# Response of the Equality and Human Rights Commission to the Select Committee Inquiry:

|  |  |
| --- | --- |
| Title: | The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards |
| Source of inquiry: | Joint Committee on Human Rights |
| Date: | March 2018 |

## For more information please contact

|  |  |
| --- | --- |
| Name of EHRC contact providing response and their office address: | |
| Naomi Lumsdaine  2nd Floor, Arndale House, The Arndale Centre, Manchester, M4 3AQ | |
| Telephone number: | 020 7832 7841 |
| Mobile number: | 07704 560 244 |
| Email address: | naomi.lumsdaine@equalityhumanrights.com |

## Executive summary

## The Equality and Human Rights Commission (‘the Commission’) considers that the Law Commission’s proposals for Liberty Protection Safeguards (LPS) would provide a better balance between the need to protect an individual’s human rights with the need for a more effective and less complex scheme than the existing Deprivation of Liberty Safeguards (DOLS). The Commission also welcomes the proposal to extend the protections of the LPS scheme to 16 and 17 year olds.

## However, the Commission notes the following issues of concern with respect to the LPS, the timing of potential implementation, and a statutory definition of ‘deprivation of liberty’:

## the LPS and associated amendments to the Mental Capacity Act 2005, do not adequately comply with the UN Convention on the Rights of Persons with Disabilities (CRPD) in relation to supported decision making, or the requirements of Article 8 European Convention on Human Rights (ECHR);

## the type of situation giving rise to a duty to refer a deprivation of liberty authorisation to an Approved Mental Capacity Practitioner for independent scrutiny should be extended to ensure this is an effective safeguard;

## it may be premature to replace DOLS with a new scheme when the Government intends to reform the Mental Health Act 1983. As an interim legislative measure, the DOLS could be extended to all settings, and the ‘best interests’ test amended to give primacy to the will and preferences of the individual;

## for any new scheme to succeed there must be a clear commitment to adequately resource it and comprehensive plans for its implementation, including training;

## a statutory definition of deprivation of liberty for care and treatment would lead to complexity and potential gaps in safeguards for people deprived of their liberty in terms of Article 5 ECHR, contrary to the purpose of the proposed reform.

## Introduction

1. The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence in response to the Joint Committee on Human Rights’ call for evidence on reform of the Deprivation of Liberty Safeguards. Reform of the DOLS provides an important opportunity to improve human rights protection and compliance with the UN Convention on the Rights of Persons with Disabilities (CRPD) in relation to decisions about care, treatment and accommodation arrangements for people who lack capacity.
2. The Commission’s statutory duties include promoting equality of opportunity, working towards the elimination of unlawful discrimination, promoting protection of and compliance with the European Convention on Human Rights. This remit is reflected in sections 8 and 9 of the Equality Act 2006. As a UN accredited National Human Rights Institution, the Commission is also required to promote and seek to ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party.
3. This response outlines the key human rights provisions relevant to a legal framework for authorising deprivations of liberty for people who lack capacity. It then sets out the Commission’s primary concerns about the human rights implications of the Law Commission’s recommendations for an LPS, and associated amendments to the Mental Capacity Act 2005.

## Key Legal Principles

## European Convention on Human Rights

1. The key right at issue under the European Convention on Human Rights (ECHR) in relation to deprivation of liberty is Article 5 (right to liberty). However, the care and treatment arrangements for people who lack capacity which may amount to a deprivation of liberty, also engage Article 8 (right to private life).

## *Article 5: Right to liberty*

1. When an individual is deprived of liberty in this context the key requirements of Article 5 ECHR may be summarised as follows:

* the deprivation must be in accordance with law. In other words there must be a clear procedure prescribed by law to authorise a deprivation of liberty so that a person can foresee when they will be deprived of their liberty;
* a person may be lawfully detained if they are of “unsound mind". Case law establishes that the meaning of “unsound mind” in Article 5 is not categorically defined but is continually evolving as research progresses, treatment develops and society's attitude to mental illness changes. However, there must be reliable medical evidence of a mental disorder which must be of a degree warranting detention and must be persisting at the time of the detention;[[1]](#footnote-1)
* the deprivation of liberty must be necessary and proportionate;[[2]](#footnote-2)
* the requirement that the mental disorder must be of a degree warranting detention includes that detention is only justified where other, less severe measures, have been considered and found to be insufficient;
* there must be a right to speedy determination of the lawfulness of the detention by a court and to compensation in the event of unlawful detention;
* there must be a procedure for regular review of the necessity for the detention.

