Summary

Background

1. Deprivation of Liberty Safeguards (DoLS) were introduced in England and Wales as an amendment to the Mental Capacity Act in 2007. DoLS provides legal safeguards for individuals who are deprived of their liberty and do not have the capacity to consent. They were introduced to plug the gap in safeguards identified by the European Court of Human Rights in *HL v United Kingdom (2005) 40 EHRR 32 (App no 45508/99) (also known as the "Bournewood" case).*

2. For a deprivation of liberty to be authorised six tests must be completed: best interests, mental health, mental capacity, age, eligibility and no conflicts with advance decisions or valid decision by attorneys and deputies. Once these tests are completed a local authority can authorise a deprivation of liberty for up to 12 months. The authorisation only applies in one setting.

3. The House of Lords found that DoLS was 'not fit for purpose' in their post legislative scrutiny of the Mental Capacity Act in March 2014. Subsequent to this, the government asked the Law Commission to produce a report into mental capacity and DoLS. The Law Commission published their report in March 2017.

4. In March 2014 The Supreme Court set out the 'acid test' in *P v Cheshire West and Chester Council* and *P and Q v Surrey County Council* to outline when an objective deprivation of liberty arises. The circumstances outlined are when an individual is subject to continuous supervision and control and whether the individual is free to leave. Since then DoLS applications have increased tenfold.

A Summary of the Law Commission's Recommendations

5. **A new system** – DoLS should be replaced with Liberty Protection Safeguards. Liberty Protection Safeguards, authorisations should be in place in advance of any deprivation of liberty and should apply to those aged 16 and above and should be capable of applying in multiple settings.

6. **Authorising Liberty Protection Safeguards** - Hospital trusts and CCGs should be responsible bodies as well as local authorities; a capacity assessment, medical assessment and necessary and proportionate assessment should be completed before an Liberty Protection Safeguards assessment is authorised; authorisations are to apply for some people whose capacity fluctuates; and a responsible body should in some circumstances be able to rely on previous capacity and medical assessments.

7. **Independence** – Assessments should be independently reviewed and a new Approved Mental Capacity Practitioner role is to be created and assessments should be referred to them if there is an objection to the arrangements or in "harm to others" cases.

8. **Renewals** – An authorisation should last for up to 12 months, after this a responsible body should be able to renew them for up to another 12 months and then for up to three years.

9. **Advocates and Appropriate Persons** – An Independent Mental Capacity Advocate should be appointed unless a person does not consent or it is not in their best interests, or if the local authority determines there is an appropriate person to support and represent the individual.

10. **Interaction with the Mental Health Act** – Liberty Protection Safeguards should not apply to arrangements in hospital currently authorised by the Mental Health Act and the government should review mental health law in England and Wales with a view to introducing a single scheme to cover non-consensual care for the treatment of both physical and mental disorders when an individual lacks the capacity to consent.

11. **Wider Amendments to the Mental Capacity Act** – Past and present wishes and feelings should be given greater weight as part of best interests decisions, the statutory defence under Section 5 of the Mental Capacity Act should not be available for certain important decisions unless written records are kept, the Mental Capacity Act should be amended to allow emergency deprivations of liberty as long as a written record is provided afterwards and an individual should be able to bring civil proceeding against private care home and hospital providers if there has been an unlawful deprivation of liberty.

Our Response

12. We thank the Law Commission for completing a comprehensive report into mental capacity and Deprivation of Liberty Safeguards and we have considered their recommendations carefully.

13. We agree in principle that the current DoLS system should be replaced as a matter of pressing urgency and we have set out our provisional stance regarding each specific recommendation below.

14. We will legislate on this issue in due course. However, before the introduction of any new system, we will need to consider carefully the detail of these proposals carefully and ensure that the design of the new system fits with the conditions of the sector, taking into account the future direction of health and social care.

