



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Mental Capacity (NI) Bill

Executive Summary

In its submission the Commission provides advice on the compatibility of the Bill with international and regional human rights standards. The UNCRPD is the principal instrument of international law of relevance to the proposals.

The European Court of Human Rights (ECt.HR) has developed jurisprudence on this matter and the Council of Europe has developed recommendations. The Commission acknowledges in the submission that currently there are a number of disparities and contradictions in the standards set down by the ECt.HR and the standard set by the UNCRPD Committee and these are addressed at relevant paragraphs in this submission. In light of this the Commission advises that the Committee should seek an assurance from the Departments that a systemic review of the implementation of the legislation will commence within 3 years of its operation. By this time it is anticipated that the United Kingdom's initial report to the UNCRPD Committee on compliance with the UNCRPD will have been examined by the Committee. This examination will include consideration of laws governing mental capacity throughout the UK. The implementation review should take account of any recommendations from the UNCRPD Committee along with any developments in international law. In addition by this time it is anticipated that some clarity will have been provided regarding the contradictions between the UNCRPD and the ECHR. In addition the Ad Hoc Committee may wish to recommend that the two relevant NI Assembly Departmental Committees should actively monitor the impact of the legislation once it is enacted.

The Commission welcomes the emphasis placed on supporting over 16s to make decisions themselves, in particular clause 5 which places a statutory obligation on an intervener to give practical help and support to an individual who may lack capacity. This approach is consistent with the principle of maximum preservation of capacity reflected in the jurisprudence of the ECt.HR and recommendations of the Council of Europe.

In addition the Commission notes the progressive definition of “best interests” contained within the Bill at clause 7. The Commission advises that the Committee considers;

- whether clause 7 of the Bill could further reflect the UNCRPD by using the language of Article 12 and replacing ‘past and present wishes and feelings’ with the terms “will and preferences”**
- the implications of the requirement that an intervener have “special regard to” a person’s past and present wishes and feelings and how an intervener can demonstrate that he/she has shown “special regard”.**

Noting the wide ranging nature of the Bill the Commission advises the Committee to ask the Department to clarify how it will ensure the liability either in tort or criminal law of an individual who negligently or malignly intervenes citing the legislation as justification.

The Commission advises that the needs of persons with fluctuating capacity are diverse and the range of supports which can be provided to assist an individual to exercise their capacity can be complex. In its submission the Commission emphasises the importance of effective implementation.

The Commission advises that the act of restraining an individual should be permissible only when there is an “imminent risk of harm” and advises inserting the word ‘imminent’ to clause 12(3)(a).

Noting the important role performed by independent advocates, the Commission advises that the Department should be required to make regulations about the functioning of advocates. Therefore instead of the use of the word “may” in the first line of clause 84(5) the word “must” should be inserted.

To ensure adequate protection for those reliant on others for care, the Commission advises that the Committee consider including a separate clause(s) providing a free standing offence for an individual who has the care of another individual by virtue of being a care worker to ill treat or wilfully neglect that person, modelled on the offence(s) contained within the Criminal Justice and Courts Act 2015.

Noting that the under the UN Convention on the Rights of the Child, a child is considered to be anyone up to the age of 18, the Commission advises that the Committee enquire how the Department will further ensure the rights of 16 and 17 year olds within the scope of the Bill are safeguarded by way of the Code of Practice.

Noting that the presumption of capacity will relate to persons over the age of 16 only, the Commission recommends that the Committee itself recommends that the Departments develop a separate project within an expedited timeframe to consider a bespoke legal framework governing capacity within children under 16 years of age. The Commission advises that the compliance of the United Kingdom with the UN CRC will be formally examined by the UN CRC Committee in May 2016. The Commission advises that it will be raising this matter with the UN Committee and that it would be helpful if initial findings of this project were available at the time of the examination.

Introduction

1. The Northern Ireland Human Rights Commission (NIHRC or Commission), pursuant to Section 69(4) of the Northern Ireland Act 1998 is obliged to advise the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Ad Hoc Joint Committee in relation to the Mental Capacity Bill on the Mental Capacity Bill (hereinafter the "Bill").
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
 - European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951], ;
 - International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
 - United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) [UK ratification 1988];
 - United Nations Convention on the Rights of the Child, 1989 (UNCRC) [UK ratification 1991];
 - United Nations Convention on the Rights of Disabled People, 2006 (UNCRPD) [UK ratification 2009];
3. The NI Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's (UK) ratification. In addition, Section 26(1) of the Northern Ireland Act 1998 provides that *"If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken."*
4. Further, Section 26(2) states that *"the Secretary of State may, by order, direct that an action be taken on a matter within the legislative competency of the Assembly as required for the purpose of giving effect to international obligations. Such action can include the introduction of a Bill into the Assembly."*
5. The NIHRC further recalls that Section 24 (1) of the Northern Ireland Act 1998 provides that *"A Minister or Northern Ireland*

department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention [ECHR] rights”.

6. In accordance with the Northern Ireland Act 1998, section 6(2) it is outside the legislative competence of the Northern Ireland Assembly to enact laws that are incompatible with any of the ECHR rights.
7. In addition to the treaty standards, there is a body of ‘soft law’ which has been developed by the human rights organs of the United Nations and the Council of Europe. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
 - Committee of Ministers Recommendation No. Rec (1999) 4, Principles concerning the legal protection of incapable adults
 - Committee of Ministers Recommendation No. Rec (2004) 10 , the protection of the human rights and dignity of persons with mental disorder
 - Committee of Ministers Recommendation No. Rec (2009) 11 Principles concerning continuing powers of attorney and advance directives for incapacity
 - Committee of Ministers Recommendation No. (2004)10 concerning the protection of the human rights and dignity of persons with a mental disorder

1. Compatibility

8. The Commission notes that paragraph 46 of the Explanatory and Financial Memorandum states that *“The provisions of the Bill are compatible with the provisions of the Human Rights Act 1998, and European Convention on Human Rights”*. The Commission recalls that, acting on advice from the Joint Committee of Human Rights, the Westminster Government has issued guidance to departments encouraging fuller disclosure of views about Convention compatibility in the Explanatory Notes which accompany a Bill.¹

The Commission advises the Committee to ask the Departments to set out the basis for the statement of compatibility.