*Article 8: Right to private and family life*

1. Article 8 ECHR protects the right to personal autonomy, dignity, physical and psychological integrity. Acts undertaken in relation to the care and treatment of a person who lacks capacity to consent will almost invariably interfere with these rights sufficiently to engage Article 8, even if the acts are considered to be in the individual’s best interests.
2. The right to family life protected by Article 8 is also engaged in relation to decisions about where a person should be accommodated. A proposed residential placement that is located far from a person’s family or personal support network may, for example, breach this right.
3. An act that engages Article 8 must be necessary and proportionate.**[[3]](#footnote-3)** To be proportionate, an act must satisfy the following principles:

## the objective of the act is sufficiently important to justify the limitation of a fundamental right;

## it is rationally connected to the objective;

## the act is no more than necessary to accomplish the objective. This includes consideration of whether a less intrusive measure could have been used; and

## having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[[4]](#footnote-4)

1. Cumulatively, restrictive care and treatment arrangements may amount to a deprivation of liberty under Article 5.

## *Article 3*

1. The most intrusive and risky forms of control and treatment used in care and treatment settings, such as use of physical restraint and medication without informed consent, may also breach Article 3 (prohibition against torture, inhuman or degrading treatment).

## UN Convention on the Rights of Persons with Disabilities (CRPD)

1. All rights under the ECHR should be interpreted, so far as possible, in compliance with other international human rights treaties that the United Kingdom has ratified. In this context the most relevant treaty is the UN Convention on the Rights of Persons with Disabilities, which the UK ratified in 2009.
2. The key provisions of the CRPD in relation to care and treatment arrangements for disabled people are Article 12 (equal recognition before the law) and Article 14 (liberty and security of person).

*Article 12: Equal recognition before the law*

1. Article 12 CRPD requires equal recognition before the law. The relevant portions of Article 12 provide:

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

*12.4 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 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*. (emphasis added)

1. The Committee’s guidance on Article 12[[5]](#footnote-5) explains that the Convention requires a shift from substituted decision making to supported decision making, and that supported decision making must be available to all. In this respect we note the UN Disability Committee has indicated that Article 12 of the Convention requires removal of best interests decision making, which is a form of substituted decision making, rather than promotion of the individual’s wishes within best interests decision making[[6]](#footnote-6).
2. The Committee sets out a detailed list of requirements for a supported decision making scheme to ensure compliance with Article 12 of the Convention and to guard against abuse.[[7]](#footnote-7)
3. The Committee’s Concluding Observations on UK compliance with the CRPD in 2017, noted their concern about “the prevalence of substituted decision-making in legislation… and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities”. The Committee recommended that the UK should, “abolish all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws.”[[8]](#footnote-8)

*Article 14: Liberty and security of the person*

1. Article 14 CRPD provides as follows:
2. *States Parties shall ensure that persons with disabilities, on an equal basis with others:*
   1. *Enjoy the right to liberty and security of person;*
   2. *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.*
3. *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.*
4. The United Nations Committee on the Rights of Persons with Disabilities ("the Committee") guidelines on Article 14 CRPD**[[9]](#footnote-9)** include the following principles:

* Article 14 is in essence a non-discrimination provision prohibiting deprivation of liberty on the grounds of disability;
* schemes which provide for deprivation of liberty on the grounds of actual or perceived impairment where there are other reasons for detention, including that the person is deemed dangerous to themselves or others, are incompatible with Article 14;
* deprivation of liberty of persons with disabilities on health care grounds is not permissible.

1. The Committee’s interpretation of Article 14 challenges conventional approaches to compulsory care and treatment including as enacted in the Mental Health Act 1983. The guidance follows the Committee’s comments on the right of disabled persons to enjoy legal capacity on an equal basis with others under Article 12 CRPD[[10]](#footnote-10). In particular the guidance states at paragraph 8:

*In its General Comment No. 1, the Committee has clarified that States* parties *should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without their consent or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.*

1. In many cases a mental disorder will also amount to a disability and it is difficult to see in such cases how the requirement in Article 5 ECHR of medical evidence of a mental disorder as a precondition of lawful deprivation of liberty can be reconciled with the Committee's guidance.
2. The Human Rights Act 1998 directly incorporated the ECHR into domestic law and it is unlawful for a public authority to violate ECHR rights.[[11]](#footnote-11) Given that compliance with Article 5 is required as a matter of domestic law we think this must be the starting point and therefore the requirement of medical evidence of mental disorder must be retained. Within that context, however, a replacement DOLS scheme should, so far as possible, promote the aims of Article 14 CRPD, which is binding on the UK as a matter of international law.

