Submission to the public consultation on *Deprivation of Liberty: Safeguard Proposals*

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Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Contents

1. Introduction

The Irish Human Rights and Equality Commission (the 'Commission') was established by the Irish Human Rights and Equality Commission Act 2014.[1] The Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, to encourage good practice in intercultural relations and to work towards the elimination of human rights abuses and discrimination.[2]

The Commission's functions include the examination of any legislative proposal and reporting its views on any implications for human rights and equality.[3] The Commission welcomes the publication of the Deprivation of Liberty: Safeguard Proposals Consultation Paper and the preliminary draft heads.

The preliminary draft heads propose to insert a new part, Part 13, into the Assisted Decision-Making (Capacity) Act 2015 (the '2015 Act').[4] The Irish Human Rights Commission (IHRC) has previously commented on the human rights and equality implications of the Assisted Decision Making Bill 2013 (the '2013 Bill') which became the 2015 Act.[5] The Commission has also previously commented on the Government's proposed approach to deprivation of liberty provisions in the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill,[6] which was published as the Disability (Miscellaneous Provisions) Bill 2016 and is

[1] The Irish Human Rights and Equality Commission Act 2014 merged the Irish Human Rights Commission (IHRC) and the Equality Authority into a single enhanced body.
[2] Section 10(1)(a)–(e) of the Irish Human Rights and Equality Commission Act 2014.
[3] Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.
[4] At the time of writing, the majority of the provisions in the 2015 Act had not yet been commenced.
[5] IHRC (2014) *Observations on the Assisted Decision-Making Bill,* available: https://www.ihrec.ie/documents/ihrc-obs-assisted-decision-making-bill-2013/.
[6] When the General Scheme was published it was indicated that text would be provided later by Department of Health on Head 3 (Deprivation of liberty) 'To provide legislative clarity with regard to who has statutory responsibility for a decision that a patient in a nursing home or similar residential care facility should not leave for health and safety reasons. Provide for an appeals process'. See: http://www.justice.ie/en/JELR/General-Scheme-of-the-Equality-Disability-(Miscellaneous-Provisions)-Bill-17-August-2016.pdf/Files/General-Scheme-of-the-Equality-Disability-(Miscellaneous-Provisions)-Bill-17-August-2016.pdf

currently awaiting Committee Stage in Dáil Éireann.[7] In this submission, the Commission will reemphasise previous observations with particular reference to the preliminary draft heads.

The Commission notes that in its Consultation Paper, the Department recognises that 'the development of legislative provisions relating to deprivation of liberty is a highly complex undertaking' and recognises the challenge of satisfying the requirements of the UN Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR) in that regard. . The Commission acknowledges this challenge and recalls the observations of the IHRC in its observations on the 2013 Bill that the proposals would 'not meet the standards of the CRPD'.[8] On the basis of its analysis of the preliminary draft heads, which will be set out in more detail below, the Commission is concerned that these proposals will also not meet the standards of the CRPD.

Bearing these challenges in mind, the Commission notes that the preliminary draft heads that have been published as part of this consultation exercise represent a first step in the development of legislative provisions relating to deprivation of liberty. The Commission notes that priority drafting has been approved for a stand-alone Bill to deal with the deprivation of liberty and looks forward to engaging further with the Department on that Bill as well as engaging with legislators once the Bill is presented to the Houses of the Oireachtas.[9] The Commission is also of the view that, once the legislation has been enacted and commenced, it will require close monitoring. The national monitoring mechanism to be established under Article 33 CRPD[10] and the National Preventative Mechanism to be established under the UN Convention Against Torture and other Cruel, Inhuman or

[7] IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill*, available: https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf.

[8] IHRC (2014) *Observations on the Assisted Decision-Making Bill,* para. 13.

[9] Finian McGrath TD, 'United Nations Convention on the Rights of Persons with Disabilities: Motion'*, Dáil debates,* 7 March 2018. The Commission notes that Finian McGrath TD previously indicated, in response to a parliamentary question, that the legislative provisions on deprivation of liberty would be included in the Disability (Miscellaneous Provisions) Bill 2016 at Committee Stage – see: Finian McGrath TD, Written answers, 21 November 2017, [48756/17].

[10] For further discussion of the establishment of the national monitoring mechanism see: IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill* November 2016, pp 16–26.

Degrading Treatment or Punishment (OPCAT),[11] once those instruments have been ratified,[12] will have a role to play in that regard.

Given the overlaps between the draft heads, many of the human rights and equality issues of concern are common to more than one head. Therefore, these observations have been structured thematically and reference will be made to the relevant heads throughout. The final section of this submission also provides a list of recommendations made in the paper under each draft head. Where relevant, the questions raised in the consultation paper will also be addressed throughout the submission. The topics addressed in this submission are:

- Context: the protection of the right to liberty,
- Proposed test in relation to deprivation of liberty,
- Safeguards, procedural and evidential issues,
- Review of deprivation of liberty,
- Chemical restraint and restraint practices.

The Commission is available to provide clarification on any of the matters raised in this submission and looks forward to further engagement with the Department as it develops a new Bill on the deprivation of liberty.

[11] For further discussion of the establishment of the national preventative mechanism see research commissioned by IHREC: Rachel Murray and Elina Steinerte (2017) *OPCAT: Ireland and the Optional Protocol to the UN Convention against Torture*, University of Bristol and Irish Human Rights and Equality Commission, available: www.ihrec.ie/app/uploads/2017/09/Ireland-and-the-Optional-Protocol-to-the-UN-Convention-against-Torture.pdf

[12] The Commission notes that the State has indicated its intention to ratify both the UNCRPD and OPCAT.

2. Context: The Protection of the Right to Liberty

Article 40.4.1 of Bunreacht na hÉireann, the Constitution of Ireland, provides that 'no citizen shall be deprived of his personal liberty save in accordance with law'. In *MX v Health Service Executive* the Court noted that the CRPD 'can form a helpful reference point for the identification of "prevailing ideas and concepts" ' and that 'judicial notice is to be taken of the decisions of the European Court of Human Rights and the principles contained therein'.[13] This also reflects the Department's position, as set out in the consultation paper. Bearing that in mind, this paper will refer to relevant standards in the CRPD and the ECHR. In its observations on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill, the Commission described the requirements of Article 14 CRPD and Article 5 ECHR.[14]

Article 14 CRPD protects the right to liberty and security of persons with disabilities. In its *Guidelines on Article 14 of the CRPD,* the UN Committee on the Rights of Persons with Disabilities has 'established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment'.[15] In its observations on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill, the Commission recalled that the *Roadmap to Ratification of the CRPD* signalled the possibility of submitting a declaration with regard to Article 14 CRPD upon ratification of the CRPD which would be comparable to declarations submitted by Australia and Norway.[16]