¹ See for example

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430495/EUR_Bill_-_draft_memo_for_JCHR_-_final.pdf

9. The Commission notes that the explanatory memorandum refers to the UNCRPD and briefly records steps the Departments have taken to ensure compliance with the UNCRPD. The UNCRPD is the principal instrument of international law of relevance to the proposals. This is the most recent human rights treaty; the interpretation of international human rights treaties is informed by jurisprudence that develops over time. Jurisprudence relating to the UNCRPD is in the early stages of evolution. In contrast whilst the ECHR does not directly refer to a right to legal capacity the European Court of Human Rights (ECt.HR) has developed jurisprudence on this matter and the Council of Europe has developed recommendations. The jurisprudence of the ECt.HR has identified that the regulation of legal capacity engages the right to private and family life.² The Commission therefore advises that currently there are a number of disparities and contradictions in the standards set down by the ECt.HR and the standard set by the UNCRPD Committee and these are addressed at relevant paragraphs in this submission
10. The UNCRC states that "*a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*". The Commission notes that the age of majority in Northern Ireland is 18 under the Age of Majority (NI) Act 1969.³ The Commission notes that the Bill will introduce a presumption of capacity in all children over the age of 16. The obligations imposed on the State by virtue of the UNCRC therefore will apply to 16 and 17 year olds who will be presumed to have capacity under the Bill. The Commission will highlight a number of measures required to meet this obligation in this submission.
11. The Commission notes that the Departments have acknowledged their obligation under the UN CRC with respect to 16 and 17 year olds. **The Commission advises that the Committee enquire how the Department will further ensure the rights of 16 and 17 year olds within the scope of the Bill are safeguarded by way of the Code of Practice.**
12. The Commission notes that the Bill will fuse together mental capacity and mental health law the Commission recognises that this is "*a ground breaking approach not yet attempted in any other jurisdiction*".⁴ The Bill will have far reaching implications and will engage a broad range of the State's international human

² Shtukurov v. Russia (application no. 44009/05). 27 March 2008

³ Age of Majority Act (Northern Ireland) 1969 section 1

⁴ Explanatory Memorandum para 18

rights obligations. The inclusion of mental health will engage the right to health. The ICESCR, Article 12 states:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

13. The ICESCR Committee has stated that the right to health:

*"imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health"*⁵

The Commission advises the Committee to be mindful of the State's obligation to ensure "*the highest attainable standard of physical and mental health*" when scrutinising the Bill.

14. The UNCRPD is said to represent a "paradigm shift" in disability rights, moving from a medical model to a social model of disability, which focuses on societal barriers to the participation of persons with disabilities in society. The Commission welcomes the willingness of the Department to take account of the UNCRPD in the development of the Bill. The period of time since the UNCRPD was opened for signatories is relatively short, as a result there is not a breadth of international examples of state measures to ensure compliance with the UNCRPD for the NI Executive to draw on. The Departments have however made a concerted effort to take account of emerging discussions and the advice provided by the Commission on compliance with the UNCRPD.⁶

15. The UNCRPD seeks to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their dignity. The Preamble recognises that: *"disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others"*.

⁵ Economic, Social and Cultural Rights Committee, General Comment No. 12 E/C.12/2000/4 11 August 2000

⁶ NIHRC Submission on the Draft Mental Capacity (NI) Bill Consultation 2014

16. The UNCPRD does not define disability. Instead Article 1 identifies a number of characteristics which members of the protected group may exhibit:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

17. The characteristics identified are not defined, the description of disability included in the UNCPRD is therefore not exhaustive.
18. The Commission notes that due to the wide ranging nature of the Bill it is likely to have an impact on the enjoyment of many of the rights enshrined within the UNCPRD. The Article of central relevance to the Bill is Article 12 on legal capacity and is itself central to the Convention and to the enjoyment of the rights enshrined therein. Article 12 states:

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit

property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

19. The UNCRPD Committee has produced General Comment 1 on the legal implications of the Article 12 and has emphasised that:⁷

“In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”⁸

20. There is a disparity between the international human rights standard as set out by the UNCRPD Committee in General Comment 1 and the regional standard as set out in the jurisprudence of the European Court of Human Rights. Alongside the other UK Commissions and the Equality Commission for Northern Ireland, the Commission raised concerns with the UNCRPD Committee regarding the lack of clarity provided by the then draft General Comment 1.⁹ Noting that the draft General Comment did not fully consider regional human rights standards, in particular the ECHR, the Commissions advised the Committee to *“consider and clearly articulate how Article 12 of the CRPD is to be read alongside regional international law and standards”*.¹⁰ The published General Comment unfortunately did not address this matter. As a result in a number of important matters including deprivation of liberty and medical treatment without consent the standards set down by the UNCRPD General Comment 1 conflict with standards set down by the European Court of Human Rights (ECtHR) and the Council of Europe.

