Older People's Commissioner for Wales
Comisiynydd Pobl Hŷn Cymru

☎ 08442 64 06 70
08442 64 06 80
www.olderpeoplewales.com

Cambrian Buildings
Mount Stuart Square
Cardiff CF10 5FL

Adeiladau Cambrian
Sgwar Mount Stuart
Caerdydd CF10 5FL

Vaughan Gething
Chair of the Health and
Social Care Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

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Dear Chair,

As requested following the recent evidence session with the Health and Social Care Committee attended by my Director of Protection, Scrutiny and Human Rights, please find below additional evidence in relation to the Social Services and Well-being Bill.

Eligibility criteria

Further to the issues raised during the committee's evidence session on 2nd May, thank you for the opportunity to provide supplementary evidence in respect of my concerns about the lack of detail on eligibility criteria in the draft Social Services and Wellbeing (Wales) Bill.

The Explanatory Memorandum accompanying the Bill makes clear that a range of proposals within the legislation will be subject to supporting regulations, delegated to Welsh Ministers. Whilst I am aware of the rationale for this approach, it is my view that some of the areas that are being devolved to regulations, particularly the national eligibility framework, are potentially high risk in terms of the impact and sustainability of the Bill.

I have publicly welcomed proposals to establish national eligibility criteria as I believe that in principle, this will help provide clarity and fairness and help reduce inconsistencies across local authority areas; concerns which are often raised with me by older people.

One of my current priorities as Commissioner is to consider and analyse in detail the difference that the Bill will make to the lives of older people across Wales, whatever their care and support need. The eligibility framework is a key component of this practical application of the Bill because it will set the criteria used by local authorities to decide whether or not a person's needs or desired outcomes will be met by local authority social care and support services.

However, the current lack of detail around the eligibility criteria means that it is effectively impossible to fully assess how proposals across the breadth of the Bill will work in practice. Without seeing the detail of proposals around eligibility, it is not feasible to comment on them in any meaningful way.

I share the concerns of a number of other organisations that if the criteria for eligibility is set too high then this this will have a negative impact on the wider aspirations of the Bill, particularly those linked to prevention and well-being. There is a risk that the Bill's ambition to widen access to prevention could become irreconcilable with local authorities being allowed to raise their eligibility threshold to Critical levels and would mean preventative measures and services not being provided until an individual reaches a crisis point. This would be a backwards step.

I am strongly of the view that greater detail needs to be given regarding plans for national eligibility criteria in order that myself and other stakeholders can develop a more informed view of the Bill's proposals. I would urge the Welsh Government to outline openly its proposals on eligibility (or at the very least give an indication of the desired direction of travel) and explain how this links to the proposed duty on preventative services. I would specifically welcome a formal timetable and statement of intent from the Welsh Government on the eligibility framework.

In addition, the final position on eligibility must be open to strong and

critical scrutiny. My expectations are that the national framework is developed in collaboration with key partners, is subject to a full consultation process and a robust impact assessment. More generally, I would reinforce my view that in order to ensure that the Bill delivers on its stated aspirations it is essential that scrutiny of the supporting regulations and guidance is undertaken with the same vigour and gravity as for the primary legislation. This is an area that as Commissioner I will be taking an on-going interest in.

Definition of neglect/self-neglect

'Neglect' is referred to in various sections of the Bill but always in conjunction with 'abuse' so that the term 'abuse and neglect' appears on 26 occasions. It is important to recognise that these two things are different – one involves doing something to someone and the other tends to be an omission to do something. Neglect will usually mean that a person who has a duty of care towards another person has failed to carry out that duty of care.

The starting point has to be to establish who owes the duty of care. In relation to children this is assumed to be a parent or person with primary caring responsibility and the duty broadens to others in society who may also play a significant part in a child's life, such as a teacher or social worker or doctor. Adults, however, are assumed to be responsible for their own lives, circumstances and actions. Where they need care or support to help them live an acceptable standard of life, it can sometimes be difficult to establish who has a duty of care legally and morally. Neglect can only exist where a duty of care is not being met.

In the context of the older person, the duty of care may lie with a relative who has power of attorney for that person's finances or welfare or with someone who has taken on the moral duty for caring for a person. When an older person enters a hospital or care home there is a duty of care on these agencies and their staff members to deliver a certain level of care and attention. The duty of care when someone enters a care home should be clearly outlined in the provider's contract for care, whether with a local authority or health board or with an individual who funds their own care. Any failure to meet that duty constitutes a breach of contract and should be actionable.