The right to liberty is linked to a number of other provisions in the CRPD. The UN Committee on the Rights of Persons with Disabilities emphasises the non-discriminatory nature of Article 14 CRPD and demonstrates the close interrelation between the right to liberty and the right to equality and non-discrimination set out in Article 5 UNCRPD.[17] The

[13] *MX v Health Service Executive* [2012] 3 IR 254, p 282.
[14] To avoid repetition, the Commission will not restate the requirements of Article 14 CRPD and Article 5 ECHR in detail. For previous analysis, see IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill*, pp 26–34.
[15] UN Committee on the Rights of Persons with Disabilities (CRPD) (2016) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities*, paras 6–9.
[16] To avoid repetition, the Commission will not restate the discussion of a declaration here: see, IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill*, pp 35–36. In that paper the Commission referenced UNCRPD (2013) *Concluding observations on the Initial report of Australia* CRPD/C/AUS/CO/1, at para. 34, which recommended, among other matters, that Australia 'review its laws that allow for the deprivation of liberty on the basis of disability'. The Commission understands Ireland will, on ratification, make declarations to Articles 12 and 14 CRPD and the wording of the proposed declaration is modelled on a hybrid of the Australian and Norwegian declaration.
[17] CRPD (2016) *Guidelines on Article 14 CRPD: The right to liberty and security of persons with disabilities,* para 5.

Committee also notes that the right to liberty 'is central to the implementation of article 19 on the right to live independently and be included in the community'.[18] In addition, guidance from the Committee on Article 12 CRPD also states that the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without the free and informed consent of the persons concerned or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty, in violation of Articles 12 and 14 CRPD.[19]

Article 5(1)(e) ECHR allows for the detention of persons 'of unsound mind' where such detention is in accordance with the law. The European Court of Human Rights jurisprudence has focused on setting appropriate standards and safeguards to be applied in order to ensure that such a law is adequately precise and foreseeable.[20] It is not sufficient simply to enshrine involuntary detention in statute: such legislation must comply with the principles set down by the ECHR.

[18] CRPD (2016) *Guidelines on Article 14 CRPD: The right to liberty and security of persons with disabilities*, para 9.
[19] CRPD (2014) *General Comment No. 1 Article 12: Equal Recognition before the Law*, para 40.
[20] For example, *Sunday Times v United Kingdom* (App. No. 6538/74) 26 April 1979, (1979) 2 EHRR 245, para 49. This is discussed in the context of mental health in Peter Bartlett (2012) 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' *The International Journal of Human Rights,* Volume 16, 2012 – Issue 6.

3. Proposed Test in Relation to Deprivation of Liberty (Heads 2–8 and Heads 11–12)

European and Irish jurisprudence has determined that deprivation of liberty includes both an objective and a subjective element.[21] Head 2(1) sets out the circumstances in which an individual may be deprived of his/her liberty where it is proposed that s/he should live in, or continue to reside in, a facility where s/he will be under continuous supervision and control and will not be free to leave and where there is 'reason to believe that the person lacks capacity to make a decision to live in the relevant facility'. This forms the basis of the test the deprivation of liberty throughout the preliminary draft heads. The draft heads also propose that an individual may only be deprived of his/her liberty on the basis of necessity either to protect an individual from significant harm or to prevent an imminent risk of significant harm to an individual's health or welfare or to another person.

3.1 Objective element of deprivation of liberty: under continuous supervision and control and not free to leave

The consultation paper poses the question as to whether the term 'under continuous supervision and control' should be defined. The explanatory notes to Head 1 state that although deprivation of liberty is not defined, it is 'captured in the definition of "admission" and "admission decision" as meaning entry to or residence in a relevant facility where the person will be under continuous supervision and control and will not be free to leave'.

In assessing whether an individual has been deprived of his or her liberty in *Guzzardi v. Italy,* the European Court of Human Rights has stated that:

> … the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case, such as

[21] For example, *Kane v Governor of Mountjoy Prison* [1988] IR 757. See also: *HL v United Kingdom,* Application no. 45508/99, 5 October 2004; *Storck v Germany,* Application no. 61603/00, 16 June 2005.

> the type, duration, effects and manner of implementation of the measure in question.[22]

Similar reasoning was applied in *SMcG v Child and Family Agency*, which related to the detention of children, where the Supreme Court stated:

> In considering whether or not the circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individuals concerned. One must have regard to a range of criteria, including the type, duration, effects and manner of implementation of the District Court order.[23]

Moreover, when faced with the question as to whether there could be an acid test for deprivation of liberty in *Cheshire West and Chester Council v P and another,* Lady Hale concluded that this is not possible and that 'it is right to say that the Guzzardi test is repeated in all the cases, irrespective of context'.[24] In light of jurisprudence and given that the term 'under continuous supervision and control' only comprises one part of the objective element of deprivation of liberty, the Commission is of the view that it would not be advisable to attempt to enshrine particular circumstances in statute. Therefore, the Commission is of the view that an assessment of the objective element of the test, i.e. the question as to whether an individual was under continuous supervision and control and was not free to leave, would depend on the factual matrix before the court.

The Commission does not agree that the term 'under continuous supervision and control' should be defined in this legislation.

3.2 Subjective element of deprivation of liberty: consent to confinement, including capacity to consent

Central to the subjective element of the test for deprivation of liberty is the question as to whether a person consented to their confinement.[25] An assessment of consent gives rise to

[22] *Guzzardi v. Italy*, Series A no. 39, 6 November 1980, para 92.
[23] *SMcG v Child and Family Agency* [2017] IESC 9.
[24] [2014] UKSC 19, paras 48–49.
[25] *DPP v Pringle, McCann and O'Shea*, Unreported, 22 May 1981, p 98–100.

issues such as voluntariness of consent, whether the consent was informed and whether the individual had capacity to consent.[26]

The Commission notes that consent is referred to only in Head 11 in the draft proposals and does not form part of the substantive procedures set out in Heads 3–8.[27] Head 3 proposes to put in place structures to 'ensure that concerns about an individual's capacity are identified as early in the process of planning for admission to a relevant facility as possible'.[28] Heads 4–6 set out the procedures for making an admission decision and a temporary admission decision in both routine and urgent circumstances, respectively. Heads 7–8 concern persons living in a relevant facility and covers issues such as fluctuating capacity, amongst other matters.