21. The General Comment also does not consider many practical implications of a legal capacity framework premised solely on supported decision making. Paragraph 22 of the General Comment states:

⁷ UNCRPD Committee General comment No. 1 (2014) Article 12: Equal recognition before the law CRPD/C/GC/1

⁸ *Ibid* para 25

⁹ Joint submission from the Equality and Human Rights Commission, the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 28 February 2014

¹⁰ *ibid*

"All people risk being subject to "undue influence", yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence; however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes."

22. The General Comment does not clarify how an individual's will and preferences should be considered when undue influence is suspected.
23. The Commission acknowledges that the Bill represents a substantial progress in developing greater adult capacity. In this submission the Commission will provide advice on both the regional human rights standard within the ECHR and the international human rights standards within the UNCRPD and other standards where they are relevant.

The Commission advises that as international human rights standards in the area of capacity are in the process of development, the Committee should seek an assurance from the Departments that a systemic review of the implementation of the legislation will commence within 3 years of its operation. By this time it is anticipated that the United Kingdom's initial report to the UNCRPD Committee on compliance with the UNCRPD will have been examined by the Committee. This examination will include consideration of laws governing mental capacity throughout the UK. The review should take account of any recommendations from the UNCRPD Committee along with any developments in international law. In addition by this time it is anticipated that some clarity will have been provided regarding the contradictions between the UNCRPD and the ECHR. In addition the Ad Hoc Committee may wish to recommend that the two relevant NI Assembly Departmental Committees should actively monitor the impact if the legislation once it is enacted.

3. Clause by Clause analysis of the Bill

Clause 1-4

24. The Commission notes that the proposed Bill will not differentiate in law between persons with disabilities and persons without. At clause 3 the Bill sets out the diagnostic test for determining if a person lacks capacity. The diagnostic test is a functional test, furthermore at paragraph 3 the clause makes clear that whether an individual has or does not have a disorder or disability is irrelevant. However, clause 3 requires a person's inability to make a decision to be; *"because of an impairment of, or a disturbance in the functioning of, the mind or brain"*. This approach to impairments will in practice impact more on persons with disabilities than those without. In its General Comment the UN Committee has stated:

*"The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law."*¹¹

25. Whilst acknowledging the progressive step in making clear that the presence of a disability is not a pre-requisite for an individual to be considered to lack capacity the Commission notes that the approach to capacity set out at clause 3 of the Bill runs contrary to the Committee's General Comment as set out above.
26. The Commission notes that a deletion of the words: *"because of an impairment of, or a disturbance in the functioning of, the mind or brain"* from clause 3 would have significant implications for the framework of the Bill and indeed would render the Bill incompatible with the ECHR. Article 5(e) of the ECHR permits the lawful detention of persons of unsound mind, through its jurisprudence the ECt.HR has restrictively defined *'unsound mind'*, as will be set out below, a general power to deprive an individual of his or her liberty on grounds that they are incapable of making a decision would be impermissible under the ECHR.¹²

¹¹ Ibid Para 15

¹² Rakevich v Russia (Application no. 58973/00) 28 October 2003

The Commission therefore does not advise that the Bill be amended and instead **advises that the diagnostic threshold be included as a matter for inclusion within the post implementation review, discussed at paragraph 23.**

27. The Bill will introduce a rebuttable presumption of capacity in all persons over the age of 16.¹³ This presumption is rebuttable on a decision specific basis and only once it has been demonstrated that an individual is incapable of making a decision despite the provision of adequate support.¹⁴ Where a person is incapable of making a decision another person may intervene. An intervener must make any decision on the basis of the incapacitated person's best interests. The draft Bill therefore proposes a system of substitute decision making. However an intervener can only substitute his or her decision for that of the incapacitated person where the incapacitated person is unable to make a decision through the provision of support.¹⁵
28. The ECHR does not directly refer to a right to legal capacity. However, through its jurisprudence the European Court of Human Rights (ECt.HR) has identified that the regulation of legal capacity engages the right to private and family life.¹⁶ The ECHR, Article 8 states:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
29. Restrictions or interventions are permissible provided they are in accordance with domestic law and are proportionate to a legitimate aim. The ECt.HR has elaborated on the requirement that any interference must be "in accordance with the law" this:

"means that the impugned measure must have some basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and

¹³ Clause 5(3)

¹⁴ Clause 4

¹⁵ Ibid

¹⁶ Shtukaturov v. Russia (application no. 44009/05). 27 March 2008

inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise..”¹⁷

The Commission notes that the Bill will form the legal basis for both individuals and the relevant authorities to intervene in the lives of others. Once enacted the Bill will be augmented by way of a Code of Conduct for interveners and with respect to numerous matters by way of secondary legislation, the Committee should assure itself that the Bill and supporting law are precisely drafted. In addition the relevant Department should develop and implement arrangements to ensure the general public and staff within relevant authorities are made fully aware of the new legal framework, to ensure compliance with ECHR, Article 8.

Clause 5

30. The Committee of Ministers has issued Recommendations No. R (99) 4, which sets out principles concerning the legal protection of incapable adults.¹⁸

31. Principle 3 of the Recommendations set out the obligation of the state to ensure the maximum preservation of capacity. It states:

“The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.”¹⁹

32. The ECt.HR has relied upon the Recommendations in its jurisprudence. In the case of Shtukaturon the ECt.HR stated that

¹⁷ M.M v UK (Application no. 24029/07) 13 November 2012 para 193 See further Malone v. the United Kingdom, 2 August 1984, §§ 66-68

¹⁸ Adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers’ Deputies

¹⁹ Ibid

the Recommendations express “a common European standard”.²⁰ The Recommendations place an emphasis on the functional approach to capacity and place an obligation on states to provide support to persons with fluctuating capacity.