*Article 5: Equality and non-discrimination*

1. The CRPD requires the state to take all appropriate steps to provide ‘reasonable accommodations’ to promote equality and eliminate discrimination for disabled people.[[12]](#footnote-12) This is a similar requirement to the ‘reasonable adjustments’ duty under s.20 of the Equality Act 2010. The European Court on Human Rights has confirmed that Article 14 ECHR (non-discrimination in the enjoyment of ECHR rights) encompasses the ‘reasonable accommodations’ duty under the CRPD. **[[13]](#footnote-13)**

## Specific Issues

***Does the Law Commission’s proposals for Liberty Protection Safeguards strike the correct balance between adequate protection for human rights with the need for a scheme which is less bureaucratic and onerous than the Deprivation of Liberty Safeguards?***

1. The Commission acknowledges that there is an urgent need for an effective administration authorisation process to safeguard all individuals who are currently subject to unlawful deprivations of liberty and ensure compliance with Article 5 ECHR. At present, the Court of Protection is struggling to deal with large number of applications it receives, and in many cases where deprivations of liberty fall outside the DOLS scheme no authorisation is being sought.
2. The Law Commission’s recommendations for Liberty Protection Safeguards appear to constitute a less complex, onerous and more comprehensive alternative to the DOLS. The LPS contains new safeguards to protect human rights and constitutes a shift in approach towards a supported decision making model. However, the Commission is concerned that the LPS scheme is still not sufficiently compliant with the CRPD or Article 8 ECHR. If the LPS is introduced to replace the DOLS, an important opportunity will be lost to enhance respect for and protect the rights of people who lack capacity in England and Wales.
3. In terms of promoting human rights compliance, the following aspects of the LPS are particularly welcome.

‘*Necessary and proportionate’ test for authorising a DOL*

1. The proposal to replace the ‘best interests’ test for authorising a DOL with a ‘necessary and proportionate’ test better reflects the requirements of Article 5 ECHR. The Commission agrees with the Law Commission that this is also a more accurate reflection of the pragmatic considerations at play in DOL authorisation decisions, which should enhance its efficacy as a practical safeguard.

*Extension of the LPS to any setting in which people may be deprived of their liberty*

1. The State’s positive obligation under Article 5 ECHR requires relevant public authorities to take measures to protect vulnerable people who may be subject to a deprivation of liberty of whom they have or ought to have knowledge, including in a domestic setting.
2. The LPS proposals set out a system in which the location of the deprivation of liberty is irrelevant, so that the same authorising system applies everywhere, including respite care, children’s homes, residential special schools and private domestic settings. This will have obvious benefits in terms of avoiding the need for the Court of Protection to authorise deprivations of liberty in thousands of cases where people are residing outside of care homes and hospitals and the DOLS does not apply. Accompanying guidance should help to raise awareness of the diversity of contexts in which deprivations of liberty may occur and an authorisation with associated safeguards to comply with Art 5 is required.

*Extension of the LPS to 16 and 17 year olds*

1. In 2017, the Court of Appeal held that parents may consent to a confinement that would otherwise constitute a deprivation of liberty for a child of 16 or 17 years old who lacks capacity.[[14]](#footnote-14) The Commission considers that this gives rise to a discriminatory denial of Article 5 safeguards for disabled 16 and 17 year old children, since lack of capacity in relation to long term care and treatment decisions at that age will typically arise as a consequence of a disability. The Law Commission’s proposal to extend the LPS to 16 and 17 year olds is therefore welcome.
2. In light of the Court of Appeal decision, any new legislation will need to make it clear that parents cannot consent to living arrangements that would otherwise constitute deprivations of liberty in relation to 16 and 17 year olds. This would provide clarity with respect to the legal position.
3. Whilst the LPS therefore has significant advantages compared to the DOLS, the Commission notes the following issues of concern with the proposed scheme.