Where questions as to capacity to consent to confinement arise, Heads 3–8 envisage a set of procedures whereby an intervention may be made on behalf of an individual, i.e. the making of an admission decision for the purposes of routine admission under Heads 4 and 6 or the making of a temporary admission decision in urgent circumstances under Head 5. The Commission is concerned that Heads 3–8 focus on a lack of capacity rather than an inquiry as to consent. The UN Committee on the Rights of Persons with Disabilities has asserted 'the absolute ban on deprivation of liberty on the basis of actual or perceived impairment has strong links with article 12 of the Convention (equal recognition before the law'.[29] In its General Comment No. 1 on the Article 12, the Committee has stated:

> 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 the free and informed consent of the persons concerned 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[30]

[26] *Fitzpatrick v FK* [2007] 2 IR 7, pp 21–40.
[27] For example, Head 11(2)(a) provides that records may be kept by a healthcare professional who 'had reason to believe that a person lacked the capacity to make a decision to consent to admission'.
[28] Explanatory note 1 to draft Head 3.
[29] CRPD (2016) *Guidelines on Article 14 CRPD: The right to liberty and security of persons with disabilities*, para 8.
[30] CRPD (2014) *General Comment No. 1: Article 12: Equal Recognition before the law,* CRPD/C/GC/1, para 40.

As noted at the outset, Article 5(1)(e) ECHR provides for the detention of persons 'of unsound mind' where such detention is in accordance with the law. However, the focus of the European Court of Human Rights is not to prescribe what mental disorder may warrant compulsory confinement – instead the Court has focused on the appropriate standards and safeguards to be applied in order to ensure that such a law is adequately precise and foreseeable.[31] For example, in *Stanev v Bulgaria,* the European Court of Human Rights recognised that 'the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation'.[32]

The draft proposals are also silent as to the voluntariness of consent. According to the Department of Health's National Advisory Committee on Bioethics 'in practice voluntary detention may not always be genuinely voluntary'. In its submissions as *amicus curiae* in *PL v The Clinical Director of St Patrick's University Hospital,* the Commission submitted to the Court of Appeal that 'deference to clinical judgment must be qualified so as to acknowledge the institutional context'.[33] In that case, Mr Justice Hogan, citing the judgment of Mr Justice Hardiman in *North Western Health Board v HW* [34] with approval, noted that 'it must be recalled that voluntarism remains a cornerstone of our system of medical treatment'.[35]

The Commission is of the view that when considering whether a person requires to be admitted to a relevant facility, the test to be applied should be consent, which includes a consideration of whether an individual has capacity to consent as prescribed under the Assisted Decision-Making (Capacity) Act 2015.

[31] For example, *Sunday Times v United Kingdom* (App. No. 6538/74) 26 April 1979, (1979) 2 EHRR 245, para 49. This is discussed in the context of mental health in Peter Bartlett (2012) 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' *The International Journal of Human Rights,* Volume 16, 2012 – Issue 6.
[32] *Stanev v Bulgaria,* Application 36760/60, 17 January 2012, para 145.
[33] IHREC (2017) *Outline of submissions of the amicus curiae in PL v The Clinical Director of St Patrick's University Hospital,* para 35.
[34] [2001] IESC 90.
[35] *PL v The Clinical Director of St Patrick's University Hospital,* Court of Appeal, Approved judgment of Mr Justice Hogan, 14 February 2018, para 57.

3.3 Application of guiding principles to interventions under the 2015 Act

In its observations on the 2013 Bill, the IHRC welcomed the inclusion of the guiding principles in the 2015 Act.[36] The Commission is of the view that the guiding principles may act as a helpful tool before and during the making of an admission decision and a temporary admission decision.

Section 8 of the 2015 Act clearly establishes that the guiding principles must be applied by an intervener before and during an intervention.[37] Given that the general principles are referred to throughout the draft heads, it is worth noting some of the key aspects of the principles. Firstly, the guiding principles contain a presumption of capacity as a starting point.[38] This presumption is not adequately reflected in the draft heads, which refer to a lack of capacity throughout. Secondly, the principles require interventions to be made in a manner that minimises restriction of the relevant person's rights and must be 'proportionate' and 'limited in duration'.[39] Thirdly, section 8(7)(a) of the 2015 Act requires the intervener to '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'. In the case of an intervention in respect of a person who lacks capacity, the guiding principles state that an intervener must have regard to '(a) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and (b) the urgency of making the intervention prior to such recovery'.[40]

However, there appear to be some discrepancies in the preliminary draft heads as to whether the guiding principles set out in section 8 of the 2015 Act are to be applied to an intervention in its totality or to an assessment of capacity for the purposes of making an intervention. For example, Heads 3(1), 4(2), and 6(1)(a) seem to suggest that the guiding principles apply to the entire intervention. However, Heads 5(1)(b), 7(1)(a)(ii), 7(2), 7(4), 7(9), and 8(1) seem to suggest that the guiding principles should only apply to a capacity

[36] IHRC (2014) *Observations on the Assisted Decision-Making Bill*, para 137.
[37] An intervention is defined in section 2 of the Assisted Decision-Making (Capacity) Act 2015 as 'an action taken under this Act, orders made under this Act or directions given under this Act in respect of the relevant person by – (a) the court or High Court, (b) a decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative, (c) the Director, (d) a special visitor or general visitor, or (e) a healthcare professional'.
[38] Section 8(2) of the Assisted Decision-Making (Capacity) Act 2015.
[39] Sections 8(6)(a), (c) and (d) of the Assisted Decision-Making (Capacity) Act 2015.
[40] Section 8(9) of the Assisted Decision-Making (Capacity) Act 2015.

assessment. The Commission is concerned that the lack of clarity in the draft proposals could give rise to a misapplication of the guiding principles in the case of a deprivation of liberty intervention.

The Commission recommends that Heads 5(1)(b), 7(1)(a)(ii), 7(2), 7(4), 7(9), and 8(1) should be amended to ensure that the guiding principles set out in section 8 of the Assisted Decision-Making (Capacity) Act 2015 are to be applied to an intervention in its entirety rather than an assessment of capacity.

3.4 Assessment of capacity

Head 11(2)(a) provides that a healthcare professional may be required by regulations to keep records as to the process engaged in when forming a 'reasonable belief' as to an individual's lack of capacity and/or fluctuating capacity.[41] This implies that it is expected that the healthcare professional should apply a particular process. However, there is currently a lack of clarity in the preliminary draft heads as to what procedures are to be followed by healthcare professionals before asserting that s/he has a 'reasonable belief' that an individual lacks capacity. This uncertainty is compounded by the lack of clarity as to the application of the guiding principles outlined above.