Law Commission Recommendation		Response	Remarks
Overarching			
1	The DoLS should be replaced as a matter of pressing urgency	Accepted	We accept this proposal and will aim to bring forward legislation for reform of the Deprivation of Liberty Safeguards (DoLS) legislation when parliamentary business allows.
2	The Liberty Protection Safeguards should provide for the authorisation of care or treatment arrangements which would give rise to a deprivation of liberty within the meaning of Article 5 of the ECHR. Deprivation of liberty should have the same meaning as in Article 5(1) of the ECHR.	Accepted	We agree that that the system should be known as Liberty Protection Safeguards (LPS). We want any new system to afford protection of people's rights robustly and we are committed to our obligations as a signatory of the European Convention of Human Rights.
3	The Liberty Protection Safeguards should be accompanied by the publication of a new Code of Practice which covers all aspects of the Mental Capacity Act	Accepted	The mental capacity Code of Practice and the accompanying DoLS Code of Practice are vital tools to support good care practice; however, it is our view that the current Code of Practice is out of date. In light of this we accept the recommendation for a new mental capacity Code of Practice to accompany the new Liberty Protection Safeguards to support practitioners and embed the new system.
4	The Liberty Protection Safeguards should enable the authorisation of arrangements which are proposed (up to 28 days in advance), or are in place, to enable the care or treatment of a person which would give rise to a deprivation of that person's liberty. The arrangements that can be authorised should include: (1) arrangements that a person is to reside in one or more	Accepted	We agree that it is not proportionate for an individual to be subject to a separate LPS application if they are receiving care in another location temporarily. Most individuals have detailed care plans as part of the Care Act 2014 and in Wales, the Social Services and Wellbeing (Wales) Act 2014 and this will allow care providers to make arrangements that can apply in more than one setting, aligning with duties under the Care Act and Social Services and Wellbeing (Wales) Act and providing a more seamless experience for the person.

	particular places; (2) that a person is to receive care or treatment at one or more particular places; and (3) arrangements about the means by which and the manner in which a person can be transported to a particular place or between particular places.		
5	The Liberty Protection Safeguards should apply to people aged 16 and above.	Accepted	Current deprivation of liberty cases for 16-17 year olds are authorised through the Court of Protection and not through the Deprivation of Liberty Safeguards system. We agree in principle that a new system should apply to 16 and 17 year olds. However, we recognise that any changes will need to carefully consider wider rights, for example those around parental responsibility and how that should apply to decisions on deprivations of liberty. We will consider this carefully before bringing forward legislation
6	The Government should consider reviewing mental capacity law relating to all children, with a view to statutory codification.	Not accepted at this stage	We note the Law Commission's recommendation, but do not intend to review the mental capacity law relating to children at this time.
	Authorising a DoL – including responsible bodies, assessments required, fluctuating capacity, who must be consulted		
7	The responsible body, which can authorise arrangements, should be: (1) if the arrangements or proposed arrangements are being, or will be, carried out	Accepted	We recognise that there are challenges applying to current DoLS system to modern hospital settings. We therefore agree with this proposal as it provides hospital trusts and CCGs with an opportunity to take responsibility for where the provision of healthcare requires someone to be deprived of their liberty. Experience in Wales suggests that this can work

	primarily in a hospital, the hospital manager; (2) if paragraph (1) does not apply and the arrangements or proposed arrangements are being, or will be, carried out primarily through the provision of NHS continuing health care, the clinical commissioning group or local health board; (3) if neither paragraph (1) nor paragraph (2) applies, the responsible local authority.		well. As and when any legislation is implemented, we will work closely with NHS England, the Royal Colleges and other stakeholders to deliver this. It should be noted that this recommendation would not cause major changes in Wales as Health Boards are already responsible bodies for hospitals in Wales.
8	The responsible body may authorise arrangements if (amongst other requirements) a capacity assessment has been carried out which confirms that the person lacks capacity to consent to the arrangements which are proposed or in place and would give rise to a deprivation of that person's liberty.	Accepted	We agree with this proposal.
9	The responsible body may authorise arrangements if (amongst other requirements) a medical assessment has been carried out which confirms that the person is of "unsound mind" within the meaning of Article 5(1)(e) of the ECHR.	Accepted	We agree with this proposal and would want to ensure that the new Code of Practice helps practitioners to understand the definition of 'unsound mind' in practice.
10	The responsible body may authorise arrangements if (amongst other requirements) those arrangements are necessary and	Being considered as part of Mental Health Act review	We have looked at this proposal carefully and we agree that a 'necessary and proportionate' test is useful in the context of deprivation of liberty. However, many stakeholders in post-publication engagement sessions with the Department