*Duty to refer cases to an Approved Mental Capacity Practitioner for independent scrutiny*

1. The duty to refer cases to an Approved Mental Capacity Practitioner (AMCP) for independent scrutiny only applies where it is ‘reasonable to believe’ that the person does not wish to reside at the relevant place or to receive the care or treatment there, or an assessor has determined that the arrangements are necessary and proportionate wholly or mainly by reference to the likelihood and seriousness of harm to other individuals. Where a person’s wishes cannot be ascertained, there is only a power to refer.
2. To ensure this safeguard is effective, the Commission considers that the duty to refer to an AMCP should be extended to cover cases where the wishes and preferences of the individual cannot be safely ascertained, whether as a consequence of disability or other factors, such as institutionalisation.
3. To enhance protections for fundamental human rights, the duty to refer might also be extended to include the following situations:
4. the restrictions on the person are particularly intense or intrusive even though the care regime is not obviously against their wishes. This would include but not be limited to cases where the care plan includes the use of physical or chemical restraint; or
5. the family object to the care and treatment, but not necessarily on the basis that the arrangements are contrary to the person’s wishes.

*Access to the court*

1. The Law Commission report states:

“We would expect the new Code of Practice to reinforce the duty of the advocate or appropriate person to bring a case to court *if there is reason to believe that this is what the person wishes*, whether or not the person has any chance of success...”

1. This approach relies heavily on the person being deprived of their liberty expressing a wish to bring proceedings. This is often not going to be a realistic expectation and the Commission considers that in the absence of automatic referrals to a court further thought should be given to the circumstances in which legal proceedings should be commenced.
2. In the case of *RD & Ors (Representatives and Advocates: Duties and Powers Practice Note),* [[15]](#footnote-15) the Court of Protection provided guidance for representatives and advocates on how to decide whether it is appropriate to apply to Court of Protection to challenge a DOLS authorisation on behalf of someone who is not expressing a wish to bring legal proceedings, and gave examples of behaviours and other factors that might indicate an objection to care arrangements. The Court noted that an advocate or representative can apply to the Court if they do not consider that the criteria for a deprivation of liberty are met, including that the authorisation is contrary to the person’s best interests, or could be as effectively achieved in a way that is less restrictive of their rights and freedom of action. A new deprivation of liberty protection scheme should reflect these principles.

*MHA overlap*

1. The LPS would permit the deprivation of liberty of a person with a learning disability in hospital for the purpose of receiving treatment for a mental disorder without the additional MHA 1983 requirements of there being abnormally aggressive or seriously irresponsible conduct. The Committee may wish to consider whether that is appropriate, and whether if it is, special rules should apply as regards the duration of authorisations, the mandatory use of Approved Mental Capacity Practitioners, and applications to the court, to afford additional protections.

*The proposals for monitoring and inspection*

1. The Law Commission’s draft bill includes a provision that is intended to enable the UK Government and Welsh Government to pass regulations to introduce “light-touch” forms of regulation, such as gathering information, interviewing people, surveys and reporting on ‘certain types of deprivation of liberty’.[[16]](#footnote-16) It is important that the new scheme provides for a regulatory framework which is consistent with the Optional Protocol to the Convention Against Torture (OPCAT). The United Kingdom ratified this protocol in December 2003, and it came into force in June 2006.
2. At a national level the protocol requires adequate systems to be in place to conduct inspection visits to places of detention. This would include monitoring in supported living, shared lives accommodation and in domestic settings where the people are deprived of their liberty. Whilst a proportionate and sensitive approach to inspection in domestic settings is required to respect the right to privacy and family life of the individuals who live there, we think this is appropriate given the positive obligation under Article 5 ECHR to take measures to protect people who are deprived of their liberty, often in highly vulnerable situations.

