Mental Capacity (NI) Bill

Introduction

1. The Northern Ireland Human Rights Commission (NIHRC or Commission) pursuant to Section 69(3) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Department of Health, Social Services and Public Safety and to the Department of Justice on the consultation Mental Capacity Bill (hereinafter the “consultation document”).

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. Each of the international treaties is potentially relevant to the development of domestic laws and policies that seek to implement the State’s obligations towards people with capacity issues. In the context of this advice, the Commission relies in particular on,

- European Convention on Human Rights (ECHR), as incorporated into domestic law by the Human Rights Act 1998;
- The United Nations Convention on the Rights of the Child, 1989 (UNCRC);
- The United Nations Convention on the Rights of Disabled People, 2009 (UNCRPD);
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.” 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.”

4. 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

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”.

**General observations**

6. The Commission welcomes the opportunity to provide comments on the draft Mental Capacity Bill (NI). The draft Bill is intended as a progressive step towards realising the rights of persons with disabilities.

*The Commission advises that the draft provisions of the Bill provided in the consultation document are broadly compliant with the ECHR. However in this advice the Commission identifies a number of concerns which*
require refinement to safeguard against future challenges and to prevent abuse.

7. With respect to international human rights law, the principal instrument is the UNCRPD. This is the most recent human rights treaty, the interpretation of international human rights treaties is informed by the jurisprudence that develops over time. Jurisprudence relating to the UNCRPD is continuing to evolve. The Commission provides this advice based on the UNCRPD Committee’s interpretation of the UNCRPD.

8. The Commission has previously provided advice to both Departments on compliance with international human rights law and remains willing to consider requests for specific advice.

9. The Commission welcomes the commitment to include a statement of compatibility with both the ECHR and relevant international treaties, such as the UNCRPD.

The Commission advises the Departments to ensure that the Northern Ireland Assembly are provided all relevant legal analysis upon which each of these statements shall be based. This will ensure informed scrutiny by the legislature.

UNCRPD

10. 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”.

11. The UNCRPD 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.”

12. The characteristics identified are not defined, the description of disability included in the UNCRPD is therefore not exhaustive.

13. The Commission notes that due to the wide ranging nature of the Bill it is likely to have an impact on the enjoyment of all rights enshrined within the UNCRPD. The Article of the UNCRPD of central relevance to the draft 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.”

14. Further clarity as to the legal implications of the UNCRPD has been provided by way of the UNCRPD Committee’s General comment on Article 12. General comments are authoritative statements of expert members of the Committee setting out the Committee’s interpretation of the Convention which the Committee will refer to when examining a state’s compliance with its obligations under the UNCRPD.

15. In its General Comment 1 the UNCRPD Committee has emphasised that:

"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.”

16. The Committee has stated that State Parties have an obligation to replace substitute decision-making regimes with supported decision-making regimes. 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

1 UNCRPD Committee General comment No. 1 (2014) Article 12: Equal recognition before the law CRPD/C/GC/1
2 Ibid para 25
3 CRPD/C/AUT/CO/1 30 September 2013 para 28
opposed to being based on the person’s own will and preferences.”

17. In addition the General Comment states that:

“The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”

18. The Commission notes that the proposed Bill does not differentiate in law between persons with disabilities and persons without. However in its application it will impact on persons with disabilities more than those without, due to the greater propensity for persons with disabilities to have impaired decision making skills. As acknowledged in the consultation document the proposed Bill, whilst making extensive provision for supported decision making, continues to make provision for substitute decision making.

Whilst noting that the Bill contains aspects which are broadly in compliance with the UNCRPD by continuing to make provision for substitute decision making, on the basis of the Committee’s interpretation, the proposals are in breach of Article 12. Alongside the other UK Commissions the Commission raised concerns with the UNCRPD Committee regarding the lack of clarity provided by the then draft General Comment 1. In particular 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”. The finalised General Comment unfortunately did not address this matter. The Department’s proposals for recognition of capacity represent a substantial progress in developing greater adult capacity. The Commission acknowledges that supported decision making is an emerging area of law

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4 ibid para 27
5 ibid Para 21
6 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
and practice, which makes the task of the Departments in ensuring compliance complex.

Deprivation of Liberty

19. The Commission notes that the Bill makes provision for a person who lacks capacity to be deprived of his or her liberty.  

20. 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.

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."

21. 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."

