

Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

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Introduction

The Equality and Human Rights Commission's (the Commission) response to this consultation has been undertaken in our capacity as a National Human Rights Institution and in accordance with our statutory remit in respect of equality and human rights under the Equality Act 2006.

The Commission's statutory duties include promoting equality of opportunity, working towards the elimination of unlawful discrimination, and promoting awareness, understanding and protection of human rights.

The Commission is also responsible for monitoring the effectiveness of equality and human rights enactments and advising on the effectiveness

of enactments, as well as the likely effect of a proposed change in the law.

As a UN accredited National Human Rights Institution, the Commission is 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.

This response focuses on whether the proposals set out in the consultation paper comply with, and promote, rights under the European Convention on Human Rights (ECHR), the UN Convention on the Rights of Persons with Disabilities (UNCRPD), and the Optional Protocol to the Convention Against Torture (OPCAT), as well as promoting equality rights particularly for disabled people.

The Commission considers other consultees are likely to be better placed to respond in detail to some of the practical issues regarding implementation of the proposals and therefore does not respond to all the issues raised in the consultation paper.

Summary of the new scheme proposed in the consultation

The consultation proposes a wholly new scheme to replace the current Deprivation of Liberty Safeguards (DoLS). The proposed new scheme is called Protective Care.

The first level of Protective Care is called Supportive Care. It is intended to provide assessment and protection for people who may lack capacity in relation to their care and accommodation arrangements. Individuals in this category are not deprived of their liberty.

The Supportive Care scheme requires the responsible local authority to carry out an assessment (or ensure one has been carried out) to establish whether the individual lacks capacity in relation to their care and accommodation arrangements, and if they do, provide safeguards. These include keeping their care arrangements under review, appointing an advocate or appropriate person and considering whether a referral to the Restrictive Care and Treatment scheme is needed.

The second level of Protective care is called Restrictive Care and Treatment. It applies to individuals who lack capacity to consent to their care and treatment and whose care and treatment arrangements include restrictions. Eligibility criteria based on the level of restrictions are set out in detail in the proposals. They include but are wider than restrictions which would amount to a deprivation of liberty.

The Restrictive Care and Treatment scheme has a number of procedural requirements and safeguards including the appointment of an Approved Mental Capacity Professional who would have a similar role to the Approved Mental Health Professional under the Mental Health Act 1983. There would be a responsibility to carry out an assessment including considering whether the restrictions may amount to a deprivation of liberty. There would be a right to apply to a new First-tier Tribunal jurisdiction in relation to the scheme.

Separate schemes are proposed in relation to hospital settings for patients with physical disorders and for mental health patients.

The consultation paper also makes proposals for a new legal framework for supported decision making and to amend section 4 of the Mental Capacity Act 2005 to attach a level of primacy to the individual's wishes and preferences.

Areas of agreement

Subject to the particular issues identified below the Commission broadly welcomes and supports the proposals in the consultation. In particular that:

- The current Deprivation of Liberty Safeguards (DoLS) should be replaced with a wholly new scheme.
- There should be a broader scheme of Protective Care including the proposed initial stage of Supportive Care.
- The proposed Restrictive Care and Treatment scheme safeguards should apply to a wider group of people subject to restrictions than those deprived of their liberty.
- There should be a new First-tier Tribunal jurisdiction to provide a speedy remedy under the new scheme.
- There should be a new formal legal framework to promote supported decision making.
- Section 4 of the Mental Capacity Act 2005 be amended to attach a level of primacy to the individual's wishes and preferences.
- The safeguards should be extended to domestic settings.
- There should be procedures in place for inspection and monitoring of the new scheme compliant with obligations under OPCAT and that the existing regulators' remit be extended for this purpose.

The Commission will not repeat the detailed arguments set out in the consultation paper in favour of the above but notes in particular that the scheme:

- Is intended to be compliant with the ECHR and supportive of the principles in the UNCRPD.
- Promotes the protection of disabled individuals who may be subject to restrictions by extending the group of individuals to whom the new safeguards apply including those subject to restrictions on contact with family and friends.
- Provides an additional level of support to those individuals who will be subject to Supportive Care. This should also assist in ensuring that those who may need the further safeguards of the Restrictive Care and Treatment scheme are identified.
- Promotes the rights of disabled people to be supported to make their own decisions in line with the UNCRPD.
- Potentially promotes access to justice for this group of individuals including by automatic referral to the new First-tier Tribunal jurisdiction.