33. In contrast to the General Comment 1 on the UNCPRD, the Recommendation and supporting jurisprudence of the ECtHR do envisage circumstances in which, despite the provision of adequate support, a person will be unable to make a decision.²¹ By way of example the Recommendations acknowledge that interventions in the health field may be permitted:

*“Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that: - it is for his or her direct benefit, and authorisation has been given by his or her representative or by an authority or a person or body provided for by law.”*²²

34. Restrictions or interventions are permissible provided they are in accordance with domestic law and are proportionate to a legitimate aim. The ECtHR has ruled that systems of full incapacitation or full guardianship represent a disproportionate interference with the rights of the incapacitated person.²³ In the case of *Shtukaturov*, the ECtHR noting that the Russian Civil Code distinguished only between full capacity and full incapacity, but did not provide for borderline situations, found the Code to represent disproportionate interference with the right to private life. The ECtHR in particular noted that the system did not provide for a “tailor made response”.²⁴

35. Principle 5 of the Recommendations recognises that “no measure of protection should be established for an incapable adult unless the measure is necessary”. In determining whether a measure is necessary: “account should be taken of any less formal arrangements which might be made, and of assistance which might be provided by family members and by others”. The Recommendations therefore suggests that to ensure that a protection measure is necessary, opportunities to support an individual to make a decision should be exhausted. The Commission notes that under clause 1 (4) of the Bill a person is not to be treated as unable to make a decision unless all

²⁰ *Shtukaturov v. Russia* (application no. 44009/05) 27 March 2008 para 95

²¹ *CASE OF SÝKORA v. THE CZECH REPUBLIC* (Application no. 23419/07) STRASBOURG 22 November 2012

²² Principle 22 – Consent

²³ *Salontaji-Drobnjak v Serbia*, 13 October 2009, para 144

²⁴ *Shtukaturov v. Russia* (application no. 44009/05) 27 March 2008 para 95

practical help and support has been given. The Commission further notes clause 5 on supporting persons to make decisions.

The Commission welcomes the inclusion of clause 5 which places a statutory obligation on an intervener to give practical help and support to an individual who may lack capacity. This approach is consistent with the principle of maximum preservation of capacity included in the Recommendation and reflected in the jurisprudence of the ECt.HR. The Commission advises that the needs of persons with fluctuating capacity are diverse and the range of supports which can be provided to assist an individual to exercise their capacity can be complex.

Clause 7

36. The UNCRPD Committee has stated that State Parties have an obligation to replace substitute decision-making regimes with supported decision-making regimes.²⁵ The Committee's General Comment states that:

*"Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."*²⁶

37. Whilst making provision for supported decision making, the Bill in a number of clauses makes provision for substitute decision making, in such circumstances a decision is to be taken on the basis of the individual's best interests, see clauses 2,7,8 and 9. In its General Comment the Committee has stated that:

"The development of supported decision-making systems in parallel with the maintenance of substitute decision-making

²⁵ CRPD/C/AUT/CO/1 30 September 2013 para 28

²⁶ *ibid* para 27

regimes is not sufficient to comply with article 12 of the Convention”.

38. The UNCROPD Committee’s General Comment identifies that substitute decision-making regimes are characterised by decisions being taken on the basis of the objective “best interests” of the person concerned, as opposed to being based on the person’s “own will and preferences”. The Commission advises that the UNCROPD Committee has not provided a definition of best interests.
39. The Bill, at clause 7, provides a definition of best interests which requires a person ascertaining another’s best interest to have special regard to a person’s ‘past and present wishes and feelings’. The definition of best interests within the Bill is a significant improvement on the existing law.
40. The Commission notes that the term ‘best interests’ is used in many jurisdictions to define a multitude of tests. The Council of Europe Recommendations recognise the centrality of the principle of best interests in circumstances in which substitute decision making occurs. Principle 8 states:

“In establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration”.

41. Principle 9 identifies the obligation to determine the past and present wishes and feelings of the adult and to facilitate an adult in expressing a view. It states:

“1. In establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.

2. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect.

3. It also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view.”

42. The Commission notes that under the Bill in establishing an individual's best interests an intervener must take into account P's past and present wishes, clause 7(6). In addition the Commission notes the role of a nominated person who must be consulted prior to a serious intervention.²⁷ The terminology used is the person's 'past and present wishes and feelings'.

43. The Commission notes that the wording of the Bill reflects the Mental Capacity Act 2005 in England & Wales. Concerns have arisen in England & Wales regarding the application of the principles within the Mental Capacity Act 2005, a Select Committee of the House of Lords published a post legislative scrutiny report into the Act in 2014.²⁸ The Lords found that:

*"The empowering ethos of the Act has not been widely implemented. The least restrictive option is not routinely or adequately considered....The presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult."*²⁹

44. The Select Committee identified that the continued reliance on the use of the best interests test permitted the continuing dominance of a paternalistic authoritarian model of care.³⁰ The Commission welcomes the progressive definition of best interests at clause 7 and the inclusion of clause 5 which have clearly been drafted in light of the UNCRPD and should go some way to prevent the re-occurrence of many of the difficulties encountered in England & Wales.