The Commission advises that the draft deprivation of liberty clauses are incompatible with the UNCRPD, Article 12 on the basis of the Committee’s interpretation. (See advice at paragraph 16)
Compulsory Treatment

22. The Commission notes that the Bill makes provision for a person who lacks capacity to receive medical treatment without their consent.9

23. Numerous articles of the UNCRPD have implications for the provisions of the Bill relating to compulsory medical treatment. 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."10

The Commission advises that on the basis of General Comment 1 any provision for persons to receive non-consensual treatment is a breach of Articles 12,15,16 and 17 of the UNCRPD. (See advice at paragraph 16)

Examination of Compliance

24. It is likely that UK will be examined by the UNCRPD Committee in 2015. At this time the Committee will consider the UK Initial Report which details law and policy relating to persons with disabilities, including mental capacity and mental health law. The UK Report does not contain information relating to the changes to mental capacity and mental health law in Northern Ireland.

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9 Clause 18(1)
10 Footnote 7 para 42
25. The Commission notes that there have been extensive discussions in England & Wales regarding the compliance of the Mental Capacity Act 2005 with the UNCRPD.\textsuperscript{11}

The Commission advises that to fully inform the UNCRPD Committee prior to the examination the Northern Ireland Executive should develop a further submission to inform the Committee of the proposals within the draft Bill and to set out measures taken to meet compliance with the UNCRPD, Article 12. In addition as this is a developing area of law the Commission advises that the Departments undertake to carry out a systemic review the implementation of the Bill/Act commencing within 2 years of its enactment. This review should take account of developments in international human rights law and assess compliance in light of established practice.

**Provisions of the Bill: Legal Capacity**

26. The Commission notes that the Bill will introduce a rebuttable presumption of capacity in all persons over the age of 16.\textsuperscript{12} 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.\textsuperscript{13} 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.\textsuperscript{14}


\textsuperscript{12} Clause 5(3)

\textsuperscript{13} Clause 6(5)

\textsuperscript{14} Ibid
27. The ECHR does not directly refer to a right to legal capacity. However through its jurisprudence the European Court of Human Rights (ECht.HR) has identified that the regulation of legal capacity engages the right to private and family life.\(^\text{15}\) 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.”.

28. Restrictions or interventions are permissible provided they are in accordance with domestic law and are proportionate to a legitimate aim. The ECht.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 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.”\(^\text{16}\)

29. The Commission notes that at numerous clauses the Bill leaves matters to be determined by way of secondary legislation.

**The Commission advises the Departments to assure themselves that the legal framework governing legal capacity is drafted with sufficient precision to ensure legal certainty and to prevent arbitrariness.**

\(^{15}\) Shtukaturov v. Russia (application no. 44009/05). 27 March 2008

\(^{16}\) 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
30. The Committee of Ministers has issued Recommendations No. R (99) 4, which sets out principles concerning the legal protection of incapable adults.\(^{17}\)

31. Principle 3 of the recommendations recognises 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.” \(^{18}\)

32. The ECt.HR has relied upon the Recommendation in its jurisprudence. In the case of Shtukaturov the ECt.HR stated that the Recommendations express “a common European standard”.\(^{19}\) The Recommendations place an emphasis on the functional approach to capacity and place an obligation on the States to provide support to persons with fluctuating capacity.

33. The Recommendation and supporting jurisprudence of the ECt.HR do envisage circumstances in which despite the provision of adequate support a person will be unable to make a decision.\(^{20}\) 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." \(^{21}\)

34. Restrictions or interventions are permissible therefore 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

\(^{17}\) Adopted by the Committee of Ministers on 23 February 1999 at the 660
th meeting of the Ministers’ Deputies
\(^{18}\) Ibid
\(^{19}\) Shtukaturov v. Russia (application no. 44009/05) 27 March 2008 para 95
\(^{20}\) CASE OF SYKORA v. THE CZECH REPUBLIC (Application no. 23419/07) STRASBOURG 22 November 2012
\(^{21}\) Principle 22 – Consent
interference with the rights of the incapacitated person. In the case of Shtukaturov, the ECT.HR 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 ECT.HR in particular noted that the system did not provide for a “tailor made response”.

The Commission advises that the development of capacity laws with a decision/issue based focus is consistent with the jurisprudence of the ECT.HR and the Council of Europe Recommendation.

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.

36. The Commission notes that under clause 1 (3) of the Bill a person is not to be treated as unable to make a decision unless all practical help and support has been given. 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.