*Reasonable Accommodation*

1. In order to promote the aims of Article 14 CRPD so far as presently possible, we suggest an additional legal provision that steps by way of reasonable accommodation must have been considered, and if appropriate taken, so as to avoid the need for a deprivation of liberty or otherwise minimise the level of restrictions to which an individual is subject.
2. For example the provision of extra care support, assistive technology, or alternative accommodation may enable a lower level of restriction than a deprivation of liberty. So long as the proposed adjustment does not impose a disproportionate or undue burden there would be a requirement under our proposal to make the necessary adjustments to the individual’s care and treatment arrangements to avoid a deprivation of liberty and/or to reduce the level of restriction to which the individual is subject.
3. Reasonable steps to provide the least restrictive care and treatment regime should always be considered as part of good care planning. Reasonable accommodations may also be required to prevent a breach of the duty to make reasonable adjustments under ss.20 and 29 of the Equality Act 2010, and Article 14 ECHR in conjunction with the relevant Convention right(s) engaged. However, the Commission considers that the inclusion of an express provision concerning the duty to make reasonable accommodations would help to focus the decision maker on this requirement, to minimise the discriminatory effect of the deprivation of liberty.

*Best Interests decision making and Article 8 safeguards*

1. The LPS is integrally linked to the MCA, and the Law Commission has proposed some associated amendments to the MCA in relation to individual care and treatment decisions for people who lack capacity, to enhance compliance with Article 12 CRPD and Article 8 ECHR. The Commission does not consider that these reforms go as far as possible, and required, to meet the UK and Welsh Governments’ human rights obligations.
2. Supported Decision Making
3. The Law Commission proposes amending section 4 of the MCA to require ‘particular weight’ to be given in the ‘best interests’ decision to the wishes and preferences of the individual.[[17]](#footnote-17) Emphasising that a person’s wishes and feelings should be given ‘particular weight’ within the hierarchy of best interests decision making does not comply with the requirement under Article 12 CRPD to accord primacy to the will and preferences of the individual.
4. In order to give better effect to Article 12 CRPD, the Commission considers that a person’s wishes and preferences, where reasonably ascertainable, should be given effect in so far as practicable. Where a person’s wishes are not reasonably ascertainable or cannot practicably be given effect, a ‘best interests’ decision will need to be taken whilst still giving primacy to the person’s preferences and wishes as far as possible. (We outline our concerns in relation to ‘best interests’ decision making under the current provisions of the MCA, at paragraphs 48 to 56 below.)
5. This model aligns with the approach originally preferred by the Law Commission, that there should be an assumption that the person's wishes and feelings should be determinative of their best interests, although this assumption could be overridden where there were good reasons to do so. Such good reasons might include where the person’s wishes and feelings indicated a course which was irrational or wholly impracticable. This approach was supported by a majority of respondents to the Law Commission consultation.
6. Protection of Article 8 rights
7. Acts of care and treatment for people who lack capacity to consent to them almost invariably engage Article 8, since they will in some way restrict or interfere with an individual’s autonomy, physical or psychological integrity. Decisions in care plans that are contrary to a person’s ascertainable wishes or otherwise made without their valid consent, will need to be ‘necessary and proportionate’, in order to comply with Article 8, as set out at paragraph 8 above.
8. The Law Commission acknowledges the need for better protection for the Article 8 rights of people who lack capacity in the making of decisions about their care and treatment regardless of whether, cumulatively, such decisions amount to a deprivation of liberty.[[18]](#footnote-18) The final recommendations include proposals for new Article 8 safeguards for ‘best interests’ decision making intended to complement the LPS scheme. The Law Commission describes these safeguards as ‘integral to the overall approach that [they] set out in the Bill’.[[19]](#footnote-19)
9. The recommended proposal is an amendment to prevent professionals from being able to rely on the MCA s.5 defence[[20]](#footnote-20)against liability in respect of certain key decisions unless there is a contemporaneous written record confirming that they have complied with certain decision making requirements and safeguards (‘the s.5 safeguard’).[[21]](#footnote-21) If the proposed s.5 safeguard is triggered, the written record must include:
10. confirmation of the steps taken to assess capacity;
11. the steps that have been taken to help a person make the decision or an explanation as to why it was not practical to take such steps;
12. steps that have been taken to establish whether or not the act is in the person’s best interests;
13. a description of any ascertained wishes and feelings, and the reasons for departing from them if they conflict with the best interests decisions;
14. confirmation that any duty to provide an advocate has been complied with.
15. Whilst the requirement to record this information should provide an important safeguard in promoting compliance with the MCA, the Commission considers that this additional safeguard is deficient in two key respects.
16. Firstly, the Law Commission proposes a limited list of ‘serious acts’ to which this s.5 safeguard would apply.[[22]](#footnote-22) This list does not include acts which can cause serious infringements of Article 8 rights (and potentially Article 3), such as forms of restraint that may fall outside the definition of restraint in s.6 MCA. For example, ‘medical treatment’ is on the proposed list of ‘serious acts’, but chemical sedation for control rather than treatment purposes would not appear to fall into this category.[[23]](#footnote-23)
17. The Commission considers that all formal care and treatment decisions taken on the basis that the person lacks capacity should require such a written record, to enhance accountability and human rights compliance.
18. Secondly, this safeguard does not remedy the general deficiency of the MCA’s ‘best interests’ approach to decision making in terms of compliance with Article 8 (or Article 12 CRPD as noted above). Neither the ‘best interests’ factors in s.4 MCA, nor the duty to ‘have regard’ to less restrictive alternative measures (s.1(6) MCA) adequately reflect the requirements of ‘necessity and proportionality’ for the purposes of Article 8 in relation to care and treatment decisions made without consent.
19. The Commission suggest that a ‘necessary and proportionate’ test for all care and treatment decisions that are contrary to the ascertainable wishes and preferences of the individual, or where those wishes cannot be ascertained, should be explicit on the face of the MCA. This could be in addition to, or incorporated as a mandatory requirement into, the s.4 ‘best interests’ decision.
20. We refer the Committee to the Guiding Principles of the Assisted Decision-Making (Capacity) Act 2015 (Ireland), by way of an example of how principles of supported decision making[[24]](#footnote-24), and the requirements of ‘necessity and proportionality’ under Article 8[[25]](#footnote-25), have been incorporated into legislation in another jurisdiction.