Given the lack of clarity in the draft heads, it is assumed that either a common law or a statutory law assessment of capacity would apply. In *Fitzpatrick v FK* the High Court formulated six principles applicable to capacity assessments, which include a presumption of capacity as a starting point.[42] Section 3 of the 2015 Act provides that an individual's capacity is to be construed functionally and the provision contains a number of steps for carrying out that test.[43] Sections 36 and 37(1) of the 2015 Act also gives power to the Court to make declarations as to capacity. Where such a declaration has been made under section 37(1), the Court is obliged to set regular intervals at which the declaration is to be reviewed.[44] The

[41] The keeping of records will be discussed in more detail in section 4.3 (procedural issues: record keeping and regulations) below.
[42] [2007] 2 IR 7.
[43] Section 3 and the majority of the provisions in the 2015 Act have not yet been commenced.
[44] Section 49 of the Assisted Decision-Making (Capacity) Act 2015.

Commission notes that no real consideration has been given to capacity declarations under section 37(1) of the 2015 Act in the preliminary draft heads.

The Commission notes that the consultation document states that in line with the 2015 Act 'a person's capacity to decide to live in a relevant facility … is to be construed functionally'. However, the draft heads do not refer to section 3 of the 2015 Act, and therefore, this may give rise to uncertainty as to whether healthcare professionals are expected to construe capacity functionally or not. In its observations on the 2013 Bill, the IHRC noted 'the Bill is intended to move Irish law away from archaic and discriminatory approaches to mental capacity and towards an approach based on supporting a person's capacity set out in international human rights law'.[45] Commenting on the functional approach, the UN Committee on the Rights of Persons with Disabilities has stated:

> This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law[46]

The Commission recalls that section 8(7)(a) of the 2015 Act requires the intervener to give effect to an individual's past and present will and preferences. In cases where it is impracticable to determine a person's will and preferences, the UN Committee on the Rights of Persons with Disabilities has suggested that 'the standard of "best interpretation of the will and preferences" of the person' should be applied.[47] The Committee has also stated that 'States Parties must respect and support the legal capacity of persons with disabilities to make decisions at all times, including in emergency and crisis situations'.[48] The Commission notes that some provision has been made under Head 5 for enquires to be made as to the existence of decision-making support structures.

[45] IHRC (2014) *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, para 3.
[46] CRPD (2014) *General Comment No. 1: Article 12: Equal Recognition before the law,* CRPD/C/GC/1, para 15.
[47] CRPD (2016) *Guidelines on Article 14 CRPD: The right to liberty and security of persons with disabilities*, para 23.
[48] CRPD (2014) *General Comment No. 1: Article 12: Equal Recognition before the law,* CRPD/C/GC/1, para 22.

As mentioned above, the proposed standard to be applied by a healthcare professional in relation to a decision as to a lack of capacity is a 'reasonable belief'. The draft heads propose that this standard be applied in both routine and urgent circumstances. This approach differs from that applied under the Mental Health Act 2001, where the views of healthcare professionals are subject to a lower threshold in emergency circumstances. The UN Committee on the Rights of Persons with Disabilities has stated that States 'must respect and support the legal capacity of persons with disabilities to make decisions at all times, including in emergency and crisis situations'.[49] In *PL v The Clinical Director of St Patrick's University Hospital* the Court of Appeal considered the use of the phrase 'of opinion' in relation to the power to prevent voluntary patient from leaving approved centre and the use of the word 'satisfied' in relation to the power to detain voluntary patients under sections 23 and 24 of the Mental Health Act 2001, respectively.[50] The Court considered the terms could be differentiated by virtue of the fact that the broader term used in section 23 was designed to 'deal with short term exigency'.[51] In that case reference was also made to *State (Lynch) v Cooney* where the Supreme Court held that an opinion formed pursuant to the exercise of a statutory power must be 'held bona fide and be factually sustainable and not unreasonable'.[52] The Commission is of the view that if the guiding principles are to be applied in full, the Department should reconsider whether 'reasonable belief' is the most appropriate standard to be applied in the context of the preliminary draft heads.

Section 8(9)(a) of the 2015 Act also provides some guidance on fluctuating capacity which arises under Heads 7–8. In its observations on the 2013 Bill, the IHRC noted that the Bill did not fully reflect the principle that mental capacity can fluctuate and may need to be supported in different ways and to different degrees throughout a person's life.[53]

[49] CRPD (2014) *General Comment No. 1: Article 12: Equal Recognition before the law,* CRPD/C/GC/1, para 42.
[50] *PL v The Clinical Director of St Patrick's University Hospital,* Court of Appeal, Approved judgment of Mr Justice Hogan, 14 February 2018, para 35.
[51] *PL v The Clinical Director of St Patrick's University Hospital,* Court of Appeal, Approved judgment of Mr Justice Hogan, 14 February 2018, para 38.
[52] *State (Lynch) v. Cooney* [1982] IR 337.
[53] IHRC (2014) *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, para 15.

Recalling its recommendation that the guiding principles be applied to an intervention in its entirety,[54] the Commission recommends that Head 2(1)(c) be deleted and replaced with a provision that requires an investigation of whether an individual has consented to confinement, which includes a consideration of whether an individual has capacity to consent as prescribed under the Assisted Decision-Making (Capacity) Act 2015.[55]

3.5 Deprivation of liberty on the basis of necessity to prevent, or protect against, significant harm (Heads 4–6)

Heads 4–6 establish procedures for the admission of individuals to relevant facilities in both routine and urgent circumstances where a healthcare professional considers admission to be 'necessary'. Before considering the application of this necessity test, the Commission notes that the preliminary draft heads suggest that different factors be taken into consideration in routine admissions as compared to urgent circumstances. Head 5(1)(a) proposes two circumstances in which the necessity element of the three-prong test for the making of a temporary admission decision may be met, namely to either: (i) 'prevent an imminent risk of significant harm to the person's health or welfare' or (ii) 'to prevent an imminent risk of significant harm to another person'. Head 6(1)(a)(i) provides that an admission decision may be made for the purposes of routine admissions where 'such a decision is necessary in order to protect the relevant person from significant harm'. The Commission recalls that the guiding principles, set out in section 8 of the 2015 Act, requires interventions to be 'proportionate to the significance and urgency of the matter the subject of the intervention'.