Neglect might be described as a failure to fulfil a duty of care which has a serious adverse effect on the health and well-being of an individual or deprives them of the means by which they can sustain their health and well-being. Examples of this kind of neglect might include the provision of substandard care or no care, withholding resources that would enhance well-being, or withholding information about resources that would enhance their health and well-being.

Self-neglect is a more difficult term because it must be recognised that people may choose to live in circumstances that could be considered detrimental to their health or well-being or even dangerous. The key word here is ‘choice’ and people must be allowed to make choices about their lives. It is all about a balance of human rights – the right to choose a life that is unacceptable to others and the right to be supported and protected when a person is found to lack the ability to perform essential self-care tasks, which is having a serious adverse effect on their health and wellbeing. This might include an inability to provide oneself with adequate food, clothing, shelter, or medical care; or an inability to obtain services necessary to maintaining physical health, mental health, emotional well-being, general safety, and/or managing financial affairs.

I think it would be sensible to have a small working group that looks at this matter of neglect and self-neglect, and I would be happy to host such a group.

Powers of intervention

At the Health and Social Committee session, Anna Buchanan said that I would provide more evidence on the law already used to gain access to those who may be living under coercive control or undue influence.

The recent judgment in *DL v A Local Authority and Others [2012] EWCA Civ 253* affirms that a local authority may call on the inherent jurisdiction of the court in order to gain access to those being unduly influenced/coercively controlled.

DL, a man in his fifties who lived with his father and mother (90 and 85 respectively), had behaved aggressively towards his parents physically and verbally, controlling access to visitors and seeking to coerce his father into transferring ownership of the house into DL’s name, whilst

pressuring his mother to move into a care home against her wishes. It is important to note that both parents **had capacity** within the meaning of the Mental Capacity Act 2005.

The local authority, hearing about DL's conduct and being concerned about it, applied to the court for injunctions restraining DL's conduct towards his parents, for example, preventing him from assaulting them or coercing them or engaging in degrading treatment, such as making his father write 'lines' or doling out other punishments.

The Court also made an order that the Official Solicitor should be given powers of entry to find out the parents' true wishes and support them in resisting DL's behaviour, which could have included helping them move out or having DL removed.

It is also important to note, where it is argued that powers of intervention are a breach of human rights, that an interference with the right to respect for an individual's private and family life can be justified to protect his health and/or to protect his right to enjoy his Article 8 rights as he may choose without undue influence by a third party (Munby J in *Re SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam)).

Section 47 National Assistance Act 1948

If the Bill does not include a power of intervention and a power to remove a person to a place of safety another option, in limited circumstances and with the court's permission, is to retain an amended version of s.47 of the National Assistance Act 1948. I have attached a relevant article on s.47 for the Committee to consider which questions the Law Commission's decision to repeal it.

I hope this clarifies my position on the issues raised at the evidence session. Please do not hesitate to contact my office if there is any further help that I can provide.

Yours sincerely,

Sarah Rochira, **Older People's Commissioner for Wales**

The strange deaths of section 47

David Hewitt

David Hewitt is a Judge of the First-tier Tribunal and a Visiting Fellow at the University of Northumbria, Newcastle, UK and at the University of Lincoln, Lincoln, UK.

Abstract

Purpose – *The purpose of this paper is to evaluate the Law Commission's recommendations concerning the power of removal contained in section 47 of the National Assistance Act 1948. That provision applies to certain people who are seriously ill, living in squalor, or not receiving proper care and it enables them to be taken to hospital or a care home and detained there.*

Design/methodology/approach – *The Law Commission's final report on adult social care law was considered and compared with earlier Commission publications that addressed this issue, and also with other sources (such as a paper published by the Department of Health in 2000).*

Findings – *The Law Commission calls for the repeal of section 47, because it is hard to interpret, difficult to implement and seems to breach the European Convention on Human Rights. The Commission says other provisions, such as those in environmental health legislation, the Mental Health Act 1983, and the Mental Capacity Act 2005, provide a more appropriate means of caring for people in distress and that more information is needed before a decision can be taken as to what, if anything, should replace section 47. Some of these criticisms, and also the call for more information, were made by the Department of Health.*

Originality/value – *The Law Commission's findings and recommendations concerning section 47 have not otherwise been widely reported, nor has much been done to analyse their development or antecedence. The paper also offers a modest critique of this aspect of the Commission's report.*

Keywords *Section 47, National Assistance Act, Detention, Grave chronic disease, Infirm, Unsanitary conditions, Proper care and attention, Hospitals, Patient care*

Paper type *General review*

Section 47 of the National Assistance Act (NAA) 1948 should be repealed. That, at least, is the conclusion of the Law Commission (LC) (2011b), in its final report on adult social care law. In many circumstances, section 47 permits the compulsory removal to hospital of anyone who is seriously ill, living in squalor or not receiving proper care. It has been wreathed in mystery, and controversy, for quite some time.