45. The Commission notes that a review of the compatibility of the Mental Capacity Act 2005 with the UNCRPD by the Essex Autonomy Project concluded, inter alia, that: *"[t]he best-interests decision-making framework on which the MCA relies should be amended to establish a rebuttable presumption that, when a decision must be made on behalf of a person lacking in*

²⁷ Clauses 70 to 82

²⁸ Select Committee on the Mental Capacity Act 2005 - Report Mental Capacity Act 2005: post-legislative scrutiny 25 February 2014

²⁹ Ibid para 102-3

³⁰ Select Committee on the Mental Capacity Act 2005 - Report Mental Capacity Act 2005: post-legislative scrutiny 25 February 2014 Para 89

*mental capacity, and the wishes of that person can be reasonably ascertained, the best-interests decision-maker shall make the decision that accords with those wishes”.*³¹

The Commission advises that the Committee considers;

- **whether clause 7 of the Bill could further reflect the UNCRPD by using the language of Article 12 and replacing ‘past and present wishes and feelings’ with the terms “will and preferences”**
- **the implications of the requirement that an intervener have “special regard to” a person’s past and present wishes and feelings and how an intervener can demonstrate that he/she has shown “special regard”.**

46. The Commission recalls that the Bill will provide a presumption of capacity in children aged 16 and 17 years of age. The UNCRC recognises that the capacity of a child is evolving, Article 5 states:

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

47. The UNCRC, at Article 3 states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall

³¹ Essex Autonomy Project ‘Achieving CRPD Compliance is the Mental Capacity Act Compatible with the UNCRPD? If not, what next? 22 September 2014 – see Executive Summary

conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

48. The UNCRC, at Article 12, States:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

49. The UNCRC Committee has provided guidance on the determination of a child's best interests by way of its General Comment on Article 3, which states:

*"the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child."*³²

50. In addition the General Comment states:

*"The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake."*³³

51. The Commission notes that in determining the best interests of a child specific considerations are required.

The Commission advises that the Code of Practice refer to the UN CRC and acknowledge that the capacities of a child are potentially still evolving. In addition the Code of

³² General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) General Comment/recommendation CRC/C/GC/14_ 29 May 2013 para 32

³³ Ibid para 44

Practice should acknowledge that under the UN CRC a child has a right to be heard.

52. The Commission advises that the presumption of capacity included within the Bill will not apply to under 16 year olds.³⁴ It is noted that a separate project considering the legal framework governing capacity in children under 16 was to be undertaken. However it is now understood that due to resources this project will no longer go ahead.³⁵
53. As outlined above the State has a specific obligation to ensure respect for the “evolving capacities” of children under the UN CRC, Article 5. As children get older, their capacity to take responsibility for decisions affecting their lives enhances. This concept is closely related to the concept of participation contained in the UN CRC, Article 12.

The Commission advises that the Committee itself recommends that the Departments develop a separate project within an expedited timeframe to consider a bespoke legal framework governing capacity within children under 16 years of age. The Commission advises that the compliance of the United Kingdom with the UN CRC will be formally examined by the UN CRC Committee in May 2016. The Commission advises that it will be raising this matter with the UN Committee and that it would be helpful if initial findings of this project were available at the time of the examination.

Clause 9 Protection from Liability

54. The ECHR requires states to refrain from violating the human rights of individuals. There is also a positive obligation to take measures to protect individuals from harm caused by private persons or entities.³⁶ A failure to take appropriate measures or to exercise due diligence to prevent such harm being caused by third parties, may amount to a violation of the rights of the individual.³⁷ The safeguards within the Bill are intended to prevent individuals from using the provisions of the Bill in a harmful way against others.
55. Clause 9 (c) of the Bill requires D to take reasonable steps to establish whether P lacks capacity in relation to a matter and

³⁴ Consultation document pg 38

³⁵ Second Stage Debate

³⁶ ECHR Article 1 - Young James and Webster v UK

³⁷ Osman v UK

clause 4 provides a number of indications of circumstances in which an individual will be considered unable to make a decision.

56. The Commission notes that the ECt.HR has stated that:

*"Article 6(1) of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable ... has direct access to a court to seek restoration of his or her legal capacity"*³⁸

57. Restricting an individual's control over a specific matter on the basis that they lack capacity may be considered to amount to a declaration of partial incapacity. The author of the declaration is the intervener. The Bill and consultation document does not make clear how an individual who has been the subject of a general intervention can seek to challenge this. Whilst the intervener may be liable in tort or criminal law it is not clear how an individual who has been or is being the subject of an intervention could in fact raise this matter with the police or through the courts.

58. The Commission notes that an intervener may be considered to be making a declaration that an individual is "*partially incapable*", in such circumstances an individual must have access to the courts to seek restoration of their capacity under ECHR, Article 6. The Commission notes an individual who intervenes in the life of another without complying with the safeguards within the Bill may be liable under tort or criminal law. However it is unclear how an intervener who intervenes without cause would be brought to account.

The Commission advises the Committee to ask the Department to clarify how it will ensure the liability either in tort or criminal law of an individual who negligently or malignly intervenes citing the legislation as justification.

Clause 12 Acts of restraint: condition that must be met

59. In its 2012 report into the Human Rights of Older People in Nursing Homes the Commission recommended a statutory definition of restraint be introduced to Northern Ireland. The Commission welcomes the inclusion of clause 12 and advises on potential amendments to further strengthen the safeguards offered by clause 12.

³⁸ ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012, para 245

60. The improper use of restraints has been found to fall within the ambit of Article 3 of the ECHR.³⁹ The ECHR, Article 3 states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

61. The European Court has, on occasion, found that excessive measures of restraint violate the prohibition on torture or inhuman and degrading treatment.⁴⁰ The use of physical, chemical or environmental restraints may, in principle, give rise to concerns regarding the right to liberty and security of the person enshrined in Article 5 of the ECHR. The ECtHR has defined a deprivation of liberty as the "*confinement in a particular restricted space for a not negligible length of time*" combined with the absence of valid consent of the individual in question.⁴¹

62. The Council of Europe Recommendation (2004)10 concerning the protection of the human rights and dignity of persons with a mental disorder at Article 27 sets out standards for the use of restraint and seclusion, which is supplemented by detailed guidance in the Explanatory Notes.⁴² Article 27(1) states:

"Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed."