As noted elsewhere, Article 5(1)(e) ECHR allows for the detention of persons 'of unsound mind', provided that such detention is in accordance with the law. The European Court of Human Rights has justified the deprivation of liberty of persons of unsound mind on the basis that an individual may pose a danger to public safety.[56] The Court has found that instances of detention were 'arbitrary' if they were undertaken with no formal authority, or

[54] This recommendation was made further to discussion of the application of the guiding principles to interventions under the 2015 Act in section 3.3 above.
[55] This recommendation will require subsequent amendments to Heads 3–8.
[56] *Hutchison Reid v the United Kingdom* (2003) 37 EHRR 211, para 52.

were not subject to judicial scrutiny.[57] Commenting on the notion of arbitrariness in *Saadi v United Kingdom,* the European Court of Human Rights stated:

> The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. ... The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty[58]

It has been argued that the proportionality test established by Article 5 ECHR may require a consideration of whether detention on the basis of disability amounts to arbitrary detention in the future in the context of developments in international human rights law, particularly the UNCRPD.[59]

The UN Committee on the Rights of Persons with Disabilities has stated:

> The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty[60]

[57] *Stanev v Bulgaria* [2012] 55 EHRR 22, para 145; *Shtukaturov v Russia* [2008] 54 EHRR 27, para 114.
[58] *Saadi v United Kingdom* Application 123229/03, 29 January 2008, para 70. See also: *James, Wells and Lee v United Kingdom*, Application No. 25119/09, 18 September 2012.
[59] See further: Eilionóir Flynn (2017) 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches', *International Journal of Mental Health and Capacity Law.*
[60] CRPD (2016) *Guidelines on Article 14 CRPD: The right to liberty and security of persons with disabilities*, para 13. See also CRPD (2017) *General comment No. 5 on living independently and being included in the community,* para 82: 'Involuntary institutionalization on the grounds of impairment or associated circumstances such as presumed "dangerousness" or other factors as elaborated by the Committee in its guidelines on article 14 is often caused or increased by a lack of disability-specific support services. Implementing article 19 thus will ultimately prevent violation of article 14'. This view has also been reiterated by UN Working Group on Arbitrary Detention (2015) *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, WGAD/CRP.1/2015, para 56.

4. Safeguards and Procedural and Evidential Issues Arising From Legislative Proposals (Heads 4–8 and Heads 11–12)

4.1 Last resort test (Heads 5–6)

In *Saadi v United Kingdom,* the European Court of Human Rights stated:

> The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained[61]

Similarly, the UN Human Rights Committee has also stated that deprivation of liberty:

> … must be applied only as a measure of last resort and for the shortest appropriate period of time and must be accompanied by adequate procedural and substantive safeguards established by law.[62]

The Commission notes that the guiding principles set out in section 8 of the 2015 Act include a proportionality test. The preliminary draft heads also enshrine an explicit last resort test into the admission decision procedure for the purposes of routine admissions. Under Head 6(1)(a)(ii) an admission decision may only be made where 'there is no other appropriate, practicable and less intrusive manner to protect the relevant person'. This test does not apply in the case of urgent admissions, as proposed by Head 5. Under Head 5(2)(b) a registered medical practitioner, or medical expert, may review whether the conditions for making a temporary admission decision had been met but is not required to consider whether any other course of action could have been taken in the circumstances.

[61] *Saadi v United Kingdom,* Application No. 123229/03, 29 January 2008, para 70.
[62] UN Human Rights Committee (2014) *General Comment No.35 – Article 9: Liberty and Security of person*, CCPR/C/GC/35, para 19.

The Commission recommends that Head 5(2)(b) should be amended to require a medical expert to apply the last resort test set out in Head 6(1)(a)(ii) when reviewing the validity of a temporary admission decision.

4.2 Persons living in a relevant facility who wish to leave (Head 7)

Head 7(1) proposes that where a person, who the healthcare professional believes to lack capacity, expresses a desire to leave a facility, he/she may be 'temporarily prevented' from doing so in urgent circumstances, as set out in Head 5(1). Head 7(3) then states that the healthcare professional 'shall not incur any liability' for temporarily preventing a person from leaving where the capacity of that person fluctuates. The Commission is concerned that this proposal would provide blanket immunity to healthcare professionals and would act as a barrier to an effective remedy for the individual concerned. The Commission notes that a similar provision in the Mental Treatment Act 1945 was declared unconstitutional.[63]

The Commission recommends that Head 7 should be revised to ensure access to effective remedies.

4.3 Procedural issues: record keeping and regulations (Heads 11–12)

The jurisprudence of the European Court of Human Rights has demonstrated that 'the requirement of procedural lawfulness is particularly important' when considering the lawfulness of a deprivation of liberty under Article 5(1)(e) ECHR.[64] There are some instances in the preliminary draft heads where the precise procedural steps are not entirely clear. For example, Head 5 proposes that a temporary admission decision will lapse after 25 days and allows for such a decision to be revoked where a registered medical practitioner or medical expert considers that the test has not been met. In those circumstances, it is unclear whether there is a positive obligation on the healthcare practitioner to inform the relevant person that s/he is free to leave the relevant facility. The Commission is concerned that a

[63] *Blehein v Minister for Health & Children* [2008] IESC 40.
[64] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (2014) *Jacobs, White and Ovey: The European Convention on Human Rights* (6th ed. OUP: Oxford), p 237.

lack of clear procedures, as required by the ECHR, may lead to the unlawful detention of an individual with no statutory basis for doing so.

The Commission notes that Heads 11–12 give the Minister the power to make regulations in relation to record keeping in a prescribed form. A number of circumstances in which records may be required to be kept are detailed in Head 11. For example, Head 11(2)(b)–(d) provides that a healthcare professional may be required to keep records as to the process engaged in when forming a 'reasonable belief' as to an individual's lack of capacity and/or fluctuating capacity. The Commission notes that the use of the word 'may' rather than 'shall' in Heads 11–12 does not ensure mandatory record keeping. The Commission is concerned that this may infringe on fair procedures, particularly where an individual may require access to records in the case of a review of deprivation of liberty. The Commission is of the view that record keeping would also be relevant for the purposes of proper regulation and notes that regulation has not been mentioned in the consultation document. The Department may wish to consider whether further legislative amendments are necessary in order to ensure an effective regulatory framework is in place once these legislative proposals become operational.

Head 12 also gives the Minister the power to make regulations in relation to notification procedures and in relation to restraint practices. The latter will be discussed in more detail below. However, the making of such regulations is discretionary. The Commission notes that there may be other circumstances in which the Minister may require the power to make regulations, such as in relation to notifying an individual that s/he is free to leave a relevant facility. In its observations on the 2013 Bill, the IHRC recommended that the guiding principles established by the 2015 Act apply to the Minister in the formulation of any regulations under the 2015 Act.[65]

The Commission recommends that Head 12 should be amended to provide that the Minister 'shall' make regulations outlining the procedures to be followed by healthcare professionals to ensure that a relevant person has been informed that s/he is free to leave a relevant facility.

[65] IHRC (2014) *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, para 170.