The LC's report is the culmination of a lengthy consultation that was itself preceded by a special paper (LC, 2010) and followed by a detailed analysis (LC, 2011b). The Commission received 231 responses, 79 of which concerned section 47 (and 56 of these said the provision should be abolished) (LC, 2011a, paragraph 12.143).

This result is not, perhaps, surprising: section 47 was first consigned to the dustbin more than a decade ago, only to be revived in 2008. As we shall see, the LC's own conclusion is far from unequivocal.

What does it do?

Under section 47 of the NAA 1948, a local authority may apply to a magistrates' court for an order permitting it to remove a person to "suitable premises", such as a hospital or a care home. Such an application may be made in the case of someone who is:

- Suffering from grave chronic disease or, being aged, infirm or physically incapacitated, living in insanitary conditions.
- Unable to devote to themselves, and not receiving from other persons, proper care and attention (NAA, s 47(1)).

The subject must be given seven days' notice of the hearing (NAA, s 47(7)), and the application must be accompanied by a certificate from a "medical officer of health", to the effect that removal is necessary:

- in the interests of the person; or
- for the prevention of injury to the health of, or of serious nuisance to, other persons (NAA, s 47(2)).

The magistrates' court may make an order if it is satisfied that it is "expedient" to do so (NAA, s 47(3)), and any order will authorise the subject's removal, and his detention for up to three months (a section 47 order is renewable for further periods of up to three months: NAA, s 47(4).)

The purpose of removing and detaining someone under section 47 is to secure "necessary care and attention" for him (NAA, s 47(3)), but there is no power of compulsion to that effect:

- If the person is capable of making a decision about them, his "care and attention" may be provided with his consent (but not otherwise).
- If he is incapable, they may only be provided in his "best interests", under section 5 of the Mental Capacity Act 2005.

After six weeks have expired in any period of detention, the subject of the order, or someone on his behalf, may make an application to the court, which may in turn revoke the order "if it appears expedient to do so" (NAA, s 47(6)).

There is also an emergency procedure, introduced by the National Assistance (Amendment) Act 1951. If it is necessary to remove an individual without delay, an order to that effect may be made without notice and will last for up to three weeks (NA(A)A, s 1(1) and (4)(a)).

These and other aspects of the section 47 power have been the subject of heavy criticism.

General criticisms

Not everyone who took part in the LC's consultation exercise opposed the section 47 power (LC, 2011a, 12.168 and 12.169). According to one respondent (an adult safeguarding board): "It is a useful option [...] where the service user has capacity but needs to be removed from their home" (LC, 2011a, 12.149).

It seems that a number of respondents referred to the case of Mayan Coomeraswamy, who died in January 2009 at the age of 59 years, apparently from natural causes (LC, 2011b, 9.71). Media reports of evidence given at the inquest into his death, suggest that:

- Mr Coomeraswamy's home was in a state of grave disrepair and barely fit for human habitation.
- Though he suffered from mental disorder, he saw a community psychiatric nurse and received regular depot medication.
- He would not, however, accept assistance with cleaning, decorating or heating his home (Harding, 2010).

Mr Coomeraswamy was believed to be capable of making decisions about these aspects of his life, and as a result, though some thought was given to it, section 47 was not invoked, because of "human rights considerations".

Attributing Mr Coomeraswamy's death at least in part to "neglect", the coroner blamed mistakes by care workers, together with a "piecemeal legal framework", which he said was riddled with contradictions and inadequacies. It seems respondents saw this case

"as evidence that the existing law was inadequate and [that] section 47 needs to be reformed to become ECHR-compliant" (LC, 2011b, 9.71). The LC (2010, 12.50) had reached a similar provisional conclusion (though reform is not the option it has chosen to recommend).

Human rights-based criticisms

According to the LC, a "large number" of respondents favoured repeal on human rights grounds (LC, 2011a, 12.145) and none argued that section 47 did not breach the European Convention on Human Rights (ECHR) (LC, 2011b, 9.65). This is not, however, the first time that such a breach has been discussed. In August 2000, in a paper sent to regional directors of public health, the Department of Health raised it as a distinct possibility (Department of Health, 2000; Hewitt, 2002). It is perhaps surprising, therefore, that in 2008, the government introduced legislation whose effect was not to repeal, but actually to revise section 47 (Mental Health Act (MHA) 2007, Schedule 9, paragraph 12). In its paper, the Department of Health also asked for more information about the frequency with which, and the circumstances in which, section 47 continued to be used.