***Should the Government proceed to implement the proposals for Liberty Protection Safeguards as a matter of urgency?***

1. The Commission notes the government’s proposals to introduce mental health law reform, in part to reduce the use of detention under the Mental Health Act 1983 (MHA). Accordingly, the proposals for MHA reform might lead to more people deprived of their liberty in community care settings, including their homes. Given the considerable interplay between the existing MHA and MCA (explored at Chapter 13 of the Law Commission report) the Commission considers that the replacement of DOLS would be best considered in conjunction with MHA reform, to ensure consistency of approach between (currently) the two regimes. This would also provide an opportunity for a fundamental rethink of how decisions about the care and treatment of people who lack capacity or have mental illness are approached, to enhance respect and protection for rights under the ECHR including, to the extent possible, the principles of the CRPD.
2. As the Law Commission recognises, by considering the legal framework for people that lack capacity in isolation from mental health law reform, their proposals for reform could not go as far as the recent Mental Capacity (Northern Ireland) Act 2016 (not yet in force), in promoting compliance with the CRPD with respect to mental health care and treatment.[[26]](#footnote-26)
3. The Commission suggests the Committee might consider an interim measure, such as legislation to amend to the MCA to:
   1. extend the DOLS to all settings*,* to cover people residing in placements or accommodation other than hospital and care home settings in which, post *Cheshire West[[27]](#footnote-27),* court authorisation is currently required for deprivations of liberty. This would help to relieve pressure on the Court of Protection and supervisory bodies; and
   2. reform s.4 MCA to enhance compliance with Article 12 CRPD and Article 8 ECHR, as outlined above.
4. Finally, the Commission also notes that before any new scheme can be introduced there must be a clear commitment to adequately resource it and comprehensive plans for its implementation, including training. This includes a commitment to maintain non-means tested legal aid for deprivation of liberty challenges. Without adequate resourcing and planning the new scheme will not work effectively.

**Should a definition of deprivation of liberty for care and treatment be debated by Parliament and set out in statute?**

1. The Commission agrees with the Law Commission’s analysis of the problems inherent in attempting to define a deprivation of liberty for care and treatment in statute.[[28]](#footnote-28) A deliberately narrower definition than the *Cheshire West* ‘acid test’could not bind the courts in their interpretation of the scope of Article 5. A statutory definition of deprivation of liberty for care and treatment would in any event be unable to accommodate evolving case law on Article 5. This would lead to complexity and potential gaps in safeguards for people deprived of their liberty, contrary to the purpose of the proposed reform.