Specific issues

The proposals in relation to individuals deprived of their liberty under the Restrictive Care and Treatment scheme (Chapter 7)

Compliance with Article 5 ECHR and Article 14 UNCRPD

It is essential for those individuals subject to the Restrictive Care and Treatment scheme who are deprived of their liberty that this is in compliance with Article 5 ECHR both to comply with international law and to ensure such detention is lawful under the Human Rights Act 1998.¹

The United Kingdom ratified the UNCRPD in 2009 and although not incorporated into domestic law any new legislation that impacts on the rights of disabled people must comply with the UNCRPD so far as possible.

The consultation paper states that the proposals made are intended to be compliant with the ECHR whilst aiming to be supportive of the principles of the UNCRPD and creating an appropriate balance with the existing regime of the Mental Capacity Act.

¹ It is unlawful for a public authority to act in a way which is incompatible with a Convention right under section 6 of the Human Rights Act 1998.

Article 5 ECHR

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.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, and that the deprivation of liberty is necessary and proportionate.³
- 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.

Promoting compliance with Article 5 ECHR

1. In order to ensure compliance with Article 5 ECHR we consider it is important that the care plan should not only record that a deprivation of liberty has been authorised, but also whether it is considered that implementing the care plan does in fact cause a deprivation of liberty.

It may be this is the intention of the consultation proposal, however, at paragraph 7.167 it appears to be suggested that an authority to deprive a person of their liberty may be issued in circumstances where the care regime might amount to a

² Winterwerp v Netherlands (A/33) European Court of Human Rights, 24 October 1979 (1979-80) 2 E.H.R.R. 387

³ Stanev v Bulgaria (36760/06) European Court of Human Rights (Grand Chamber), 17 January 2012

deprivation of liberty and without determining the issue conclusively.

We understand the wish to avoid an overly legalistic approach, however, we think it is important that the scheme makes it sufficiently clear whether a person is being deprived of their liberty so that they can challenge this if they wish.

We also think that to authorise a deprivation of liberty without deciding whether the individual is being deprived of their liberty risks authorisations being given when it is not necessary to do so and therefore potentially unlawfully.

2. We also suggest the care plan should record on what grounds the deprivation is considered necessary and proportionate including that there is no less restrictive alternative available.

In this regard the consultation proposal would only require the Approved Mental Capacity Professional to certify in the care plan that the deprivation of liberty is in the person's 'best interests' (7.167).

The best interests requirement may be intended to incorporate the requirements that the deprivation of liberty be necessary and proportionate. However, we think that the decision maker should be directed expressly to those issues, including whether there is a less restrictive alternative, in order to ensure that these issues have been properly considered, and thereby compliance with Article 5 ECHR.

Article 14 UNCRPD

Article 14 UNCRPD: Liberty and security of the person, provides as follows:

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.*
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.

The United Nations Committee on the Rights of Persons with Disabilities ("the Committee") has recently published guidelines on Article 14 UNCRPD⁴. The guidelines include in summary the following points:

- 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.

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 UNCRPD⁵. 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."

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.

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.

⁴ 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.

⁵ Committee on the Rights of Persons with Disabilities General Comment No. 1 (2014)

Within that context, however, the new scheme should so far as possible promote the aims of Article 14 UNCRPD.

Promoting compliance with Article 14 UNCRPD

In order to promote the aims of Article 14 UNCRPD so far as presently possible (whilst recognising that our suggestion does not fully meet the Committee's concerns) we suggest an additional legal provision that steps by way of reasonable accommodation must have been considered, and if appropriate taken, so as to obviate the need for a deprivation of liberty or to minimise the level of restriction.

"Reasonable accommodation" is defined in Article 2 UNCRPD. It means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden on the service provider, so as to afford to a disabled person the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.

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.

We think that reasonable steps to provide the least restrictive care and treatment regime should always be considered as part of good care planning but that the inclusion of this suggested provision would be helpful to expressly direct the decision maker to these issues in circumstances where full compliance with Article 14 UNCRPD is unlikely to be possible.

Extension of the Restrictive Care and Treatment scheme to domestic settings

The Commission agrees with the proposal to extend the Restrictive Care and Treatment scheme to include supported living, shared lives

accommodation,⁶ and domestic settings when restrictive care and treatment is in place.

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.

The Commission's proposals in relation to considering reasonable accommodation, and whether less restrictive measures could be taken, would apply equally in the domestic setting. It may be, for example, that the provision of extra care support or assistive monitoring technology would reduce the level of restriction and/or the need for deprivation of liberty.

The proposed Hospital scheme (Chapter 8)

The Commission agrees with the proposal for having a separate tailored scheme for hospital patients when care and treatment is being provided for physical disorders.

The conditions proposed for authorising a deprivation of liberty in this context require only that the person lacks capacity to consent to the proposed care or treatment as a result of "*an impairment of or a disturbance in the functioning of the mind or brain*" (8.21). This does not appear to amount to a requirement that the person be suffering from a disability or disorder of the mind or brain warranting detention.