37. The Commission notes 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.

The Commission advises that any implementation plan for the Bill should make extensive provision for the training of persons who will routinely consider interventions, to include training on support mechanisms available and their application.

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22 Salontaji-Drobnjak v Serbia, 13 October 2009, para 144
23 Shtukaturov v. Russia (application no. 44009/05) 27 March 2008 para 95
24 Principle 3 – Maximum preservation of capacity Shtukaturov v. Russia See para 59
25 See Supported Decision Making: Evolution of an idea and Canadian experience Michael Bach Canadian Association for Community Living March 26, 2014
**Future Planning**

38. The Commission notes that the Bill makes provision for the recognition of advance decisions and for lasting powers of attorney.\(^\text{26}\)

39. The Commission notes that the Committee of Ministers of the Council of Europe has recommended:

"that governments of member states promote self
determination for capable adults by introducing legislation on
continuing powers of attorney and advance directives."\(^\text{27}\)

40. The Committee of Minister has identified a set of principles which continuing or lasting powers of attorney should reflect.

   The Commission advises that provision for recognition of advance decisions and for lasting powers of attorney are welcome. In addition the Commission advises that the proposals are broadly in compliance with the Committee of Ministers recommendations.

**General Safeguards**

41. The Commission notes that the Bill provides for a rebuttable presumption of capacity in all over 16 year olds. The draft Bill proposes to codify the common law “doctrine of necessity” which protects a person from liability when intervening in another person’s life. There are a number of safeguards in place which an individual must comply with to ensure that he or she can rely on the protections within the Bill. In everyday circumstances an intervener must comply with the general safeguards to access the protections within the Bill. The central safeguards are that an intervener must only act when he or she reasonably believes that P lacks capacity to consent to the intervention and that it is in P’s best interests. An intervener who fails to meet the safeguards may be liable under tort or criminal law.

42. The Commission notes that under the Bill individuals will be able to intervene in the lives of others, without having prior legal authority. The Commission notes the important safeguards included within the Bill.

\(^{26}\) Clause 10 and Clause 93
\(^{27}\) Principles concerning continuing powers of attorney and advance directives for incapacity Recommendation CM/Rec (2009) 11
43. International human rights law 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. 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. The safeguards within the Bill are intended to prevent individuals from using the provisions of the Bill in a harmful way against others.

44. The Departments will be aware of concerns which 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 2005 Act in 2014. 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."

The Commission advises that in line with their duties the Departments should consider what measures are required to ensure individuals do not use the provisions of the Bill in a harmful way against others.

45. The Commission notes that in circumstances in which an individual has not complied with the general safeguards he/she may be liable under the law of tort or criminal law. The Commission notes that this largely reflects the current position set down in common law. The consultation document does not contain details on the number of actions in tort or criminal prosecutions brought in circumstances in which an intervener has either inaccurately or dishonestly presumed another individual to lack capacity. Further

28 ICCPR, Article 2
31 Ibid para 102-3
information on the criminal penalties and actions in the law of tort should be publicised to ensure that interveners are aware of their potential liabilities should they negligently or dishonestly abuse the provisions of the Bill.

46. The Commission notes that the E Ct.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.”

47. 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.

The Commission advises the Departments to consider the robustness of the general safeguards and in particular to consider how an individual subject to an intervention could seek the assistance of the police or the court.

48. The Bill requires all interveners to act in what they reasonably believe to be the incapacitated person’s best interests. 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”.

49. 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

32 ECtHR, Stanev v. Bulgaria, No. 36760/06, 17 January 2012, para 245
33 Clause 6
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.”

50. 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 6(6)). In addition the Commission notes the role of a nominated person who must be consulted prior to a serious intervention.34 Permitting P to nominate his or her preferred nominated person is in accordance with Principle 9(2).

51. The Commission notes that evidence submitted to the House of Lords inquiry into the Mental Capacity Act 2005, identified that the continued reliance on the use of the best interests test permitted the continuing dominance of a paternalistic authoritarian model of care.35 As emphasised in the extract provided above the prevalence of such an attitude was a consequence of a failure to properly and fully implement the provisions of the 2005 Act.