The Commission recommends that record keeping should be mandatory in all of the circumstances set out in Head 11 as well as any further circumstances in order to ensure that an individual has access to records where s/he applies to have their deprivation of liberty reviewed.

The Commission reiterates its recommendation that the guiding principles established by the Assisted Decision-Making (Capacity) Act 2015 should apply to the Minister in the formulation of any regulations under the draft proposals.

4.4 Medical evidence (Heads 5–6)

As already stated above, the CRPD underlines that deprivation of liberty cannot be solely based on an individual's disability. The requirement of the provision of objective medical evidence first arose in the European Court of Human Rights in *Winterwerp v The Netherlands.*[66] In *HL v UK,* the European Court of Human Rights established that appropriate procedures are required in relation to medical evidence in deprivation of liberty and legal capacity cases.[67]

The consultation paper poses two questions in relation to the role of medical professionals in the proposed deprivation of liberty safeguards. Firstly, the consultation paper asks: is the evidence of one medical expert sufficient? In Irish jurisprudence on mental health, medical evidence has been provided by a number of healthcare professionals, which is often reflective of the individual's medical records and experience with different services.[68] The Commission notes that the 2015 Act requires a statement by a registered medical practitioner and another healthcare professional in relation to co-decision agreements and enduring powers of attorney.[69] Section 103 of the Lunacy Regulation (Ireland) Act 1871 also requires two certificates signed by a legally qualified medical practitioner to attest to the

[66] *Winterwerp v The Netherlands,* Application No. 6301/73, 24 October 1979.
[67] *HL v UK,* Application No. 45508/99, 5 October 2004.
[68] *HSE v KW* [2015] IEHC 215; *HSE v JB* [2015] IEHC 216; *Han v President of the Circuit Court* [2008] IEHC 160.
[69] Sections 21(4)(f), 28(4)(c), 60, 68(7)(b) and 73(4)(c)–(d) of the Assisted Decision-Making (Capacity) Act 2015. At the time of writing these sections had not yet been commenced.

assertion that 'any person is of weak mind and temporarily incapable of managing his affairs'.[70]

Secondly, the consultation paper asks: should a health professional other than a registered medical practitioner be able to provide medical evidence? If so, what type of healthcare professional? The Commission notes the reference to a second healthcare professional in the 2015 Act has not yet been defined – the 2015 Act states 'such other healthcare professional of a class as shall be prescribed by regulations made under section 31'. At the time of writing, section 31 of the 2015 Act had not been commenced.

It should also be noted that registered medical practitioners are prohibited from making a recommendation for involuntary admission under the Mental Health Act 2001 in the following circumstances:

(a) if he or she has an interest in the payments (if any) to be made in respect of the care of the person in the approved centre concerned,
(b) if he or she is a member of the staff of the approved centre to which the person is to be admitted,
(c) if he or she is a spouse, a civil partner or a relative of the person, or
(d) if he or she is the applicant.[71]

The Commission is of the view that careful consideration must be given to the definition of medical expert in order to ensure that there is no imbalance of power between the categories of persons prescribed.

The Commission also notes that the Law Reform Commission has recently reviewed aspects of the law of evidence, including medical expert evidence, and the recommendations contained therein may be of wider relevance to the issues under consideration in the context of these legislative proposals.[72]

[70] The Lunacy Regulation (Ireland) Act 1871 has been repealed by sections 1(2), 7(2) and 56 of the Assisted Decision-Making (Capacity) Act 2015. At the time of writing repeal had not taken place due to the fact that by sections 7(2) and 56 of the Assisted Decision-Making (Capacity) Act 2015 have not yet been commenced.
[71] Section 10(3) of the Mental Health Act 2001, as amended by section 98(4) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, as commenced by S.I. No. 648 of 2010.
[72] Law Reform Commission (2016) *Report on consolidation and reform on aspects of the laws of evidence,* chapters 6–8.

The Commission recommends that the evidence of at least two medical experts should be required in deprivation of liberty cases.

The Commission recommends that consideration be given to the exclusion of medical experts from providing medical evidence in certain circumstances, such as those set out in section 10(3) of the Mental Health Act 2001.

5. Review of Deprivation of Liberty

Review of deprivation of liberty is a fundamental safeguard under the CRPD and the ECHR. The UN Committee on the Rights of Persons with Disabilities has stated 'persons with disabilities arbitrarily or unlawfully deprived of their liberty are entitled to have access to justice to review the lawfulness of their detention, and to obtain appropriate redress and reparation'.[73] Article 5(4) ECHR provides:

> [e]veryone 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.

Elaborating on the scope of Article 5(4) in *Stanev v Bulgaria,* the European Court of Human Rights stated that an individual must have access to a court and the opportunity to be heard, either in person or, where necessary, through some form of representation.[74]

The Commission is concerned that the system of review proposed in the preliminary draft heads may be limited in scope since an admission decision is only one of the ways in which a person can be deprived of his/her liberty. In this section, the Commission will set out its concerns in relation to Head 9 and outline proposals in relation to the scope of the right to review of deprivation of liberty.

The Commission has also previously stated that a right to review of deprivation of liberty must include the right of an appeal and the right to obtain appropriate redress and reparation.[75]

[73] CRPD (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities*, at 24. The UN Working Group on Arbitrary Detention also reports (2015) in *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court* that the right to challenge the lawfulness of detention is a self-standing right, the absence of which constitutes a human rights violation, and further noted that 'the State is under an obligation to guarantee the effective exercise of this non-derogable right'.
[74] *Stanev v Bulgaria,* Application no. 36760/06, 17 January 2012, para 171.
[75] IHREC (2017) *Ireland and the Convention against Torture*, p 50.

Recalling Article 13 CRPD,[76] the Commission recommends legal aid provisions under section 52 of the Assisted Decision-Making (Capacity) Act 2015 should be extended to deprivation of liberty reviews and individuals should be supported to have their voice heard during court proceedings.

5.1 Proposed approach set out in Head 9

Head 9 proposes to link reviews of admission decisions to reviews of declarations as to capacity. Declarations as to capacity may be made by a court in accordance with section 37(1) of the 2015 Act which then triggers the court to specify intervals at which such a declaration will be reviewed in accordance with section 49(1) of the 2015 Act. Given that admission decisions may only be declared lawful or unlawful in accordance with section 37(3) of the 2015 Act,[77] a discrepancy arises in the proposed approach. As Head 9(1) relates to reviews of declarations of capacity under sections 37(1) and 49(1) of the 2015 Act, the draft proposals do not seem to provide an adequate opportunity for a court to specify intervals at which it may review an admission decision. It may be the case that this discrepancy is simply a drafting error. The Department may have intended to refer to section 37(3) where reference has been made to section 37(1), in order to ensure that admission decisions would be subject to regular review by a court, similar to what is already provided for in the 2015 Act.