	proportionate, having regard to either or both of the following matters: (1) the likelihood of harm to the person if the arrangements were not in place and the seriousness of that harm; and (2) the likelihood of harm to other individuals if the arrangements were not in place and the seriousness of that harm		of Health and Social Care on the new model raised concerns about the inclusion of harm to others in necessary and proportionate assessments. We understand from stakeholders that the current system provides sufficient flexibility that where, in the relatively small number of cases, there is a wish to consider a risk of harm to others, professionals can exercise their discretion to bring that into their assessment. Stakeholders have also raised concerns that this inclusion mirroring the explicit requirement in the Mental Health Act, can be contrary to the person-centred empowering ethos of the Mental Capacity Act. Given that the Government has commissioned a wide-ranging and independent review into the Mental Health Act we consider it is more appropriate for this issue to be considered as part of this.
11	If the capacity assessment which was relied on for the purpose of authorising arrangements stated that the person's capacity to consent to the arrangements is likely to fluctuate, the authorisation should not automatically cease to have effect provided that the responsible body reasonably believes that the gaining or regaining of capacity will last for a short period only.	Accepted	We accept this recommendation and agree that if an authorisation for arrangements continues to apply for someone who has regained capacity temporarily; it would only be valid if the individual regains capacity for a negligible period of time. As and when legislation is brought forward, the updated Code of Practice would provide further detail on when it is reasonable to rely on previous assessments.
12	A capacity assessment and a medical assessment must in all cases have been prepared by someone who meets the requirements set out in regulations made by the Secretary of State and	Accepted	We agree with this proposal. We think it right that the Secretary of State for Health and Social Care (or where appropriate the Welsh Ministers) is able to set this out in regulations and to make changes to regulations as and when it is necessary to do so.

	Welsh Ministers.		
13	The capacity assessment, the medical assessment and the assessment of whether the arrangements are necessary and proportionate must be provided by at least two assessors. If the assessments are carried out by two assessors, they must be independent of each other – or if there are more than two assessors at least two must be independent of each other.	Accepted	We are committed to ensuring there is a robustly independent process for authorising applications for arrangements.
14	The responsible body should be able to rely on a capacity or medical assessment carried out under the Liberty Protection Safeguards on a previous occasion or for any other purpose, provided it is reasonable to do so. In doing so, it must have regard to the length of time that has elapsed since the assessment was carried out, the purpose of the assessment and whether there has been any significant change in the person's condition.	Accepted	We agree with this proposal. Currently supervisory bodies are limited in their ability to rely on previous and equivalent assessments. We believe that this proposal will reduce the burden of unnecessary duplicate assessments on individuals and families. As and when legislation is brought forward, the updated Code of Practice would provide further detail on when it is reasonable to rely on previous assessments.
15	The responsible body may authorise arrangements if (amongst other requirements) it has consulted, unless it is not practical or appropriate to do so: (1) anyone named by the person as someone to be	Accepted	We agree with this proposal. Part of ensuring a robust process is making sure there is consultation with relevant parties, and family members and others will often know the person best and their input can significantly improve assessments. We understand that some family members of people subject to DoLS can feel excluded from the process and this recommendation helps ensure and improve person-centred arrangements.