Criteria

As the Department of Health had done, the LC said section 47 might be used in a way that breaches Article 5 of the ECHR. This is the "right to liberty", which, for present purposes, may only be taken away to prevent the spreading of disease or in the case of someone with an "unsound mind", or of an "alcoholic", a "drug addict" or a "vagrant" (ECHR, Article 5(1)(e)). The LC said section 47 might be used to detain someone of sound mind who is:

- Simply suffering from grave, chronic disease – without being infectious.
- Living in insanitary conditions and infirm, aged or physically incapacitated – without being an alcoholic, a drug addict or a vagrant (LC, 2010, 12.51).

(For its part, the Department of Health also argued that because section 47 contains no power short of detention, its use might be disproportionate and so lead to a breach of Article 8 of the ECHR – the right to respect for one's private and family life, amongst other things).

Ending the order

A person "removed" under section 47 may be detained for up to three months, even though the condition that warranted his detention has now abated. Crucially, there is nothing to require – or even to permit – the order to be discharged in those circumstances. The LC (2010, 12.52; 2011b, 9.93) has argued that in many cases, this will render use of the section 47 power arbitrary and therefore constitute a further breach of Article 5.

Challenging the order

The only way a section 47 order may be ended before it expires is by its subject making an application to the court to have it revoked. He may do that only once he has been detained for six weeks, a state-of-affairs the LC said might breach the right, guaranteed by Article 5(4) of the ECHR, speedily and regularly to challenge one's detention in court (LC, 2010, 12.54; 2011b, 9.94). Furthermore, there is no automatic right to review, and the LC has suggested that where someone lacks capacity to take the necessary steps himself, this too will breach Article 5(4) (LC, 2010, 12.55; *R (H)* v. *Secretary of State for Health*, 2005. It is understood that this case is the subject of an application to the European Court of Human Rights).

There might also be a problem with the emergency procedure, which research suggests accounts for a large proportion of removal orders (Nair and Mayberry, 1995; Muir, 1990, both cited in LC, 2010, 12.49), but which cannot be challenged in court at all. The Department of Health said this might breach Article 5(4) (Department of Health, 2000) and the LC has now expressed itself in more emphatic terms (LC, 2010, 12.53; 2011b, 9.93).

Other criticisms of the section 47 power have focused upon the mechanism by which it may be invoked and utilised.

Operational criticisms

Definition

In this respect, too, the criteria for use of section 47 are a cause for concern. The LC questions, for example:

- Why older, infirm and physically incapacitated people are targeted expressly.
- Why older people living in insanitary conditions are included, but younger people are not (LC, 2011b, 9.90).

The requirement that the person to be removed, and then detained, be living in "insanitary conditions" and "unable to devote to [himself], and not receiving from other persons, proper care and attention" has also come under close scrutiny. Consultation, it seems, suggested that it "set[s] the bar unrealistically high for the use of the power", and that "the reference to 'insanitary conditions' confuses this power with alternative public health powers" (LC, 2011a, 12.162; b, 9.92).

In fact, the LC (2011b, 9.92) described this reference as "anachronistic", a word that might, perhaps, be used more widely. In its consultation paper, the Commission said:

> [S]ection 47 is one of the few principles of the old poor law that remain in place[,] and its wording is based on local legislation drafted in Bradford in 1925, designed to assist in slum clearance (LC, 2010, 12.58).

One commentator, indeed, has questioned whether the "premises of the legislation (which derived from nineteenth century views of continency and 'proper' conduct) are concordant with modern values" (Counsell, 1990). Now, the LC concludes:

> [M]uch of the terminology in section 47 is outdated and stigmatising (such as "being aged"), or lacks sufficient clarity and precision (for example, it is also unclear how "infirm" or "physically incapacitated" a person would need to be in order to be removed) (LC, 2011b, 9.90).

There is also a feeling that those who have to interpret and apply section 47 must do so in a vacuum. Magistrates' courts are not courts of record, the LC pointed out in its consultation paper, "which may increase the likelihood of different approaches being taken to the meaning of section 47" (LC, 2010, 12.58); and to compound the problem, "review by the higher courts of section 47 orders is rare" (LC, 2010, 12.58). In fact, concerns about magistrates go beyond their ability simply to understand section 47.

Magistrates

It has been suggested that magistrates' courts do not provide a suitable forum for the consideration of section 47 cases (LC, 2011b, 9.89). The LC notes that they are generally regarded as criminal courts, and that consequently, some respondents argued that they should not consider non-criminal cases and that it is stigmatising for all involved when they do. Furthermore, magistrates' courts are seen as being prone to delay and, unlike the First-tier Tribunal or the Court of Protection, lacking the expertise to deal with cases involving self-neglect and mental ill-health (LC, 2011a, 12.164).