63. The Recommendation requires restraint to be used in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed. The Commission notes that clause 12(3) sets out the conditions for restraint to occur. The Commission notes that clause 12(3)(a) states that "failure to do the relevant act would create a risk of harm to P". **The Commission advises that inserting the word 'imminent' to clause 12(3)(a) therefore requiring a "imminent risk of harm" would reflect Council of Europe Recommendation (2004)10.**

³⁹ Henaf v France (27 November 2003) 40 EHRR 990

⁴⁰ For example: Henaf v France (27 November 2003) 40 EHRR 990 (shackling to a bed amounted to degrading treatment) or Mouisel v France (14 November 2002) 38 EHRR 735 (handcuffing of ill prisoner in hospital amounting to degrading treatment).

⁴¹ Storck v Germany (16 June 2005) 43 EHRR 96, para 74. Henaf v France (27 November 2003) 40 EHRR 990.

⁴² Council of Europe Recommendation (2004)10, Concerning the Protection of the Human Rights and Dignity of persons with Mental Disorder

64. Building on Article 3 of the ECHR, the Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) was created under the Council of Europe's *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* to prevent ill treatment of people deprived of their liberty. The CPT carries out a programme of visits to the Member States that have ratified the Convention to assess the treatment of people deprived of their liberty.⁴³

65. The CPT's standards set out the following requirements:⁴⁴

- that restraint is subject to a clearly defined policy
- initial attempts of restraint should as far as possible be non-physical
- physical restraint should in principle be limited to manual control
- staff should receive training on the use of non-physical and manual restraint, and
- all instances of physical restraint should be recorded in a specific register and in the person's file.

66. The Commission notes that the circumstances in which a person who lacks capacity may be restrained are wide ranging. The use of restraint by members of professional bodies will be regulated by strict guidelines and members should have received appropriate training before restraining another. The Commission notes that the Department of Health Social Services and Public Safety has recently published revised Residential Care Home Minimum Standards which includes guidance on the use of restraint.⁴⁵

67. The Commission notes that clause 12 requires that the restraint is necessary to prevent harm to P and that it is

⁴³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2002) CPT Standards, CPT, Council of Europe, Strasbourg [Revised 2010], para 35 (available: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>).

⁴⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2002) CPT Standards, Council of Europe, Strasbourg [Revised 2010] (available: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>). See also: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (CPT) (2005) Standards of the CPT on the Use of Restraints, Strasbourg: Council of Europe, a working document which refers to the use of restraints in hospital, nursing home or social welfare institutions (available: <http://www.cpt.coe.int/en/working-documents/cpt-2005-24-eng.pdf>).

⁴⁵ DHSSPS News 'Health Minister Jim Wells today launched revised care standards for nursing homes.' 13 April 2015

proportionate both to the likelihood of harm and to its seriousness.

Given the broad range of circumstances in which restraint can be applied and the State's obligation to prevent breaches of an individual's right to freedom from torture, the Commission advises that the Committee seek an assurance from the Departments that the Code of Practice will place a requirement on individuals to comply with relevant regulations and guidance governing the use of restraint in the relevant setting.

Clause 16 – 23 Medical Treatment

68. The Commission acknowledges that clauses 16 – 23 have been developed to take account of the jurisprudence of the ECt.HR and the relevant Recommendations from the Council of Europe. Involuntary treatment amounts to an interference with the applicant's right to respect for his private life, protected by Article 8 of the ECHR.⁴⁶ With respect to forced treatment the ECt.HR has stated that:

*" (a) person's body concerns the most intimate aspect of private life. Thus, a compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right"*⁴⁷

69. The right to private and family life is a qualified right. Interferences with this right are permissible if they are in accordance with the domestic law, have aims that are legitimate under paragraph 2, of Article 8 and are necessary in a democratic society.

70. The Council of Europe Committee of Ministers Recommendation Rec (2004) 10 Article 12 states:

"[...], treatment may only be provided to a person with mental disorder with his or her consent if he or she has the capacity to give such consent, or, when the person does not have the capacity to consent, with the authorisation of a representative, authority, person or body provided for by law."

⁴⁶ Shopov v. Bulgaria (application no. 11373/04)

⁴⁷ Y.F. v Turkey, App. No. 24209/94, judgement 22 July 2003, (2004) 39 EHRR 34, para 33.

71. In the case of *Glass v UK* a hospital administered diamorphine to a severely mentally and physically disabled child against his mother's objections. The ECt.HR ruled that:

*"the decision of the authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8 of the Convention".*⁴⁸

72. The Commission notes that in circumstances where a nominated person reasonably objects to P receiving treatment with serious consequences, the authorisation of the HSC panel will be required, under Schedule 1 para 9. If a decision to authorise such treatment were to be made, P or his/her nominated person would be entitled to apply to the Review Tribunal to challenge the authorisation. **The Commission advises that this framework if applied appropriately will ensure compliance with the ECHR, Article 8.**

73. The international human rights standards relating to the provision of medical treatment without consent differ from those set down by the ECt.HR.

74. The UNCRPD Committee has stated:

*"As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention. States parties must, instead, respect the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations; must ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available; and must provide access to independent support."*⁴⁹

⁴⁸ CASE OF GLASS v. THE UNITED KINGDOM (Application no. 61827/00) JUDGMENT STRASBOURG 9 March 2004 para 83

⁴⁹ Footnote 7 para 42

75. This extract indicates that clauses of the Bill which allow for non-consensual medical treatment are contrary to Articles 12,15,16 and 17 of the UNCRPD. However as discussed above this does not reflect the standard set down by the ECt.HR.⁵⁰ **The Commission advises that this matter should be included within the post implementation review discussed at paragraph 23.**

Clause 24 Deprivation of Liberty

76. The Commission notes that safeguards relating to deprivation of liberty are provided at clause 24 and under clause 293 deprivation of liberty '*means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention*'. The Commission acknowledges that these clauses and schedule 1 have been drafted with regard to the jurisprudence of the ECt.HR and relevant recommendations from the Council of Europe.