	consulted; (2) anyone engaged in caring for the person or interested in their welfare; (3) any donee of a lasting power of attorney or enduring power of attorney, and any court appointed deputy; (4) any appropriate person or independent mental capacity advocate; (5) in the case of a person aged 16 or 17, anyone with parental responsibility; and (6) in the case of a person aged 16 or 17 who is being looked after by a local authority, the authority concerned.		
16	The responsible body should not be able to authorise arrangements which provide for a person to reside in, or to receive care or treatment at, a particular place, which conflict with a valid decision of a donee of a lasting power of attorney or a deputy appointed by the court.	Accepted	We agree with this proposal.
17	The Mental Capacity Act should be amended to confirm that a donee of a lasting power of attorney or a court appointed deputy cannot	Accepted	We agree with this proposal.

	consent on a person's behalf to arrangements which give rise to a deprivation of that person's liberty.		
	Independent reviews and role of Approved Mental Capacity Professional		
18	The responsible body may authorise arrangements if (amongst other requirements) an independent review has been carried out and the person carrying it out has confirmed that: (1) it is reasonable for the responsible body to conclude the relevant conditions for an authorisation are met, or (2) the case has been referred to an Approved Mental Capacity Professional and their approval has been obtained. (3) The independent review may not be carried out by a person who is involved in the day-to-day care of, or providing any treatment to, the person.	Accepted	We agree with this proposal as it provides an additional level of scrutiny. We want to make sure any process for independent review is proportionate and workable so we will look closer at the detail of this proposal to consider this.
19	There should be a duty to refer a case to an Approved Mental Capacity Professional if: (1) the arrangements that are proposed, or in place,	Accepted	We agree with this proposal. Carers, family members and others have highlighted that it is important that people objecting to care arrangements have a swift referral to an independent person to consider their concerns. We think the current approach of referring every case to a best interests

	provide for the person to reside in, or receive care or treatment at, a particular place, and it is reasonable to believe that the person does not wish to reside at that place, or receive the care or treatment at that place; or (2) an assessor has determined that the arrangements are necessary and proportionate wholly or mainly by reference to the likelihood of harm to other individuals if the arrangements were not in place and the seriousness of that harm. Otherwise, there should also be a power to refer a case to the Approved Mental Capacity Professional if the case is one which is appropriate to be considered by an Approved Mental Capacity Professional and the Approved Mental Capacity Professional agrees to accept the referral.		assessor imposes burdensome assessments in many cases which may not add value to the individuals outcome. This proposal removes the need for individuals and their families who are happy with care arrangements to be subject to further assessments unnecessarily. We provisionally agree that it is reasonable for 'harm to others' to be taken into account when considering whether or not to refer an individual to an Approved Mental Capacity Practitioner, and welcome the power to refer a case otherwise if agreed.
20	The Approved Mental Capacity Professional should be required to approve the arrangements if he or she determines that the conditions for the authorisation of arrangements are met. In doing so, he or she must meet with the person (unless it is not practicable	Accepted	We agree with this proposal. In most cases we would expect an Approved Mental Capacity Professional to meet with the individual to inform their assessment. However, we think it is right that the law provides flexibility for the small number of cases where this may not be appropriate.

	or appropriate to do so), and may consult others and take further steps (including obtaining information or making further enquiries).		
21	Each local authority should be required to make arrangements for the approval of persons to act on its behalf as Approved Mental Capacity Professionals, and ensure there are sufficient numbers of persons approved as Approved Mental Capacity Professionals for the purposes of the Liberty Protection Safeguards.	Accepted	We think it is appropriate for local authorities to make arrangements for the approval of people to act as Approved Mental Capacity Professional and to ensure there are a sufficient number of them. We accept this proposal, subject to developments of the responsibilities at the new Social Work England organisation.
22	The Secretary of State and Welsh Ministers should be given regulation making powers to prescribe, amongst other matters, criteria which must be met in order for a person to become an Approved Mental Capacity Professional and a body to approve courses.	Accepted	We agree with this proposal. We think it right that the Secretary of State for Health and Social Care (or where appropriate the Welsh Minister) is able to set this out in regulations and to make changes to regulations as and when it is necessary to do so.
23	Each local authority should be required to appoint a manager who is responsible for the conduct and performance of Approved Mental Capacity Professionals and is accountable directly to the director of social services.	Accepted	We agree with this proposal and envisage that a number of people in a local authority could logically take on the role of manager for Approved Mental Capacity Professionals. This role is important to provide the local health organisation Approved Mental Capacity Professionals with professional oversight and into a network of local professionals to help ensure standards of practice in the role, and common development across the local health and social care economy.
24	The responsible body should be	Accepted	We agree with this proposal and think it is important to