Noting the experience in England & Wales, the Commission advises that any implementation plan for the Bill must make extensive provision for educating interveners on the identification of P’s best interests and on identification of individual’s past and present wishes. The explanatory memorandum and Code of Conduct to the Bill should set out how an intervener can identify an individual’s past and present wishes and provide clarity as to what weighting should be given to the individuals past and present wishes in determining his or her best interests.

34 Clauses 70 to 82
Serious Intervention: Deprivation of Liberty

52. 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 [...]”;”

Circumstances amounting to a Deprivation of Liberty

53. As acknowledged in the consultation document 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. 36 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.” 37

54. The consultation document 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:

“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”. 38

The Commission notes that any act which amounts to a deprivation of liberty must be authorised and meet the prevention of serious harm condition. The effective

36 D.D v Lithuania [2012] ECHR 254, para 145
37 CASE OF STORCK v. GERMANY (Application no. 61603/00) JUDGMENT STRASBOURG 16 June 2005
38 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.
application of the deprivation of liberty safeguards will ensure compliance with HL V UK.

**Requirements for a Deprivation of Liberty**

55. 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."

56. The legal basis for any deprivation of liberty must be made clear. The Commission notes that under clause 23(4) of the Bill an HSC panel may authorise the detention of P.

The Commission advises that the Departments ensure that the clauses of the Bill setting out the procedural requirements providing for an individual to be deprived of his or her liberty must be clear and accessible.

57. The ECT.HR has developed extensive jurisprudence on the conditions which must be in place to ensure a deprivation of liberty is in compliance with right to liberty and security. In Stanev v Bulgaria the ECT.HR stated:

"145. As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

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146. As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons.

58. In addition the E Ct. HR has held that there must be some relationship between the ground of permitted deprivation of liberty and the place and conditions of detention.

59. The jurisprudence of the E Ct. HR has been supplemented by Council of Europe Committee of Ministers Recommendation Rec (2004) 10, Article 17 of which states:

1. A person may be subject to involuntary placement only if all the following conditions are met:
   i. the person has a mental disorder;
   ii. the person’s condition represents a significant risk of serious harm to his or her health or to other persons;
   iii. the placement includes a therapeutic purpose;
   iv. no less restrictive means of providing appropriate care are available;
   v. the opinion of the person concerned has been taken into consideration.

60. The first requirement is that the reliable evidence demonstrates that the individual is of “unsound mind”. The E Ct. HR has held that “this term is not one that can be given a definitive interpretation”, but one “whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society’s attitude to mental illness changes”. The E Ct. HR has emphasised that the term will be given a “narrow interpretation”.

61. The Commission notes that under the draft Bill the term “unsound mind” or mental disorder is generally not used, in its place references to a lack of capacity have been included. The Commission notes that this is broadly considered a positive

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41 ECtHR, Stanev v. Bulgaria, No. 36760/06, 17 January 2012 para 145
42 Aerts v Belgium (61/1997/845/1051) 30 July 1998 para 42
43 Recommendation No. Rec (2004) 10 of the Committee of Ministers to member States on the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum (Adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers’ Deputies)
44 Winterwerp v the Netherlands (Application no. 6301/73) 24 October 1979 para 37
45 ibid
46 Ibid
development. However the Commission advises the Departments to assure themselves that the proposed reform is in compliance with the ECHR.

62. The second requirement is that the mental disorder must be a kind or degree warranting compulsory confinement, as identified in the above extract this condition is principally satisfied by showing a person represents a threat to himself or others. The Commission notes that a HSC panel may only authorise a deprivation of liberty in circumstances in which a failure to do would create a risk of serious harm to P or of serious physical harm to other persons. The Commission notes that this is consistent with the ECT.HR jurisprudence and with the Council of Europe Recommendation. The Commission notes that under Schedule 1, para 5 a medical report is required when making an application for a serious intervention. In developing a medical report the views of a nominated person must be taken and an independent advocate must be in place to ensure the views of the incapacitated person are taken into account.

The Commission advises that the requirement for the provision of a medical report and for its development is compliant with Rec 2004(10).

63. The third requirement is that the validity of continued confinement depends upon the persistence of such a disorder. The Commission notes that a deprivation of liberty authorisation must be renewed after 6 months. In addition a deprived person has a right to seek a review, analysed below.

The Commission advises that the procedure for renewal of an authorisation for deprivation of liberty is sufficiently robust to ensure compliance with the ECHR.