Whilst in some cases such impairment may amount to "unsound mind" for the purposes of Article 5, in some cases it may not. We think the test should be the same as for Restrictive Care and Treatment, that the person be suffering from "a disability or disorder of the mind or brain"⁷ warranting detention.

As the consultation paper recognises, it is important that the scheme clearly identifies the grounds on which it is considered necessary and proportionate to deprive an individual of their liberty. For the same reasons as explained above (at page 9) we think this should include express consideration of whether reasonable accommodation is required and whether there is a less restrictive alternative available.

⁶ Shared lives accommodation involves placement of people in family homes where they receive care and support from a shared lives carer and have the opportunity to be part of the carer's family and support networks.

⁷ See consultation paper at 7.188

The proposed Mental Health Act scheme (Chapter 10)

The Commission has no objection in principle to the proposals for a separate scheme for patients detained in a hospital setting who require mental health treatment, so long as such a scheme meets the requirements referred to above and does not result in discriminatory treatment of this class of individuals. The proposals appear, however, to be at an early stage and the Commission would welcome the opportunity to consider them further in due course and in the light of the findings of our inquiry into deaths of adults with mental health problems in detained settings (which included hospital settings).⁸

The proposed new First-tier Tribunal jurisdiction (Chapter 11)

The Commission considers the proposal for a new First-tier Tribunal jurisdiction to consider cases under the Restrictive Care and Treatment scheme has the potential to promote the rights of those affected. In particular it offers the opportunity to promote the participation of the individual by providing that the person subject to restrictions should normally attend the hearing. This would be similar to the First-tier Tribunal (Mental Health) (the "Mental Health Tribunal")⁹ and would provide a less formal setting than the Court of Protection.

The Commission supports the proposal for automatic referral of cases which should promote protection and access to court for individuals affected.

It would be important to ensure that non means tested legal aid is available, in a similar way as it is currently in the Mental Health Tribunal, in order to ensure adequate representation of the individual affected. The need for incapacitated individuals subject to deprivation of liberty to have adequate legal representation is well recognised. Non means tested legal aid is presently available for Mental Health Tribunal proceedings and for reviews by the court of authorisations under the current DoLs regime. This recognises the importance of guaranteed access to legal representation when liberty is at stake. It is considered that the same principles should apply under the proposed new jurisdiction for the same reasons.

⁸ <http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-assessments/preventing-deaths-detention-adults-mental-health-conditions>

⁹ In the Mental Health Tribunal a hearing may only proceed in the absence of the patient if the tribunal is satisfied that the patient has decided not to attend the hearing, or is unable to attend the hearing for reasons of ill-health, and a medical examination has been carried out or is impractical or unnecessary. Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, SI 2008 No 2699, r 39(2).

In addition to ensuring the availability of legal aid we think it will be important to ensure that the new jurisdiction is made as accessible as possible for disabled people and that support is available, in addition to formal legal representation, to give maximum effect to the right of disabled people to exercise their legal capacity as required by Article 12 of the UNCRPD.¹⁰

The proposals will also need to have regard to the requirement of Article 5 ECHR that there must be a right to compensation in the event of unlawful detention although this could potentially be achieved either by granting the First-tier Tribunal power to award compensation or by permitting such a claim to proceed by another route.

It is acknowledged in the consultation paper that the proposed new jurisdiction could create a difficult interface with the Court of Protection's jurisdiction (11.31) and it would be important that the details for the introduction of these proposals demonstrate that this interface will work in practice.

The proposal for a formal legal process for supported decision making (Chapter 12)

The Commission agrees in principle with the proposal for a formal legal process by which a person can appoint a supporter to assist them with decision making provided that adequate safeguards are in place.

This proposal is in line with and promotes the requirement set out in Article 12 of the UNCRPD to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Furthermore the UN Disability Committee has explained in its General Comment No. 1¹¹ that the Convention requires a shift from substituted decision making to supported decision making, and that supported decision making must be available to all.

The Committee sets out a detailed list of requirements of a scheme for supported decision making to ensure compliance with Article 12 of the convention and to guard against abuse. These include mechanisms to verify the identity and appointment of the supporter and to challenge

¹⁰ Article 12 UNCRPD includes provision that persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life. States are required to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity and to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.

¹¹ Committee on the Rights of Persons with Disabilities General Comment No. 1 (2014)

their action if it is believed they are not acting in accordance with the will and preferences of the person concerned.¹²

It is clear that such safeguards are necessary, just as they are in substituted decision making systems, to guard against abuse. In this respect the Commission agrees with the proposal that the Approved Mental Capacity Professional should be able to displace the supporter, if necessary, subject to a right of appeal.