77. Article 5 of the ECHR states:

*"1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]
(e) the lawful detention of [...] persons of unsound mind [...];"*

78. The ECt.HR will take into account a range of factors in determining if a series of circumstances amount to a deprivation of liberty, factors include the type, duration, effects and manner of implementation of the measure in question.⁵¹ In addition, the ECt.HR has found that:

*"A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question."*⁵²

79. The explanatory memorandum refers to the case of *HL v UK*, this case related to the detention of a patient who was presumed to be compliant with his continued detention, in this case the ECt.HR stated:

⁵⁰ Joint submission from the Equality and Human Rights Commission, the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 28 February 2014

⁵¹ *D.D v Lithuania* [2012] ECHR 254. para 145

⁵² *CASE OF STORCK v. GERMANY* (Application no. 61603/00) JUDGMENT STRASBOURG 16 June 2005

*"the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention".*⁵³

The Commission notes that the application of the ECHR, Article 5 in relation to deprivation of liberty in health and social care settings is a developing area of law.⁵⁴ The Commission notes that the Bill grounds the deprivation of liberty safeguards within the ECHR, by requiring any act which amounts to a deprivation of liberty under the ECHR to be authorised and meet the prevention of serious harm condition. The Commission advises that the definition of "deprivation of liberty" contained within clause 293 will ensure the legal framework develops in line with ECt.HR jurisprudence.

80. The ECHR, Article 5 requires that any deprivation of liberty of a person must be conducted *"in accordance with a procedure prescribed by law"*. Paragraph 5-1(e) reiterates this, clarifying that the deprivation of liberty of persons of unsound mind must still be "lawful". In the case of Van der Leer the ECt.HR stated that the key issue was:

*"whether the disputed detention was "lawful", including whether it complied with "a procedure prescribed by law". The Convention here refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness"*⁵⁵

81. The legal basis for any deprivation of liberty must be made clear. The Commission notes that under clause 25(1)(a) a deprivation of liberty is authorised if an authorisation has been

⁵³ 45508/99 (2004) ECHR 471 The judgement resulted in amendments to the Mental Capacity Act 2005 in England & Wales, known as the Deprivation of Liberty Safeguards (hereinafter 'DOLS'). The DOLS requires managers of care homes and hospitals to apply to a 'supervisory body' (now the local authority) for an authorisation of any suspected deprivation of liberty. In 2014 the aforementioned post-legislative scrutiny report by the House of Lords stated that "our evidence suggests that the Deprivation of Liberty Safeguards are frequently not used when they should be, leaving individuals without the safeguards Parliament intended" and found that the legislation was not fit for purpose. The Commission notes that the Departments have taken into account the HL judgement. Experience in England & Wales demonstrates that legislative provisions must be underpinned by robust implementation plans.

⁵⁴ Cheshire West and Chester Council v P (2011) EWCA Civ 1257

⁵⁵ App. No. 12/1988/156/210 paras 32 – 36 .

granted under Schedule 1. An individual subject to such an authorisation may apply to the Review Tribunal under clause 46.

82. In the *Gorshkov* case, the ECtHR emphasised that: “a key guarantee under Article 5 (4) is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion”, and that this provision therefore “requires, in the first place, an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention”.⁵⁶

83. The ECtHR has ruled that an individual subject to a deprivation of liberty safeguard must be entitled to take proceedings to challenge the lawfulness of their detention at reasonable intervals and to obtain a speedy judicial decision.⁵⁷ In its case law the ECtHR “has not looked favourably upon procedures which depend upon the exercise of discretion by a third party”.⁵⁸ The procedure for initiating a review must be “directly accessible to the applicant”.⁵⁹ The Commission notes that under clause 45, P is a qualifying person (cl.45(2)).

The Commission advises that this framework if applied appropriately will ensure compliance with the ECHR, Article 5.

84. Nonetheless the Commission advises that there is a distinction between the requirements of the ECHR and the UNCRPD with respect to deprivation of liberty, on the basis of the UNCRPD Committee’s General Comment.

85. The UNCRPD, Article 14 states:

“ 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

⁵⁶ ECtHR, *Gorshkov v. Ukraine*, No. 67531/01, 8 November 2005, paras. 44-45

⁵⁷ *Rakevich v. Russia*, No. 58973/00, 28 October 2003. paras 43-46

⁵⁸ *CASE OF M.H. v. THE UNITED KINGDOM* (Application no. 11577/06) JUDGMENT STRASBOURG 22 October 2013 para 92

⁵⁹ *Shtukaturov and Stanev* (both cited above, at § 124 and § 174 respectively)

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. "

86. Through its General Comment on Article 12 the Committee has elaborated that:

*"The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention."*⁶⁰

The Commission advises that clause 24 is incompatible with the UNCRPD, Article 12 on the basis of the Committee's interpretation. However as discussed above this does not reflect the standard set down by the ECt.HR. This matter should be included within the post implementation review discussed at paragraph 23.

Clauses 45 – 51

87. The Commission notes that the draft Bill does not propose significant amendments to the procedures of the Mental Health Review Tribunal.

