

## **Proposals for a Vulnerable Adults Bill**

### **The problem**

1. There is at present no clearly identified legal structure which social work professionals and the courts can navigate when seeking to take concrete steps to safeguard individuals who:
  - a. Do not lack capacity for purposes of the Mental Capacity Act 2005 ('MCA 2005');
  - b. Are in some way vulnerable<sup>1</sup> to coercion or duress on the part of third parties; and
  - c. Fall outside the scope of domestic violence legislation.
2. There are clear statutory duties upon local authorities to inquire into the situation of such individuals, but, as set out further below, the powers that exist in order to take concrete steps to secure the well-being of individuals in such circumstances are both disparate and in significant part incomplete.
3. The consequence of this situation is that it is both unclear to local authorities (and their partners) what steps can be taken to secure the protection of such vulnerable individuals, that such steps as can be taken are frequently expensive and cumbersome, and do not cover all situations. There is therefore a significant gap in the protections available for this group.

### **Current powers and their limitations**

4. In the case of those who lack capacity to take relevant decisions, there is a clearly identified route by which decisions can be taken on their behalf (outside the court arena) and a clearly identified route by which relief can be sought from the Court of Protection. Local authorities (or relevant other public bodies) are therefore able to access remedies which are clearly defined, and which are applied by reference to clear sets of principles. There are, further, specific criminal offences which exist to secure against wilful neglect of those lacking capacity (in s.44 MCA 2005). However, it is not possible to obtain relief under the MCA 2005 in respect of a person who does not lack the material decision-making capacity but is being coerced or otherwise controlled.
5. In the case of victims of domestic abuse, there are a number of steps which can be taken, including the use of Domestic Violence Protection Notices/Orders, and also the potential to invoke the new offence of coercive or controlling behaviour in the Serious Crime Act 2015 and powers (for instance Domestic Violence Protection Notices/Orders). However these offences/powers are limited in their scope in particular by the fact that they require (in broad terms) some form of intimate connection between abuser and the adult in question. For instance, the offence in Section 76 of the Serious Crime Act 2015 requires abuser and victim to have a personal connection in that (1) they are in an intimate personal relationship; (2) they live together and are either members of the same family; or (3) they live together and have previously been in an intimate personal relationship with each other.

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<sup>1</sup> The term 'vulnerable adults' is used here deliberately although the Care Act 2012/Social Services and Well-Being Act 2014 (and associated guidance) use the term adult at risk, as did the Law Commission in its underlying Adult Social Care Report. It is used here because this is the term that is used by the High Court when exercising its inherent jurisdiction. The Law Commission would be very likely to wish to consider what the appropriate term should be in any project that it undertook to reform the law in this area.

6. There are many situations in which these domestic abuse remedies will not be effective, for instance where the abuser is a lodger or tenant, or the abuser is a “friend” of the individual. The circumstances of people with learning disabilities are of particular relevance - most particularly those of people who are being supported to live in their own homes. The murders of Steven Hoskin<sup>2</sup> and Michael Gilbert<sup>3</sup> are pertinent since both were befriended in an overly solicitous manner by damaged men and their associates who went on to wield inhuman coercion. The coercion was expressed through isolating Steven and Michael from those who would have helped them. These men were able to identify victims who would not mount any resistance to outrageous demands. Attached to this this document are three further case studies provided by the Alzheimer’s Society demonstrating recent examples of the impact of the gaps upon those with dementia.
  
7. It has also been suggested that the offences created in the Modern Slavery Act 2015 would afford sufficient protection to the group in question. There may be isolated examples in which the conduct of the abuser would amount to offences within the scope of section 1 of the Act (slavery, servitude and forced labour) or section 2 (human trafficking). However, it seems to me unlikely that either of these offences would cover the full range of abuse covered (for instance) by the offence under section 76 Serious Crime Act 2015. Section 76(3) provides that that offence is made out where there is a substantial adverse effect on the victim’s usual day-to-day activities, which may include,<sup>4</sup> but is not limited to:
  - Stopping or changing the way someone socialises
  - Physical or mental health deterioration
  - A change in routine at home including those associated with mealtimes or household chores
  - Attendance record at school
  - Putting in place measures at home to safeguard themselves or their children
  - Changes to work patterns, employment status or routes to work
  
8. Most of these would not fall with either the definition of modern slavery or human trafficking. Absent specific protection for this class of individuals, there is therefore a gap.
  