It is perhaps surprising, then, that the LC has not opposed the involvement of magistrates in section 47 (or equivalent) proceedings. The alternatives, it says, "would not be without their difficulties" and would confer "no significant advantages", largely because: "any expansion of the role of mental health tribunals or the Court of Protection would entail a significant change in law and practice"; and authorising the High Court to hear these cases "will have potentially significant resource implications" (LC, 2011b, 9.89).

Entry

The LC is also concerned about the extent to which the section 47 power permits entry into the home of the person who is its subject, or at least about the understanding of professionals in that regard.

Although section 47(11) makes it an offence wilfully to disobey or obstruct the execution of a removal order, the Commission noted that: "there is no explicit power to force entry into people's homes or over-ride a refusal of permission to enter" (LC, 2010, 12.59). The police, it seems, are reluctant to intervene (LC, 2011a, 12.161; b, 9.66) and, more broadly: "The extent to which subjects of section 47 orders can be compelled to obey the orders is not [...] clear and may cause confusion in practice" (LC, 2010, 12.59; 2011b, 9.95).

The sharp end

The power to seek a section 47 order is given to the "appropriate authority", which will usually be a local authority. In practice, the power is exercised by environmental health departments, but, the LC (2010, 12.60; 2011a, 12.161; b, 9.66) suggested:

> [...] environmental officers may not be best suited for this role, particularly in cases where section 47 is needed to safeguard adults from abuse or neglect, as opposed to [on] environmental health grounds.

Others had already called for social services to have a greater role in such cases (Welsh Local Government Association, 2005), and it seems the LC was told that "social services [...] are the more appropriate agency for dealing with self-neglect by people of *unsound mind*" (LC, 2011b, 9.95; original emphasis).

Concern was also raised about the "medical officer of health", because the role might now have disappeared or the person filling it have become difficult to identify (LC, 2011b, 9.67). Furthermore, the LC has consistently raised concerns about the quality of the medical certificate tendered in support of a section 47 application. In many cases, it seems, that certificate comes from a consultant in communicable disease control, "even though a section 47 order does not require the risk of communicable disease or infection". This, it seems, "has led to concerns of an inappropriate focus on public health risk when assessing whether it is necessary to remove the person" (Welsh Local Government Association, 2005). It has also been suggested, the LC (2010, 12.61; 2011a, 12.163; b, 9.67) adds, "that the certificate is sometimes provided by public health specialists who are not medically qualified or have not conducted clinical examinations for some time".

Conclusion

For all these reasons, the LC (2011b, 9.73) says there are "numerous operational difficulties that render [section 47] impracticable", and that in many cases, its use will breach Article 5 of the ECHR. The Commission sees no reason, therefore, to depart from its original proposal that the provision be repealed (LC, 2010, 12.71). As to whether it should be replaced by something rather more modern, workable and ECHR-compliant, however, the Commission remains unsure. The answer, it says:

> [...] turns largely on whether the repeal of section 47 will leave people unprotected who are currently protected from abuse and neglect. In other words, would public bodies lose safeguarding powers, and if so, are these powers used in practice? (LC, 2011b, 9.73).

Is it obsolete?

It seems many respondents accepted that section 47 is obsolete; that "a large number" said it is rarely used in practice (LC, 2011a, 12.148 *et seq*); but that a "scattering" of them said they had used it in the past (LC, 2011b, 9.65).

In 2000, the Department of Health estimated that some authorities use section 47 orders "perhaps once or twice a year as a last resort" (Department of Health, 2000), while in its own consultation document, the LC repeated the call for more information in this regard (LC, 2010, 12.63).

There was already evidence that:

- Across England, in the 1970s and the 1980s, around 200 section 47 orders were made each year (Muir, 1990).

- In Leeds, in a five-year period during the 1980s, 17 orders were made (Fear *et al.*, 1988) (this, it seems, "would tend to support the national picture": LC, 2010, 12.62).
- In the mid-to-late-1980s, usage fell to less than 100 per year (Muir, 1990) (figures for 1988 and 1989 support this analysis: Nair and Mayberry, 1995.)

This evidence dates from before the introduction of the Mental Capacity Act 2005, since when, the LC (2011b, 9.65 and 9.85) notes, "No one [...] claimed to have used the power".