88. The ECt.HR has held that any review of an individual's detention under Article 5(1)(e) must:

*"be wide enough to bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying such a detention may cease to exist "*⁶¹

⁶⁰ Footnote 7 para 40

⁶¹ CASE OF X v. THE UNITED KINGDOM (Application no. 7215/75) JUDGMENT, STRASBOURG 5 November 1981 Para 58

89. A review must provide sufficient procedural safeguards, reflecting the vulnerability of the applicant.⁶² The ECt.HR has held that:

"Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place"

90. The ECt.HR has further ruled that:

"it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation".⁶³

91. The Commission notes that the Mental Health Review Tribunal will be renamed the Review Tribunal and will receive additional powers relating to public protection orders. The Commission notes that legal aid is available for representation at the MHRT and that this is non-means tested.⁶⁴ Noting that the Review Tribunal will receive additional powers and is likely to experience an increase in applications following the introduction of the Bill, **the Commission advises the Committee to enquire what additional resources will be made available to ensure the continuance of full support including representation of appellants and to the Review Tribunal itself.**

Clause 84

92. The Commission notes the important role to be played by independent advocates in determining the best interests of an individual. The Commission notes that the Bill at clause 84 empowers the Department to make regulations relating to the functioning of independent advocates.

Noting the important role performed by independent advocates, the Commission advises that the Department should be required to make regulations

⁶² *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, para 22 Winterwerp, cited above, para 60

⁶³ *CASE OF M.H. v. THE UNITED KINGDOM* (Application no. 11577/06) JUDGMENT STRASBOURG 22 October 2013 para 77

⁶⁴ Regulation 5 of the Legal Advice and Assistance (Amendment) Regulations Northern Ireland 2012

about the functioning of advocates. Therefore instead of the use of the word “may” in the first line of clause 84(5) the word “must” should be inserted.

Clause 137 and 158 Place of Safety

93. The Commission notes that clause 137 will provide a power, exercisable by the police to remove a person from a public place to a place of safety in appropriate circumstances. The Commission notes that clause 158 includes “any police station” within the definition of place of safety.
94. The Commission notes that the detention of a person in police custody for a prolonged period when this is an unsuitable place for him or her may amount to a breach of the ECHR, Article 3.⁶⁵ The Commission advises that the UNCRC, Article 37(b), *inter alia* states: “*The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*”.
95. The Commission notes that the power to detain a person in a police station is circumscribed by clauses 141 and 142. The Commission considers that to ensure detention in a police cell is a measure of last resort it is important that arrangements for detention of persons within a hospital are appropriately developed and invested in.

Noting the potential for persons, including children, who lack capacity due to an impairment or disturbance in the functioning of the mind or brain to be detained in a police station, the Commission advises the Committee to enquire how facilities for the detention in a hospital of a person removed from a public place will be developed to ensure that detention in a police station is a measure of last resort.

Clauses 202 – 207 Unfitness to Plead

96. The Commission notes that under clause 202 a court must determine if a person is unfit to be tried. The ECt.HR has developed a substantial body of case law around this topic. The ECt.HR has made clear that the ECHR, Article 6:

*“guarantees the right of an accused to participate effectively in a criminal trial”.*⁶⁶

⁶⁵ *MS v United Kingdom*, (2012) 55 EHRR 23. Page 10, paragraph 38

⁶⁶ *Stanford v UK* 1994 para24

97. The ECt.HR elaborated on the essential elements of effective participation in the SC v UK, in which it stated:

“Effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.”⁶⁷

The Commission advises the Committee to enquire if the Departments will provide guidance to the courts on the definition of unfitness to plead.

Clause 255 children

98. The Commission notes that clause 255 amends the Mental Health Order to make provision for independent advocates for children and to require a person making certain decisions to have a child's best interests as their primary consideration. These measures will provide additional safeguards for children detained under the Mental Health Order. Noting the vulnerable position of children detained under the Mental Health Order **the Commission advises that the Departments commit to regularly publish reports on the number of children detained under the Order and report to the Assembly on how the operation of the additional measures provided in clause 255 are working in practice annually.**

Clause 256 offence of ill treatment or neglect

99. It is noted that clause 256 provides for a new offence of ill treatment or wilful neglect. The wording of clause 256 largely reflects section 44 of the Mental Capacity Act 2005.
100. The Commission notes that following a report by the National Advisory Committee on the Safety of Patients in England, the Westminster Parliament introduced an additional offence for an individual who has the care of another individual by virtue of

⁶⁷ App No 60958/00 10 November 2004 para 29

being a care worker to ill treat or wilfully neglect that person.⁶⁸ This offence was introduced as the Department of Health considered a lacuna existed in the law of England & Wales, the Department stated:

*"It is entirely possible that a situation could arise where two patients, one with full capacity and one without, are being subjected to the same type of conduct, by the same person with the same intent, but a prosecution for ill-treatment or wilful neglect could only be brought in respect of the patient without capacity. Clearly, this is a situation we would want to avoid."*⁶⁹

The Commission considers that the current legislative opportunity should be used to provide similar robust protection for persons in the care of others as possible. The Commission notes that incidents of abuse and neglect in health and social care settings are not uncommon.⁷⁰ The UN Human Rights Council Special Rapporteur on Freedom from Torture has emphasised the importance of addressing abuse in health and social care settings.⁷¹

The Commission advises that the Committee consider including a separate clause(s) providing a free standing offence for an individual who has the care of another individual by virtue of being a care worker to ill treat to wilfully neglect that person, modelled on the offence(s) contained within the Criminal Justice and Courts Act 2015.

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⁶⁸ Criminal Justice and Courts Act 2015 section

⁶⁹ See proposals in England & Wales by Department of Health 'New offence of ill-treatment or wilful neglect Consultation document' February 2014, para 15

⁷⁰ See NIHRC Report 'In Defence of Dignity' 2013

⁷¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez A/HRC/22/53 1 February 2013