	required to produce or revise an authorisation record if it authorises arrangements. This must, amongst other matters, specify in detail the arrangements which are authorised and date(s) from which they are authorised. Copies of the authorisation record must be given to the person and certain other key individuals.		maintain transparency.
25	Where arrangements have been authorised under the Liberty Protection Safeguards, no liability should arise in relation to the carrying out of the arrangements if no liability would have arisen if the person had had capacity to consent to the arrangements, and had consented.	Accepted	We agree with this proposal.
	Duration of authorisation, ability to renew the authorisation and requirements for review		
26	An authorisation should last for an initial period of up to 12 months, and be renewed for a further period of up to 12 months and then for further periods of up to three years.	Accepted	We think that it is right that if someone has a stable condition from which they are unlikely to recover, that there is an option for an authorisation to be valid for up to three years. This removes the burden of annual assessments from individuals and their families. We will of course ensure there are measures in place for arrangements to be reviewed as well as triggered by carers, 'P' and family members.
27	The responsible body should be able to renew an authorisation if it reasonably believes that: (1) the person continues to lack	Accepted	We agree with this proposal. We think it is right that responsible bodies have ability to renew authorisations but there should also be measures in place for arrangements to be reviewed.

	capacity to consent to the arrangements; (2) the person continues to be of unsound mind; (3) the arrangements continue to be necessary and proportionate; and (4) it is unlikely that there will be any significant change in the person's condition during the renewal period which would affect any of the matters in (1), (2) and (3).		
28	An authorisation should cease to have effect if the responsible body knows or ought reasonably to suspect that: (1) the person has, or has regained capacity, to consent to the arrangements (except in fluctuating capacity cases); or (2) the person is no longer of unsound mind; or (3) the arrangements are no longer necessary and proportionate. The authorisation should also cease to have effect if there is a conflicting decision of a lasting power of attorney or a court appointed deputy, or if the authorisation conflicts with requirements arising under legislation relating to mental	Accepted	We agree with this proposal.

	health (in so far as it relates to those arrangements).		
29	The responsible body should be required to specify in the authorisation record when it proposes to review the authorisation of arrangements, to keep an authorisation under review, and to review an authorisation: (1) on a reasonable request by a person with an interest in the arrangements which are authorised; (2) if the person to whom it relates becomes subject to mental health arrangements; (3) if the person to whom it relates becomes subject to different requirements arising under legislation relating to mental health; and (4) if it becomes aware of a significant change in the person's condition or circumstances.	Accepted	It is right that the option to review authorisations is maintained. Regular reviews of care plans are a key part of the Care Act and Social Services and Well-being (Wales) Act and we think this proposal aligns well with those duties.
	Independent Mental Capacity Advocates and appointment of appropriate person		
30	If a responsible body proposes to authorise arrangements which would give rise to a deprivation of a person's liberty, it should be	Accepted	We are committed to the principle of advocacy and are of the view that Independent Mental Capacity Advocates provide a valuable service and think it is right that they are an option for individuals and carers.