1. Winterwerp v Netherlands (A/33) European Court of Human Rights, 24 October 1979 (1979-80) 2 E.H.R.R. 387 [↑](#footnote-ref-1)
2. Stanev v Bulgaria (36760/06) European Court of Human Rights (Grand Chamber), 17 January 2012 [↑](#footnote-ref-2)
3. Article 8(2) ECHR [↑](#footnote-ref-3)
4. *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para.20; *Huang v Secretary of State* [2007] 2 AC 167, para. 19. [↑](#footnote-ref-4)
5. Committee on the Rights of Persons with Disabilities General Comment No. 1 (2014) (‘CRPD GC1’) [↑](#footnote-ref-5)
6. CRPD GC1, para. 28 : " *States Parties obligation to replace substitute decision making regimes by supported decision making requires the abolition of substitute decision making regimes...the development of supported decision making systems in parallel with the maintenance of substitute decision making regimes is not sufficient to comply with Article 12 of the Convention.*" [↑](#footnote-ref-6)
7. CRPD GC1, para. 29 [↑](#footnote-ref-7)
8. Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, 3 October 2017, paras 30 -31 [↑](#footnote-ref-8)
9. Committee on the Rights of Persons with Disabilities Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities. Adopted during the Committee’s 14th session, held in September 2015. [↑](#footnote-ref-9)
10. Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) [↑](#footnote-ref-10)
11. Section 6(1) Human Rights Act 1998, subject to the exceptions in s.6(2) [↑](#footnote-ref-11)
12. Article 5(3) CRPD; ‘Reasonable accommodations’ is defined in Article 2 CRPD [↑](#footnote-ref-12)
13. Çam v Turkey 2016 (Application no. 51500/08), paras. 65 – 69. See also the comments of Lady Hale at paras. 45 to 46 in the judgment for *Cheshire West ibid: “45 …Far from disability entitling the state to deny such people [with disabilities] human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities. 46 Those rights include the right to physical liberty, which is guaranteed by art.5 of the European Convention…”* [↑](#footnote-ref-13)
14. At the time that the Law Commission published their recommendations, the legal position was that parents could not provide substitute consent to deprivations of liberty in relation to living arrangements for children aged 16 or 17 under s.20 of the Children’s Act 1989, *Birmingham CC v D* [2016] EWCOP 8. This was reversed by the Court of Appeal in October 2017, [2017] EWCA Civ 1695. [↑](#footnote-ref-14)
15. *RD & Ors (Representatives and Advocates: Duties and Powers Practice Note)* [2016] EWCOP 49, para. 86 [↑](#footnote-ref-15)
16. Law Commission Report (‘LC Report’), para. 12.93 [↑](#footnote-ref-16)
17. Draft Bill Cl. 8(4) [↑](#footnote-ref-17)
18. LC Report, Chapter 14, see eg. para 14.1 and 14.23 [↑](#footnote-ref-18)
19. LC Report, para.1.36 [↑](#footnote-ref-19)
20. Section 5 codified aspects of the common law defence of necessity which enabled care and treatment to be delivered to those who could not give valid consent: Re F [1991] UKHL 1, [1989] 2 WLR 1025 [↑](#footnote-ref-20)
21. Draft Bill, cl 9. [↑](#footnote-ref-21)
22. Draft Bill, cl 9(2), LC report para. 14.37. [↑](#footnote-ref-22)
23. For an alternative approach to a prescriptive list, see section 63 of the Mental Capacity (Northern Ireland) Act 2016. This defines a “serious intervention” which triggers safeguards, as any intervention which has serious consequences (physical or non-physical) for the person. [↑](#footnote-ref-23)
24. See section 7[, Assisted Decision-Making (Capacity) Act 2015 (Ireland)](http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/print) (ADMCA), in particular s.7)(b): (7) The intervener, in making an intervention in respect of a relevant person, shall— (b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable… [↑](#footnote-ref-24)
25. See s.5 ADMCA:

    (5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.

    (6) An intervention in respect of a relevant person shall—

    (a) be made in a manner that minimises—(i) the restriction of the relevant person’s rights, and (ii) the restriction of the relevant person’s freedom of action,

    (b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,

    (c) be proportionate to the significance and urgency of the matter the subject of the intervention, and

    (d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention. [↑](#footnote-ref-25)
26. LC Report, paras. 3.17 to 3.18 [↑](#footnote-ref-26)
27. P v Cheshire West and Chester Council; P and Q v Surrey County Council [2014] UKSC 19 [↑](#footnote-ref-27)
28. LC Report, para 5.37 [↑](#footnote-ref-28)