Regular review of an individual's deprivation of liberty is a necessary safeguard. While the Supreme Court held in *Croke v. Smith (No 2)*[78] that Article 40.4.1 of the Constitution did not require automatic review by an independent tribunal of the patient's detention, the European Court of Human Rights has deemed regular reviews necessary under Article 5 ECHR.[79] The Mental Health Act 2001 provides for reviews of admission and renewal orders,

[76] Article 13(1) CRPD states: 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.
[77] Section 37(3) allows a court to make a declaration as to the lawfulness of an intervention. An intervention is defined in section 2 of the 2015 Act as 'an action taken, order made or direction given under the Act'.
[78] *Croke v. Smith (No 2)* [1998] 1 IR 101.
[79] *X v. United Kingdom* [1981] 4 EHRR 350.

to a certain extent, by independent mental health tribunals.[80] The Commission notes that litigation on the review system under the Mental Health Act 2001 is currently ongoing.[81]

The preliminary draft heads give rise to situations in which an individual may be deprived of his/her liberty apart from in situations where an admission decision has been made. For example, Head 5 provides for temporary admission decisions to be made by a healthcare professional in urgent circumstances. Head 5 provides that a temporary admission decision must be reviewed by a medical practitioner no later than 3 days after the making of the decision. The Commission notes that section 23 of the Mental Health Act 2001 provides for detention for a period not exceeding 24 hours.[82] Where a medical practitioner affirms the temporary admission decision, the decision will remain valid for 25 days. While Head 5 provides for opportunities for representations to be made to court, the Commission is concerned that sufficient safeguards have not been put in place to ensure that an individual who is being detained under Head 5, has an effective opportunity to have their deprivation of liberty reviewed.

In *MH v UK*, a case that dealt with the issue of the detention 'as an emergency measure' of a person who lacked capacity, the European Court of Human Rights stated:

> an initial period of detention may be authorised by an administrative authority as an emergency measure provided that it is of short duration and the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure …[83]

The period of detention as an emergency measure extended to 27 days in this case. The Court found that the right of a person to apply for discharge within the first fourteen days of the detention period would have met the requirements of Article 5(4) ECHR, noting '[t]he

[80] Department of Health (1995) *White Paper: A New Mental Health Act*, see chapter 5.
[81] *TR v The Clinical Director of St Loman's Hospital and others*, Court of Appeal Record No. 2017/343.
[82] The scope of the section 23 detention power was considered in: *PL v The Clinical Director of St. Patrick's University Hospital* [2018] IECA 29, paras 36–48.
[83] *MH v UK*, Application no. 11577/06, 22 October 2013, para 77.

difficulty in the present case, however, is that this remedy was not available in practice to the applicant because she lacked legal capacity'.[84]

The draft heads do not provide for a right to apply for a review of a temporary admission decision, which amounts to deprivation of liberty in emergency circumstances. It is suggested that deprivation of liberty on account of a temporary admission decision is analogous to the situation in *MH v UK*, and may therefore, fall short of the requirements of Article 5(4) ECHR.

The Commission recommends that in instances where a court has declared an admission decision lawful under section 37(3) of the 2015 Act, the court should then be obliged to specify the intervals at which such an intervention ought to be reviewed.

The Commission recommends that the draft proposals should be revised to provide for regular review of a temporary admission decision, in like manner with the procedures envisaged for a review of an admission decision.

5.2 Scope of Right to Review of Deprivation of Liberty

In *MH v UK* the European Court of Human Rights stated that a person detained for an indefinite or lengthy period is entitled to take legal proceedings 'at reasonable intervals' to challenge his/her detention.[85] International standards have also recognised that 'an involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law'.[86]

As noted above, Head 9 only proposes to review admission decisions. The Commission is concerned that this may be restrictive and will not allow for all instances of deprivation of liberty to be reviewed. For example, the Commission has previously acknowledged that restrictive care and treatment can occur both in community-based or in home-care as well

[84] *MH v UK*, Application no. 11577/06, 22 October 2013, para 77.
[85] *MH v UK*, Application no. 11577/06, 22 October 2013, para 77.
[86] United Nations (1991) *The UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, Principle 17, paragraph 4, adopted by General Assembly resolution 46/119 of 17 December 1991.

as in institutionalised settings, depending on the level of continuous supervision and control.[87]

The Commission recommends that Head 9 should be revised to provide for a comprehensive right to review a deprivation of liberty, which may be instigated by the relevant person.

Furthermore, the Commission recommends that the Department should consider how such a right to review may be extended to individuals who fall outside the scope of the current proposals.

[87] IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill*, p 37.

6. Chemical Restraint and Restraint Practices (Heads 10–13)

The use of physical or chemical restraints is considered to be a violation of Article 17 CPRD, which provides for the right to respect for physical and mental integrity of persons with disabilities.[88] Having examined the use of physical or chemical restraints in a number of countries, the UN Committee on the Rights of Persons with Disabilities has recommended immediate cessation of such practices.[89] The Office of the High Commissioner for Human Rights has also described the use of chemical restraint as forming part of a framework which institutionalises and deprives persons with disabilities of their liberty.[90]

Concerns have been raised about the use of chemical restraint in Ireland[91] and this issue has also been addressed before the courts.[92] For example, in its report on Ireland, the Council of Europe's Committee on the Prevention of Torture (CPT) has documented the inappropriate use of chemical restraint to modify behaviour of patients of mental health facilities and recommended that this be addressed in legislation.[93] The Commission has also previously raised concerns about the inappropriate use of chemical restraint.[94]

The Commission welcomes the proposals under Heads 10 and Head 13 as a positive measure to address the gap in legislation in relation to the use to chemical restraint and restraint practices in Ireland. In particular, the Commission welcomes the prohibition of the use of chemical restraint under Heads 10(1)–(2) and the creation of a hybrid offence under Head 13(1)(c) in relation to same, meaning that the offence may be prosecuted summarily or on