	required to appoint an independent mental capacity advocate to represent and support the person (if there is no appropriate person appointed) unless: (1) the person does not consent to being represented; or (2) if the person lacks capacity to consent, being represented by an advocate would not be in his or her best interests. If a responsible body proposes to authorise arrangements which would give rise to a deprivation of a person's liberty and an appropriate person is appointed, the responsible body should be required to appoint an independent mental capacity advocate to support the appropriate person unless the appropriate person does not consent.		Advocacy provision by Independent Mental Capacity Advocates and other more informal advocacy from third sector organisations and others make valuable contributions to ensuring the voice of the person being deprived of their liberty is central to arrangements for care or treatment. We therefore accept this proposal in principle, to support advocacy sector which provides individuals with a quality service and choice.
31	The Secretary of State and Welsh Minsters should have regulation-making powers to make provision about how an independent mental capacity advocate is to discharge the functions of representing or supporting the person.	Accepted	We agree with this proposal. We think it right that the Secretary of State for Health and Social Care (or where appropriate Welsh Ministers) is able to set this out in regulations and to make changes to regulations as and when it is necessary to do so.
32	If a responsible body proposes to authorise arrangements, it should be required to determine if there is an appropriate person to represent and support the person. He or she	Accepted	Having an appropriate person in place allows family and friends to have a stronger role in enhancing the DoLS process for the individual. This role has been defined in the Care Act and we want to see the use of appropriate persons extended into when people are being deprived of their liberty

	must not be involved in providing care or treatment to the person in a professional capacity or for remuneration. If there is an appropriate person, the responsible body must appoint them to represent and support the person, unless: (1) the person has capacity and does not consent to that appointment; or (2) if the person lacks capacity to consent, and being represented by an advocate would not be in his or her best interests.		and considered as part of the wider consideration on arrangements for care. This also brings LPS closer into the Care Act process.
33	The UK Government and the Welsh Government should review the adequacy of the current levels of advocacy provision under the Mental Capacity Act, Care Act, Social Services and Well-being (Wales) Act, Mental Health Act and Mental Health (Wales) Measure 2010.	Accepted	We accept this recommendation and we will work with partner organisations to understand and identify the best approach to achieve an insight into operation of the advocacy market.
	Challenging authorisations – role of the Courts		
34	In tandem with the "Transforming our justice system" programme, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals should review the question of the appropriate judicial	Accepted	We will aim to take into account the impact of the Government's programme of court reform in considering whether challenges to deprivation of liberty should be dealt with by the Court of Protection or tribunal.

	body for determining challenges to authorisations of deprivation of liberty under the Liberty Protection Safeguards. This review should be undertaken with a view to promoting the accessibility of the judicial body, the participation in the proceedings of the person concerned, the speedy and efficient determination of cases and to the desirability of including medical expertise within the panel deciding the case.		
35	Pending the conclusion of our recommended review of the appropriate judicial body for determining challenges to authorisations of deprivation of liberty under the Liberty Protection Safeguards, the Court of Protection should have jurisdiction to determine any question relating to arrangements which are authorised under the Liberty Protection Safeguards. No permission should be required for any application made for such determination.	Accepted	We accept this recommendation which will allow for continuity pending the outcome of the review.
	Monitoring the scheme		
36	The Secretary of State and Welsh Ministers should be given regulation-making powers to require one or more prescribed bodies to monitor and report on the operation of the new scheme, and make provision for how the prescribed	Accepted	We agree with this proposal. We think it right that the Secretary of State for Health and Social Care (or where appropriate the Welsh Monitors) hold regulation-making powers regarding the monitoring and operation of the new scheme.

	bodies must undertake these functions.		
	Fit with the Mental Health Act		
37	The Liberty Protection Safeguards should not apply to arrangements carried out in hospital for the purpose of assessing, or providing medical treatment for, mental disorder within the meaning it is given by the Mental Health Act. But the Liberty Protection Safeguards should be available to authorise arrangements in hospital for the purpose of providing medical treatment where those arrangements arise by reason of learning disability where that disability is not associated with abnormally aggressive or seriously irresponsible conduct.	Being considered as part of Mental Health Act review	The Government has commissioned a wide-ranging and independent review into the Mental Health Act and it is more appropriate for the issue around the Mental Health Act/Mental Capacity Act interface to be considered as part of this.
38	The Liberty Protection Safeguards should not apply to arrangements which are inconsistent with: (1) a requirement imposed by a guardian under section 8 of the Mental Health Act; (2) a condition or direction under section 17 of the Mental Health Act; (3) a condition in a community treatment order made under section 17A of the Mental Health Act;	Being considered as part of Mental Health Act review	The Government has commissioned a wide-ranging and independent review into the Mental Health Act and it is more appropriate for the issue around the Mental Health Act/Mental Capacity Act interface to be considered as part of this.