The Commission concludes that although section 47 is used only rarely, "[it] does not appear to be entirely obsolete" (LC, 2011b, 9.85). The Commission does not, however, feel able to argue for the reform (or, indeed, the retention) of section 47. Instead, it calls upon the English and Welsh Governments "to seek to clarify what does in fact happen, and to take forward consideration of any replacement for section 47 in the light of those findings" (LC, 2011b, 9.86). It seems that the information requested by the Department of Health in 2000 had not been provided by 2011.

Why might it still be required?

The LC's ultimate conclusion had been anticipated in its consultation paper. "The question, therefore, arises", the Commission said, "as to why [section 47] is used at all" (LC, 2010, 12.64). The answer seems to be that when it comes to safeguarding adults at risk, other legislation might be helpful, but it does not offer a complete alternative.

The Mental Health Act

There is, the LC (2010, 12.65) suggested, a "significant overlap" between cases in which the MHA 1983 and the NAA 1948 could be used. "Indeed," it went on, "some evidence suggests that section 47 is being used in cases where the 1983 Act should have been used instead" (LC, 2010, 12.65; Wolfson *et al.*, 1990).

If a person suffers from mental disorder, then, like the 1948 Act, the MHA might be used to detain him in hospital or provide care and treatment in the community, regardless of whether he is capable or incapable of making a decision in that regard (LC, 2011b, 9.78). Furthermore, the Act can be used to treat any underlying disorder and "since the property is vacated temporarily, mental health services may be able to arrange for the necessary cleaning or repairs to be completed" (LC, 2011b, 9.78; to which the response might be this, which was posted under the Guardian's story about Mayan Coomeraswamy: "Well, there are fewer sure-fire ways to induce a serious relapse in a mentally ill person than to force entry to their living space, kidnap them for three days and rearrange everything in their home while they're gone").

The two acts do not overlap entirely, however, and some people who might be cared for under section 47 would not fall within the MHA: people living in insanitary conditions who do not suffer from mental disorder, for example, or those whose mental disorder is not of a nature or a degree to warrant their being detained so that it can be treated (LC, 2011b, 9.78). Therefore, the LC (2010, 12.65) concludes: "there remains a gap between the scope of the 1983 Act and the wider remit of section 47".

The LC also gives voice to a suspicion that MHA powers are not used when they might be. Section 135 of the Act, for example – which "can be used to remove a person who is 'believed to be suffering from a mental disorder' from their home with a view to making necessary arrangements for their 'treatment or care'" (LC, 2011b, 9.68) – "is normally used to assess a person at a place of safety for detention in hospital, rather than its wider purpose" (LC, 2011a, 12.158; b, 9.70). Furthermore, even when invoked, the section only permits detention for up to 72 hours, which is inadequate for putting in place safeguarding arrangements (LC, 2011a, 12.158; b, 9.70) and, more specifically, "restricts its effectiveness in dealing with cases of extreme squalor and disrepair" (LC, 2011b, 9.79). Neither does guardianship entirely fit the bill. While it might enable a formal support structure to be imposed upon someone in the community, it "provides few powers to override a refusal by the relevant individual" (LC, 2011b, 9.79).

The Mental Capacity Act

The Mental Capacity Act 2005 provides a framework within which care may be given to people in their "best interests". The LC (2011a, 12.153) notes that some respondents argued that it can be "much more effective" than section 47. The big difference between the two, however, is that the MCA can only be used where someone lacks decision-making capacity, meaning that section 47, which is not so restricted, "covers potentially a wider cohort of people" (LC, 2010, 12.66). It is also helpful, respondents argued, where someone needs removing urgently and it is not clear whether he lacks capacity (LC, 2011a, 12.156).

Where in the case of someone who lacks capacity a particular intervention is in his best interests, section 5 of the MCA permits that intervention and section 6 permits force to be used to ensure that it is made. The LC (2011b, 9.70) reports, however, that some respondents "pointed to widespread uncertainty over the amount of force that can be used to remove a person from their home in their 'best interests'"

The LC also considers the Deprivation of Liberty Safeguards (DoLS), an adjunct to the MCA that in some circumstances permit an incapable person to be deprived of liberty while also affording him compensatory safeguards. It seems section 47 is broader than the DoLS (LC, 2011a, 12.155), conceivably because, again, its use is not confined to incapable people.

The report contains a further comment on the DoLS; one that might suggest they have been misunderstood. Referring to a recent Court of Protection case, the LC (2011a, 12.155) notes:

> [S]ome local authorities argued that they are reluctant to rely on the [DoLS] to detain a person to a place of safety who is currently living at home. [The case of] *DCC* v. *KH* confirmed that a standard authorisation would be sufficient to return an individual from "contact sessions" to their place of residence, where so doing would entail a deprivation of liberty. However, some consultees suggested that the principle does not apply to the initial journey to admit the person to the residence.