9. It is important also to note that the concern is not solely about the absence of criminal penalties, but also a framework within which both investigations can be carried out by agencies other than the police, and within which preventative steps can, where appropriate, be taken by the civil courts to secure the protection of the individual in advance rather than to prosecute where offences have taken place.
  
10. Therefore, whilst amending (for instance) the Serious Crime Act 2015 to widen the circumstances under which prosecutions could be brought in respect of coercive and controlling behaviour would go some of the way to solve the problem, it would not provide a complete answer in terms of securing protection for this group of individuals.

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<sup>2</sup> [http://www.cornwall.gov.uk/media/3630284/a\\_e\\_SCR\\_Executive\\_Summary1\\_Dec\\_2007\\_.pdf](http://www.cornwall.gov.uk/media/3630284/a_e_SCR_Executive_Summary1_Dec_2007_.pdf) (accessed 25 October 2016)

<sup>3</sup>

[www.luton.gov.uk/Health\\_and\\_social\\_care/Lists/LutonDocuments/PDF/Community%20Care/Protecting%20Vulnerable%20Adults/Adult%20A%20Exec%20Summary.pdf](http://www.luton.gov.uk/Health_and_social_care/Lists/LutonDocuments/PDF/Community%20Care/Protecting%20Vulnerable%20Adults/Adult%20A%20Exec%20Summary.pdf) (accessed 25 October 2016)

<sup>4</sup> When read together with the Statutory Framework Guidance (December 2015) and CPS Prosecution Policy [http://www.cps.gov.uk/legal/a\\_to\\_c/controlling\\_or\\_coercive\\_behaviour/](http://www.cps.gov.uk/legal/a_to_c/controlling_or_coercive_behaviour/)

11. At present, there is a limited route for such protection, through the inherent jurisdiction of the High Court.<sup>5</sup> This has a number of consequences:

- a. First: there is a lack of clarity as to when it is appropriate for a local authority or public body to invoke the inherent jurisdiction to obtain protection in relation to an individual who is vulnerable, including (but not limited to) when it is appropriate to invoke it to obtain access to an individual.
- b. Second: recourse to the inherent jurisdiction means recourse to the High Court, which is both expensive and slow. Only full judges of the High Court have jurisdiction to exercise the inherent jurisdiction, a significantly more limited pool of judges than those able to exercise jurisdiction under the MCA 2005.
- c. Third: it is striking that there are no reported cases in which an application has been brought under the inherent jurisdiction to obtain access to a vulnerable individual in support of the duty of inquiry imposed under the Care Act 2014 on local authorities in England.<sup>6</sup> This is in circumstances where the Department of Health had contended that there was no need to introduce a power of entry into the Care Act because existing legal powers of entry sufficed.<sup>7</sup>
- d. Fourth: whilst the Court of Appeal emphasised in *Re DL* that the jurisdiction should be exercised in a fashion which is “facilitative, not dictatorial” (para 67 per Macfarlane LJ), it is clear that this is not the approach that would be taken by all judges. In *Re PB* [2014] EWCOP 14, Parker J expressed the obiter opinion that she would have been prepared to make an order directed at a vulnerable (but capacitous) woman requiring her to live in a care home away from and to have no contact with her husband, notwithstanding that such was against her strongly expressed wishes, and notwithstanding that such would represent a deprivation of liberty (see paragraphs 109-122).

### **Solutions adopted in other parts of the United Kingdom and internationally**

12. There are precedents for codifying significant aspects of the law relating to vulnerable individuals.

- a. Most importantly, there is the Adult Support and Protection (Scotland) Act 2007, which followed upon a 1997 Scottish Law Commission Report on Vulnerable Adults,<sup>8</sup> in which the Scottish Law Commission proposed (inter alia) the introduction of powers to enable compulsory assessment and removal of a vulnerable adult and the exclusion of a suspected

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<sup>5</sup> In *Re DL* [2012] EWCA Civ 253, the Court of Appeal confirmed that this jurisdiction survived the coming into force of the MCA 2005, and expressly declined to set any limits on the jurisdiction (see paragraphs 61 and 68 per Macfarlane LJ; paragraph 76 per Davis LJ and paragraph 79 per Maurice Kay LJ).