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[88] Peter Bartlett (2012) 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', *Modern Law Review*, September 2012, Vol. 75(5), p 770.
[89] CRPD (2017) *Concluding observations on the initial report of Bosnia and Herzegovina*, paras 26–27; CRPD (2016) *Concluding observations on the initial report of Lithuania*, paras 29–31; CRPD (2014) *Concluding observations on the initial report of New Zealand*, paras 31–32.
[90] OHCHR (2015) 'International standards on the right to liberty and security of persons with disabilities. Background note', pp 3–4.
[91] SAGE (2017) 'Human Rights: Vulnerable Adults and Older People in Ireland Submission to the United Nations Committee Against Torture on the Second Periodic Report of Ireland UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 61st Session of the Committee Against Torture July 24 – 11 August 2017'. See also Sheikh, (2017) 'Editorial: The Patient, Restraint and the Fundamental Right to Human Dignity', *Medico-Legal Journal of Ireland 2017,* 23(2), pp 50–51.
[92] *D.H. (a Minor) v Ireland, The Attorney General and the North Eastern Health Board*, Unreported, High Court, 23 May, 2000.
[93] Council of Europe (2010) *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010*, para 132.
[94] IHREC (2017) *Ireland and the Convention against Torture, Submission to the United Nations Committee Against Torture on Ireland's second periodic report,* p. 47. This was based on statements from HIQA. See Sheehan, 'Health watchdog shines cold light on the dark side of disability care', *Sunday Independent*, 30 August 2015.

indictment. However, the Commission is concerned that there is no provision in the regulations envisaged under Head 11 to keep records of the administration of medication, which may be used for therapeutic purposes but may also be used for chemical restraint.

The Commission is also concerned that Head 10(3) provides for the use of restraint practices in 'exceptional circumstances' and notes that such circumstances have not been defined in the draft heads. Head 10(3) also provides that such practices may only be used in accordance with regulations which may be prescribed by the Minister under Head 12. The Commission is of the view that such regulations should be developed in accordance with Article 17 CRPD and the guiding principles set out in section 8 of the 2015 Act. The Commission also notes that there is no provision in the regulations envisaged under Head 11 to keep records in relation to the use of restraint practices.

The Commission recommends that Head 11 should be amended to require mandatory record keeping in relation to the administration of medications in order to ensure that such medications are not being used for the purposes of chemical restraint.

The Commission recommends that Head 10(3) should be amended to ensure that the use of restraint practices in exceptional circumstances should be in accordance with section 8 of the Assisted Decision-Making (Capacity) Act 2015.

The Commission recommends that Head 11 should be amended to require mandatory record keeping in relation to the use of restraint practices.

The Commission recommends that the 'exceptional circumstances' in which restraint practices may be used should be prescribed in regulations and such regulations should be developed in accordance with Article 17 CRPD.

7. List of Commission's Recommendations Relevant to Specific Heads

Head 1: Definitions

The Commission does not agree that the term 'under continuous supervision and control' should be defined in this legislation.

Head 2: Application and Purpose of this Part

Recalling its recommendation that the guiding principles be applied to an intervention in its entirety,[95] the Commission recommends that Head 2(1)(c) be deleted and replaced with a provision that requires an investigation of whether an individual has consented to confinement, which includes a consideration of whether an individual has capacity to consent as prescribed under the Assisted Decision-Making (Capacity) Act 20615.[96]

Head 5: Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances

The Commission recommends that Head 5(1)(b) should be amended to ensure that the guiding principles set out in section 8 of the Assisted Decision-Making (Capacity) Act 2015 are to be applied to an intervention, in its entirety rather than an assessment of capacity.

The Commission recommends that Head 5(2)(b) should be amended to require a medical expert to apply the last resort test set out in Head 6(1)(a)(ii) when reviewing the validity of a temporary admission decision.

Head 6: Procedure for making an Admission Decision

The Commission recommends that the evidence of at least two medical experts should be required in deprivation of liberty cases.

[95] This recommendation was made further to discussion of the application of the guiding principles to interventions under the 2015 Act in section 3.3 above.
[96] This recommendation will require subsequent amendments to Heads 3–8.

The Commission recommends that consideration be given to exclusion of medical experts from providing medical evidence in certain circumstances, such as those set out in section 10(3) of the Mental Health Act 2001.

Head 7: Persons Living in a Relevant Facility

The Commission recommends that Heads 7(1)(a)(ii), 7(2), 7(4), 7(9) should be amended to ensure that the guiding principles set out in section 8 of the Assisted Decision-Making (Capacity) Act 2015 are to be applied to an intervention, in its entirety rather than an assessment of capacity.

The Commission recommends that Head 7 should be revised to ensure access to effective remedies.

Head 8: Transitional Arrangements for Existing Residents on Commencement of this Part

The Commission recommends that Head 8(1) should be amended to ensure that the guiding principles set out in section 8 of the Assisted Decision-Making (Capacity) Act 2015 are to be applied to an intervention, in its entirety rather than an assessment of capacity.

Head 9: Review of Admission Decisions

Recalling Article 13 CRPD,[97] the Commission recommends legal aid provisions under section 52 of the Assisted Decision-Making (Capacity) Act 2015 should be extended to deprivation of liberty reviews and individuals should be supported to have their voice heard during court proceedings.

The Commission recommends that in instances where a court has declared an admission decision lawful under section 37(3) of the 2015 Act, the court should then be obliged to specify the intervals at which such an intervention ought to be reviewed.

[97] Article 13(1) CRPD states: 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.

The Commission recommends that the draft proposals should be revised to provide for regular review of a temporary admission decision, in like manner with the procedures envisaged for a review of an admission decision.

The Commission recommends that Head 9 should be revised to provide for a comprehensive right to review a deprivation of liberty, which may be instigated by the relevant person.

The Commission recommends that the Department should consider how such a right to review may be extended to individuals who fall outside the scope of the current proposals.

Head 10: Chemical restraint and restraint practices

The Commission recommends that Head 10(3) should be amended to ensure that the use of restraint practices in exceptional circumstances should be in accordance with section 8 of the Assisted Decision-Making (Capacity) Act 2015.

Head 11: Records to be kept

The Commission recommends that record keeping should be mandatory in all of the circumstances set out in Head 11 as well as any further circumstances in order to ensure that an individual has access to records where s/he applies to have their deprivation of liberty reviewed.

The Commission recommends that Head 11 should be amended to require mandatory record keeping in relation to the administration of medications in order to ensure that such medications are not being used for the purposes of chemical restraint.

The Commission recommends that Head 11 should be amended to require mandatory record keeping in relation to the use of restraint practices.

Head 12: Regulations

The Commission recommends that Head 12 should be amended to provide that the Minister shall make regulations outlining the procedures to be followed by healthcare professionals to ensure that a relevant person has been informed that s/he is free to leave a relevant facility.

The Commission reiterates its recommendation that the guiding principles established by the Assisted Decision-Making (Capacity) Act 2015 should apply to the Minister in the formulation of any regulations under the draft proposals.

The Commission recommends that the 'exceptional circumstances' in which restraint practices may be used should be prescribed in regulations and such regulations should be developed in accordance with Article 17 CRPD.



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