In fact, and though the LC does not say so, the decision in the case was somewhat broader than that: even where there is no such "authorisation", section 5 of the Mental Capacity Act (read with section 6) will cover the return – and, by implication, the outward – journey (*DCC* v. *KH*, 2009).

Environmental health powers

Under the Public Health (Control of Disease) Act 1984, a local authority may apply to a magistrate for an order to remove a person from a house where an infectious disease has occurred, and to detain him in hospital if he is suffering from a notifiable disease. This will be an alternative to section 47, provided the illness is infectious (LC, 2011b, 9.75), but the fact that section 47 is not so restricted means that it "covers potentially a wider group whose chronic illness is not infectious or capable of contamination" (LC, 2010, 12.67).

The LC notes, however, that "Article 5(1)(e) only permits the detention of people suffering from a grave chronic illness if the illness is infectious", and it adds:

> We therefore consider that section 47 can and should be repealed entirely in relation to people suffering from grave chronic illness (LC, 2011b, 9.75).

Under the Public Health Act 1936, a local authority may temporarily remove someone from his home where fumigation is required because there is a risk to health, and remove, detain and clean him where he is "verminous". It seems one respondent called these powers "arcane" (LC, 2011a, 12.160).

Under the Environmental Health Act 1990, a local authority has powers of entry, including into premises, to determine if a statutory nuisance exists or to take action or execute work. Unlike section 47, however, this power does not require that the occupier of the premises be physically incapable. The LC (2010, 12.698), therefore, concluded: "environmental health powers are potentially wider than section 47".

In fact, given their focus, the LC does not accept that the 1936, 1984 and 1990 Acts are a suitable alternative to section 47. Their powers, it says, "are aimed at protecting *public* health, rather than being focused on the harm that may be caused to the person responsible for the insanitary conditions" (LC, 2011b, 9.81; original emphasis). Furthermore, it seems

there is a problem with those to whom such powers are entrusted. According to the LC (2011a, 12.160; b, 9.70 and 9.81), "consultation suggested that environmental health departments often set high thresholds for intervention under this legislation and accordingly the powers are only used as a last resort".

The LC (2011a, 12.160) argues that environmental health powers are ineffective in dealing with the sort of situations that fall within section 47, principally because "they fail to ensure that a sophisticated social work value-based decision is made about what to do with vulnerable persons in the way section 47 does". In fact, and even more fundamentally, the LC (2011b, 9.75) says:

> In our view, however, decisions concerning infection control should rest with agencies such as environmental health and the NHS, and it is inappropriate to use social care legislation for this purpose.

The inherent jurisdiction

The "inherent jurisdiction" of the High Court, which seems to have been enjoyed since time immemorial and has developed case-by-case, may be used to remove and detain incapable (and maybe even capable) people (*Re: SA (Vulnerable Adult with Capacity: Marriage)*). It might, therefore, be an adequate substitute for section 47 (LC, 2010, 12.69), to which some respondents seem to have argued it is a better alternative and which some believe it thereby renders obsolete (LC, 2011a, 12.152).

The LC, however, seems to have undergone a modest change-of-mind during the consultation process, not least as to the precise ambit of the inherent jurisdiction in the case of capable people. Quoting from a recent case, the Commission notes that the jurisdiction acts to "facilitate the process of unencumbered decision making", but that it "cannot be used to compel a capacitated but *vulnerable* person to do or not do something which they have, after due consideration, decided to do or not to do" (LC, 2011b, 9.80; *LBL* v. *RYJ*, 2010). More generally, and in the case of incapable as well as merely vulnerable people, the LC notes that High Court (and Court of Protection) proceedings are expensive and prone to delay, and it says they are therefore "an inappropriate way of dealing with emergency safeguarding cases" (LC, 2011a, 12.154 and 12.159; b, 9.70 and 9.80).

A gap?

The LC (2011b, 9.82) concludes that section 47 "could be removed entirely in relation to people with grave chronic illness and people who lack capacity", but that complete removal would deprive public bodies of the power to intervene where someone:

- "Is of unsound mind but not of a nature or degree to warrant hospital admission".
- "Makes a capacitous decision, which is free of external pressure or physical restraint, to live in insanitary conditions (and those conditions are not such as to necessitate intervention under public and environmental health powers)".
- "Is unable to devote to [himself,] and [is] not otherwise receiving[,] proper care and attention" (LC, 2011b, 9.69 and 9.78. The consultation document had anticipated precisely this gap: LC, 2010, 12.70).