64. A further requirement identified by the ECT.HR is that there must be some relationship between the ground of permitted deprivation of liberty and the place and conditions of detention. The detention of a person under Article 5(1)(e) will only be lawful if effected in a hospital, clinic or other appropriate institution. The Commission notes that under clause 22(3) (a) a deprivation of liberty can only occur in a hospital or care home in which care or treatment is available.

47 Clause 23 (5)
48 Clauses 54 and 55
49 Winterwerp v the Netherlands (Application no. 6301/73) 24 October 1979 para 37
50 See Schedule 1 for details
51 Aerts v Belgium (61/1997/845/1051) 30 July 1998 para 46
The Commission advises that the requirement to deprive an individual of their liberty in a hospital or care home is in compliance with the ECHR and should be followed to ensure compliance.

65. The Commission notes that the overarching requirement set down in clause 8 to consider the past and present wishes of P is consistent with Article 17(v) of the Recommendations.

The Commission advises that the Departments give consideration as to how the wishes of an incapacitated person will be obtained with respect to their compulsory detention.

66. The Council of Europe Recommendations require that prior to a decision a medical report should be developed by a competent doctor who has had contact with the individual, those close to him/her and any representative of him/her. 52

67. The Commission notes that under Schedule 1, para 5 a medical report is required when making an application for a serious intervention. In developing a medical report the views of a nominated person must be in place and an independent advocate must be in place to ensure the views of the incapacitated person are taken into account. 53

The Commission advises that the requirement for the provision of a medical report and for its development are broadly compliant with Rec 2004(10).

68. 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 section 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 about the functioning of advocates and further detail on the regulations should be included in the Bill.

52 Article 20
53 Ss. 54 and 55
Right to Review

69. The ECHR, Article 5 states:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

70. 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".  

71. 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. In its case law the ECTHR “has not looked favourably upon procedures which depend upon the exercise of discretion by a third party”. The procedure for initiating a review must be "directly accessible to the applicant".  

72. The Commission notes that under clause 45, P is a qualifying person but that P may be deemed to lack capacity to make an application for review.

Noting the importance of the right to review being accessible to the person detained, the Commission advises that the Department specifically consider in what circumstances an individual would be considered incapable of deciding to exercise this right.

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

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

54 ECtHR, Gorshkov v. Ukraine, No. 67531/01, 8 November 2005, paras. 44-45
55 Rakevich v. Russia, No. 58973/00, 28 October 2003. paras 43-46
56 CASE OF M.H. v. THE UNITED KINGDOM (Application no. 11577/06) JUDGMENT STRASBOURG 22 October 2013 para 92
57 Shtukaturov and Stanev (both cited above, at § 124 and § 174 respectively)
“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.” 58

75. A review must provide sufficient procedural safeguards, reflecting the vulnerability of the applicant. 59 The ECt.HR has held

“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”

76. 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”. 60

The Commission advises that persons with capacity issues may require the provision of special assistance to enable them to effectively participate in the proceedings. The Commission further notes that legal aid for representation at Mental Health Review Tribunals will no longer be means tested. Noting that the access to justice review may make proposals relating to the scope of civil legal aid, the Commission advises the Departments to assure themselves that there will continue to be adequate provision for representation through legal aid and other representational services going forward. 61

77. The Commission notes that the duty of HSC trust to refer a case to Tribunal arises after the intervention has been applied for two years and no separate review has occurred.

58 CASE OF X v. THE UNITED KINGDOM (Application no. 7215/75) JUDGMENT, STRASBOURG 5 November 1981 Para 58
60 CASE OF M.H. v. THE UNITED KINGDOM (Application no. 11577/06) JUDGMENT STRASBOURG 22 October 2013 para 77
The Commission advises that to ensure the necessity of interventions is assessed at regular intervals this duty should arise annually.

78. The Commission notes that the draft Bill does not clarify the role of the independent advocate where an application for a review or a review hearing is undertaken. In addition the Bill does not set out any special arrangements which may be put in place to assist an applicant in light of their capacity issues.

The Commission advises the Departments to ensure there is adequate provision for representation of an applicant at the Review Tribunal to ensure compliance with the ECHR. In addition the Departments should consider whether the procedures of the Tribunal allow for the effective participation of an applicant in the hearing.

Serious Intervention: Involuntary Treatment

79. Involuntary treatment amounts to an interference with the applicant’s right to respect for his private life, protected by Article 8 of the ECHR. Article 8 of the ECHR 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 wellbeing 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.”

