectively carry out the new duty of enquiry, and give them a course of action if someone prevents them from doing so. It gives an opportunity for local authorities to offer the right information and advice and for people who are unable or unwilling to ask for help to have their voices heard.

Human Rights considerations

18. Any new legislation needs to be compatible with the European Convention on human rights (ECHR). The following human rights considerations are relevant.
19. Article 2 of the ECHR (right to life) and Article 3 (prohibition of inhuman and degrading treatment) impose positive obligations on the state to take measures to protect citizens which this proposal would support.
20. We are not proposing any new power of removal or detention, so we do not anticipate any conflict with Article 5 ECHR (right to liberty).
21. Article 8 (right to respect for private and family life) means any intervention must pursue a legitimate aim and the intervention must be at a level which can be justified and proportionate to the pursuit of the legitimate aim. Any power of entry would be for the legitimate aim of ensuring that we enable the person in question to express his or her wishes without undue pressure or coercion. We will consider what safeguards should be provided to ensure the intervention is justified and proportionate.

Consultation questions

Question 1: Do you agree that there is a gap in the proposed legislative framework for people with mental capacity, which this power would address?

Question 2: What are your views on the proposal that there should be a new power of entry, enabling the local authority to speak to someone with mental capacity who they think could be at risk of abuse and neglect, if a third party prevents them from doing so?

Question 3 (for care and support professionals working in adult safeguarding): How many times in the last 12 months, have you been aware of a situation where, had this power existed, it would have been appropriate to use it? What were the circumstances?

Question 4: What safeguards would we need to ensure local authorities use such a power effectively and appropriately?

For example, would the following provide adequate safeguards?

- *A warrant would be applied for from a Circuit Judge (e.g. a nominated judge of the Court of Protection).*
- *The local authority would present the court with evidence of the need for the warrant.*
- *The local authority would ensure that there is a process by which the occupiers of the premises understand that they can complain about the way in which a power has been used. The local authority would have to verbally inform the affected persons how they might access that process*

Question 5: Do you have any other comments?

The consultation will run from **11 July 2012** until **12 October 2012**.

Please submit your comments to **SafeguardingConsultation@dh.gsi.gov.uk** or:

Quality and Safety Team
Department of Health
124 Wellington House
133-155 Waterloo Road
London SE1 8UG

Comments received after 12 October 2012 will not be considered.