Very few people would meet this description, and furthermore, the LC (2010, 12.70; 2011b, 9.83) suggests, "it is at the very least questionable whether the state should have powers to detain such people". In the circumstances, therefore, the Commission recommends that section 47 of the NAA 1948 (and section 1 of the National Assistance (Amendment) Act 1951) be repealed (LC, 2011b, recommendation 42).

What are the options?

The LC also dedicates part of its report to considering what, if anything, should be done to fill the gap that repealing section 47 (and section 1) would leave.

Reform

As part of its analysis, the LC (2011b, 9.88-9.96) considers how section 47 might be reformed not only to ensure that it complies with the ECHR, but also "to make it effective operationally and to modernise some of its provisions" (in fact, some of its suggestions would not only make section 47 better, and more ECHR-compliant; they would do a similar job if applied to successor provisions).

Ultimately, however, and by the LC's (2011b, 9.96) own lights, this is a pointless exercise, because "section 47 cannot become ECHR compliant and operationally workable without numerous and substantial reform", "which would not only extend the scope of the power but also would transform radically its nature". In effect, the LC (2011b, 9.96) concludes, "section 47 cannot be amended without creating a completely new compulsory safeguarding order".

Replacement

Some respondents – the Supreme Court judge Baroness Hale among them (LC, 2011a, 12.168) – said that a replacement should be found for section 47 (LC , 2011a, 12.165 *et seq*). One suggested that a similar power will be required as the emphasis on safeguarding increases (LC, 2011a, 12.170), while another, a local authority, said it remains necessary to be able to deal with situations where a vulnerable person needs removing urgently from a situation that is causing them significant harm, and it is not clear if they have capacity (LC, 2011a, 12.156).

As to what any replacement provision should look like, however, the LC remains largely silent; it has, of course, set its face against "the creation of new compulsory/emergency powers" (Law Commission, 2011b, recommendation 41), and for now, it contents itself with the recommendation that:

> The Government and the Welsh Assembly Government should consider commissioning research into the existing use of section 47, and then decide, on the basis of that research, whether it would be appropriate to reform the section, following public consultation (LC, 2011b, recommendation 42).

Discussion

The views of the LC appear to have changed little during its consultation period, at least as far as section 47 of the NAA 1948 is concerned: its conclusions, and much of the evidence given to support them, closely resemble the provisional findings set out in the original consultation paper (if those conclusions are accurate, of course, this suggests, quite simply, that the Commission's original instinct was itself closely aligned with prevailing opinion).

Times, though, have changed, if not very much over the last couple of years, certainly since section 47 was introduced. In 1948, there was little in the way of environmental health legislation, the inherent jurisdiction had yet to be applied in the context of social welfare law (in fact, there was precious little social welfare law) and, perhaps most significantly, there was no Mental Capacity Act (nor anything resembling it). Pretty much all there was, at least from a health care perspective, was the Mental Treatment Act 1930, which, though it introduced "voluntary" hospital admission and gave much stronger protection to practitioners, was plainly insufficient to assist with the care of the patients who became the stock-in-trade of the NAA.

In fact, those alternative powers might represent something of a blind-spot in the LC's otherwise sensible report. In concluding that sufficient of them exist to enable section 47 to be repealed without loss, the Commission seems to have ignored the problems they present – problems it has itself scrupulously documented. Nevertheless, it is surely right to conclude, as the LC does, that people with capacity (and without mental disorder) should not be subject to compulsion solely in their own interests.

The Mental Capacity Act, in particular, has transformed this area of the law, and has made it possible to provide all manner of care, at least where someone lacks the capacity to make decisions about it. In fact, the range of the MCA might be even broader than the LC, and certainly its respondents, appear to believe.

While the analysis now put forward by the LC seems sound, there are times when its proposals, or the fact it has chosen to make them, seem rather strange. This is most true

where the Commission, having decided that section 47 should be repealed, spends several pages suggesting how the power might best be amended. Regrettably, because of its self-denying ordinance against the creation of new powers, the Commission cannot go on to look beyond amendment, and to sketch out what an alternative removal and detention power might look like. That, arguably, would have been a much greater service.

Having opted for repeal, the LC finds that it can do no more than repeat a plea the Department of Health made more than a decade ago – for more information. Until that plea is heeded, it seems we cannot regard the section 47 power as defunct. Unused – and unloved – though it might be, and human rights-non-compliant though it surely is, it seems the power has not yet passed on; the deaths it continues to die are strange ones indeed.

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Corresponding author

David Hewitt can be contacted at: david.w.hewitt@btopenworld.com