<sup>6</sup> In 2016, Action on Elder Abuse (‘AEA’) made Freedom of Information requests to all local authority adult safeguarding teams asking for information on how many occasions in a twelve month period they had sought access via inherent jurisdiction. In each case they indicated they did not monitor and therefore could not provide the information. AEA subsequently posed the same question to local authority legal teams and were advised of only 6 cases in a twelve month period: see *Elder Abuse is a Crime*: <http://www.elderabuse.org.uk/wp-content/uploads/2016/06/LegislationFinalv3.pdf> at 52.

<sup>7</sup> See <http://www.communitycare.co.uk/2014/11/20/social-workers-given-advice-using-powers-entry-protect-adults-risk/>.

<sup>8</sup> <http://www.scotlawcom.gov.uk/publications/reports/1990-1999/>.

abuser. It will be recalled in this regard that the Law Commission for England and Wales had made not dissimilar proposals in its earlier 1995 Report on Mental Incapacity.<sup>9</sup> Important features of the ASP are the guiding principles upon intervention in s.1, and the range of powers then set out in the Act ranging from a power of entry to a statutory power to ban a suspected abuser from doing certain acts. Assessment of the ASP in practice has been broadly positive: see, in particular, Michael Preston-Shoot and Sally Cornish, 'Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007,' *The Journal of Adult Protection*, Emerald Publishing, [2014] JAP 5;

- b. A more limited suite of adult support and protection orders are provided for in the Social-Services and Well-Being (Wales) Act 2014 (s.127). Note, however, that the proposals for reform outlined below would go further than the provisions contained in this Act and cover areas that are not covered by Welsh legislation;
- c. The Ministry of Justice in Singapore has also recently consulted upon a draft Vulnerable Adults Bill,<sup>10</sup> including provisions relating to powers to be given to the State to protect vulnerable adults from abuse, neglect and self-neglect; orders that the Courts may grant to protect and ensure the safety of a vulnerable adult, and parties who may apply for them; the designation of places of temporary care and protection and places of safety for vulnerable adults; the disclosure of confidential information for the purpose of protecting vulnerable adults; the protection from personal liability for those involved in protecting the vulnerable adult; and the enhancement of penalties in other laws for offences committed against vulnerable adults.

### **How to solve the problem identified**

13. Drawing up a Bill to consolidate the inherent jurisdiction and to amend other aspects of the law relating to vulnerable adults would give the opportunity to:

- a. Clarify the scope of those to whom protection should be afforded, having specific reference to the relevance of disability and the provisions of the Convention on the Rights of Persons with Disabilities;
- b. Clarify the basis of and the rationale for intervention in the affairs of those considered vulnerable, again by reference (where relevant) to the Convention on the Rights of Persons with Disabilities);
- c. Establish principles for such intervention akin to those set down in the MCA 2005 in relation to the determination of capacity and best interests;<sup>11</sup>
- d. Clarify the dividing line between those considered to lack capacity for purposes of the MCA 2005 and those falling within the definition of vulnerable adults;

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<sup>9</sup> Part IX, pp. 157-180

<sup>10</sup> <https://www.reach.gov.sg/VAA2016>.

<sup>11</sup> Whose importance was emphasised by the House of Lords Select Committee in its post-legislative scrutiny of the MCA 2005: see <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf> at paras 1.2-1.3 in particular (accessed 29 October 2016).

- e. Provide a statutory basis for jurisdiction to be exercised by all judges of the Court of Protection over those falling within the scope of the definition of vulnerable adults;
- f. Provide the opportunity to consolidate the law relating to:
  - i. The powers of the courts to ban suspected perpetrators of abuse from contact with or residence at the place of an adult at risk;
  - ii. Disclosure of confidential information in relation to vulnerable adults;
  - iii. Protection of liability for those involved in protecting vulnerable adults;
  - iv. Offences committed in relation to vulnerable adults including financial and other abuse.

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