80. With respect to forced treatment the ECt.HR has stated:

"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"63

81. 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 and are necessary in a democratic society.

62 Shopov v. Bulgaria (application no. 11373/04)
82. In extreme circumstances involuntary treatment may amount to a breach of the right to freedom from torture or inhuman or degrading treatment. The ECHR, Article 3 states:

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

83. With respect to Article 3 the ECtHR has stated:

“The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation.”

84. With respect to autonomy the Council of Europe Convention on Human Rights and Biomedicine, Article 7 states:

“Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.”

85. The aforementioned 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.”

64 CASE OF HERCZEGFALVY v. AUSTRIA (Application no. 10533/83) JUDGMENT STRASBOURG 24 September 1992 para 82
86. 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". 66

87. 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. 67 If a decision to authorise such treatment were to be made, P or his/her nominated person could apply to the Review Tribunal. 68

Noting the case of Glass v UK the ECT.HR the Commission advises the Departments to assure themselves that the arrangement for the authorisation of treatment with serious consequences where a nominated person objects are sufficiently robust, in particular in emergency situations.

Ill treatment

88. It is noted that the draft Bill proposes to introduce a statutory definition of restraint and to introduce a new offence of ill treatment or wilful neglect. 69

89. The Commission notes that the Mental Capacity Act 2005 contains a statutory definition of restraint and the offence of ill treatment or wilful neglect. 70 The consultation document does not contain information on the experience of England & Wales. The Commission notes that the Department of Health in England & Wales is proposing to introduce a new general offence of ill-treatment or wilful neglect to apply in all health and social care settings. 71 The offence is being proposed as the Department considers a lacuna exists in the law, the consultation document states:

66 CASE OF GLASS v. THE UNITED KINGDOM (Application no. 61827/00) JUDGMENT STRASBOURG 9 March 2004 para 83
67 See Schedule 1
68 Ibid
69 (clause 133).
70 Mental Capacity Act 2005
"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."72

90. The Commission notes that the draft clause 133 largely reflects section 44 of the Mental Capacity Act 2005. The Commission considers that this provision is unduly limited in scope and will not protect under 16 year olds or over 16 year olds who have capacity. The Commission notes that incidents of abuse and neglect in health and social care settings are all too common.73 The UN Human Rights Council Special Rapporteur on Freedom from Torture has emphasised the importance of addressing abuse in health and social care settings.74

The NIHRC advises that a new offence of wilful or reckless neglect or mistreatment of any individual in a health and social care setting should be introduced to Northern Ireland. This offence should apply in all health and social care settings.

Children

91. The Commission notes that the presumption of capacity included within the Bill will not apply to under 16 year olds.75 It is noted that a separate project considering the legal framework governing capacity in children under 16 is to be undertaken. However an indicative timetable is not included within the consultation document and terms of reference have not yet been determined.

The Commission advises that a project plan with a clearly defined timetable for the separate project to consider a bespoke legal framework governing capacity within children under 16 years of age should be developed and made publicly available. The Commission further advises that a resolution of this issue should be identified as early as possible is recommended.

72 Ibid para 15
73 See NIHRC Report ‘In Defence of Dignity’ 2013
74 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
75 Consultation document pg 38
92. The consultation document states: “a small number of children who require detention in hospital for assessment/treatment of mental disorder” will be dealt with by way of the Mental Health Order. The consultation document does not record the number of children currently detained in a hospital for assessment/treatment of a mental disorder.

93. The Commission notes that it is proposed to include a number of additional safeguards in the Mental Health (NI) Order 1986. The proposed insertion of the best interests principle will provide an important safeguard. The Commission notes that the UNCRPD has acknowledged the continued relevance of the best interests principle when applied to a child with a disability. The UNCRPD Committee has stated:

"While article 12 of the Convention protects equality before the law for all persons, regardless of age, article 7 of the Convention recognizes the developing capacities of children and requires that "in all actions concerning children with disabilities, the best interests of the child ... be a primary consideration” (para. 2) and that “their views [be] given due weight in accordance with their age and maturity” (para. 3). To comply with article 12, States parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children."

94. The Commission notes the proposal to make amendments to the Mental Health Order.

The Commission advises the Departments to amend the Mental Health Order to ensure compliance with the best interests principle.