The proposal to amend section 4 Mental Capacity Act 2005 in relation to the meaning of Best Interests (Chapter 12)

The Commission agrees with the proposal to amend section 4 Mental Capacity Act 2005 to provide a level of primacy to the individual's wishes and preferences.

In this respect we note the UN Disability Committee has indicated that Article 12 of the Convention requires removal of best interests decision making rather than promotion of the individual's wishes within best interests decision making¹³. The consultation paper states, however, that such a complete reconfiguration of decision making under the Mental Capacity Act 2005 is beyond the remit of the consultation.

The consultation paper considers approaches ranging from making the person's past and present wishes and feelings a primary consideration, to directing they be given effect to unless impractical.¹⁴ It favours an intermediate approach namely an assumption that the person's wishes and feelings are determinative as to their best interests, although this assumption could be overridden where there are good reasons to do so. Such good reason might include where the person's wishes and feelings indicate a course which is irrational or wholly impracticable.

We think that the approach that a person's wishes and preferences, where reasonably ascertainable, should be given effect to in so far as practicable, gives better effect to Article 12 UNCRPD by moving away from best interests decision making rather than merely promoting the

¹² UN Committee General Comment No1 at paragraph 29.

¹³ UN Committee General Comment No1 at paragraph 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.*"

¹⁴ A version of this second formulation is used in the Assisted Decision-making (Capacity) Bill 2013 in Ireland which requires that " *the intervener, in making an intervention in respect of a relevant person, shall..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.*" (Clause 8).

persons wishes and feelings within the hierarchy of best interests decision making.

The Commission suggests that further consideration be given to that approach whilst acknowledging that to move away from best interests decision making in this way raises many difficult and complex issues. For example there would need to be provision for cases where a person's wishes and preferences in relation to the relevant decision cannot be determined, or appear irrational, or contradictory, or are inconsistent over time.

The Commission provisionally proposes adopting the formulation that “*a person's wishes and preferences, where reasonably ascertainable, should be given effect to in so far as practicable*” as the primary rule but to provide that where this is not the case (i.e. the 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 persons preferences and wishes as far as possible.

The proposals for monitoring and inspection (Chapter 14)

As the consultation paper recognises 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. At national level the protocol requires adequate systems to be in place to conduct inspection visits to places of detention.

The Commission agrees with the proposal that the remit of the existing regulators, namely, the Care Quality Commission, Care and Social Services Inspectorate Wales and Healthcare Inspectorate Wales should be extended and that they be required to monitor and report on compliance with the Restrictive Care and Treatment scheme and the Hospital scheme.

This would include monitoring in supported living, shared lives accommodation and in domestic settings where the Restrictive Care and Treatment scheme applies. We think this is appropriate given the positive obligation under Article 5 ECHR, referred to above, to take measures to protect vulnerable people who may be subject to a deprivation of liberty.

Therefore, whilst it is acknowledged that there are proper concerns about privacy and to ensure respect for family life in this context, the Commission agrees with this approach. It will clearly be very important,

however, that the details of implementation of any inspection regime in the domestic setting are sensitive to privacy and family life issues and no more intrusive than necessary.

The proposals in relation to Inquests (Chapter 15)

The consultation paper proposes that the Coroners and Justice Act 2009¹⁵ should be amended to provide that inquests are only necessary into deaths of people subject to the Restrictive Care and Treatment scheme where the coroner is satisfied that they were deprived of their liberty at the time of their death and that there is a duty under Article 2 ECHR to investigate the circumstances of that individual's death.

Article 2 ECHR provides that everyone's right to life shall be protected by law. Case law has established that this includes a procedural obligation to ensure there is an effective investigation where there is evidence to suggest a possible breach of the State's obligation to protect the life of those in its direct care.¹⁶

This requirement is generally met by an Article 2 compliant inquest which includes consideration of the circumstances of the person's death and enables the jury to decide on the central facts and issues in the case rather than the more limited role of a conventional inquest which is limited to determining who the deceased was and how, when and where the deceased came by his or her death.

The Commission questions how and on what evidence the coroner would determine whether an Article 2 compliant investigation is required prior to deciding whether to hold an inquest. It would be important that relatives and any other interested party could have their views heard in this regard.

The Commission has some doubts whether this proposal would adequately protect Article 2 rights and how it would work in practice and would welcome the opportunity to consider these matters further should this proposal be taken forward. As part of our adult deaths inquiry, we set out a framework for Article 2 based on relevant case-law which we would be happy to share with the Law Commission.

Equality and Human Rights Commission

¹⁵ Proposal 15-6 refers to the Criminal Justice Act 2009 but it is assumed this is an error.

¹⁶ R. (on the application of Humberstone) v Legal Services Commission Court of Appeal (Civil Division), 21 December 2010. [2010] EWCA Civ 1479.