95. The Commission notes proposed amendments to ensure compliance with E Ct.HR judgement in the case of JT v UK 2000. The Commission further notes that the UK Government has submitted an action plan to the Committee of Ministers of the Council of Europe setting out plans for measures to ensure compliance with JT v UK. This action plan does not refer to the proposed arrangement for under 16s.

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76 Consultation document pg 39
77 Consultation document pg 40 JT v UK 26494/95 (2000) ECHR 133
The Commission advises the Departments to ensure that the Committee of Ministers are informed of the proposed arrangement for under 16s and the amendments that will be made to the Mental Health Order to ensure compliance with JT v UK.

96. 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. The obligations imposed on the State by virtue of the UNCRC therefore apply both to children who, under the draft Bill, will be presumed to have capacity, being 16 – 17 years of age and to children who are not presumed to have capacity. The Commission notes that the draft Bill will include certain additional safeguards for 16 or 17 year olds. In addition the consultation paper states: "It is envisaged that the Bill’s Explanatory Memorandum and the accompanying Code of Practice will recognise this category of persons and set out what additional protections the Bill is providing for them.".

The Commission advises that the Code of Practice should be appropriately drafted to ensure full compliance with the UNCRC.

97. 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 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."

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79 Age of Majority Act (Northern Ireland) 1969 section 1
80 Consultation document pg 39 – 41
81 Ibid
98. 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.

99. The Commission notes that the best interests principle is central to the proposed legal framework set out in the draft Bill.82 A substitute decision maker must determine what is in the best interests of the person who lacks capacity, P. With respect to children 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.” 83

100. 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." 84

101. The Commission notes that in determining an individual’s best interests an intervener must so far as practicable, encourage and help P to participate as fully as possible in the determination of what is in P’s best interests.85 In addition an intervener must ascertain P’s past and present wishes.

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82 Clause 6
83 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
84 Ibid para 44
85 Clause 6 (5)
The Commission advises that the Code of Practice should be informed by the UNCRC and should place specific emphasis on ensuring the participation of children in ascertaining their best interests.

Criminal Justice

Place of Safety

102. The Commission notes that is intended to retain a power, exercisable by the police to remove a person from a public place to a place of safety in appropriate circumstances. The Department intends to retain the current definition of “place of safety”, under Article 129 of the Mental Health (NI) Order 1986 which includes a police station. It is proposed that a police station would only be considered when “no other suitable place is available”. 86

The Commission advises that the use of a police station as a place of safety should occur only as a measure of last resort and the use of this provision should be monitored and figures published as to how often police stations are used for this purpose going forward.

Remand

103. The Commission notes that it is proposed that an individual could only be remanded for either in-patient treatment or examination when a court has independently decided that the individual should be held on remand. Under the ECHR, Article 5(1)(c) “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so”. A person may be detained under Article 5 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent authorities.

The Commission advises that to ensure compliance with international human rights law the continued detention of an individual awaiting trial must be on accepted grounds and should not be linked to the completion of treatment.

Sentencing

86 Consultation document
104. The Commission notes the proposal to extend the range of healthcare based treatment disposals available to a court on conviction of an individual. The UNCAT Committee following its latest examination of the UK recommended that the State Party

"strengthen its efforts and set concrete targets to reduce the high level of imprisonment and overcrowding in places of detention, in particular through the wider use of non-custodial measures as an alternative to imprisonment...".87

The Commission advises that courts should have available to them a range of diversionary disposals to ensure those convicted with a criminal offence, with mental health problems, receive appropriate treatment to address offending behaviour.

Unfitness to Plead

105. The Commission notes that a new definition of unfitness to plead is to be developed.88 The ECt.HR has developed a substantial body of case law around this topic.89 The E Ct.HR has made clear that the ECHR, Article 6:

"guarantees the right of an accused to participate effectively in a criminal trial".90

106. The E Ct.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.” 91

87 Committee Against Torture ‘Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) Para 30
88 Consultation document pg 57
89
90 Stanford v UK 1994 para24
91 App No 60958/00 10 November 2004 para 29
The Commission advises the Department to ensure a new definition of fitness for trial is compliant with international human rights law.

107. The Commission notes the proposal that provision be made to allow for a person deemed unfit for trial who retains capacity, remains ill, refuses treatment and is a serious risk to the public to be subject to a protection order. As identified in the consultation document the compatibility of such a measure with the ECHR would be dependent upon provision for a number of important safeguards. However in the absence of detail the Commission is unable to comment further at this time.

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92 Consultation document pg 60