	(4) a condition or direction in respect of a hospital order under section 37 of the Mental Health Act; (5) a requirement imposed by a guardian under section 37 of the Mental Health Act; (6) a condition in respect of a restriction order under section 42 of the Mental Health Act; (7) a condition imposed when a person is conditionally discharged under section 73 of the Mental Health Act; or a condition or requirement imposed under any other enactment prescribed by regulations.		
39	The UK Government and the Welsh Government should review mental health law in England and in Wales with a view to the introduction of a single legislative scheme governing non-consensual care or treatment of both physical and mental disorders, whereby such care or treatment may only be given if the person lacks the capacity to consent.	Being considered as part of Mental Health Act review	The Government has commissioned a wide-ranging and independent review into the Mental Health Act. The interface between the Mental Health Act and Mental Capacity Act will be considered as part of the review.
	Wider amendments to the MCA		
40	Section 4(6) of the Mental Capacity Act should be amended to require that the individual making the best interests determination must	Accepted	The principle of taking past and present wishes and feelings and beliefs and values into account when making a best interests determination for a person is very important to having a person-centred approach which enhances care

	ascertain, so far as is reasonably practicable: (1) the person's past and present wishes and feelings (and, in particular, whether there is any relevant written statement made by him or her when they had capacity); (2) the beliefs and values that would be likely to influence the person's decision if he or she had capacity; and (3) any other factors that the person would be likely to consider if he or she were able to do so; and in making the determination must give particular weight to any wishes or feelings ascertained.		provision. Taking past and present wishes and feelings into account already represents good care practice. We therefore agree that this should be enshrined into law.
41	If someone acting in a professional capacity or for remuneration does an act pursuant to a relevant decision, the statutory defence under section 5 of the Mental Capacity Act should not be available unless before doing the act he or she has prepared a written record (or one been prepared by someone else) containing required information. The relevant decisions should be those relating to: (1) moving the person to long-term accommodation; (2) restricting the person's	Accepted	Keeping records is an important part of protecting individuals and for professionals to be able to demonstrate a high quality provision of care or treatment. We will however need to ensure that the information required in a written record is appropriate, and that the balance is struck ensuring that burden of recording is not at the cost of the provision of high quality patient centred care.

	contact with others; (3) the provision of serious medical treatment; (4) the administration of “covert” treatment; and (5) the administration of treatment against the person’s wishes. The required information should be: (1) the steps taken to establish that the person lacks capacity; (2) the steps taken to help the person to make the decision; (3) why it is believed that the person lacks capacity; (4) the steps taken to establish that the act is in the person’s best interests; (5) a description of ascertained wishes and feelings for the purses of a best interests determination and if the decision conflicts with the person’s ascertained wishes, feelings, beliefs or values, an explanation of the reason for that decision; (6) that any duty to provide an advocate has been complied with; and (7) that the act would not be contrary to an advance decision.		

42	The Secretary of State and Welsh Ministers should be given the power, by regulations, to establish a supported decision-making scheme to support persons making decisions about their personal welfare or property and affairs (or both).	Accepted in principle	We are committed to the principle of supported decision - making and this principle is enshrined in the Mental Capacity Act. We will consider approaches to supported decision making as part of our response to the UN Convention on the Rights of Persons with Disabilities. However, it is not clear at this stage whether a new regulatory scheme is an appropriate response for this and we will need to look into this issue in more detail.
43	A person aged 16 or over who has capacity to do so, should be able to consent to specified care or treatment arrangements being put in place at a later time, which would otherwise give rise to a deprivation of that person's liberty.	Accepted in principle	We agree with the general principle that people should have choice and control over future decision being made on their behalf, as far as possible. This principle already forms part of the Mental Capacity Act However, we will need to consider in more detail this recommendation's practical application and implementation.
44	Section 4B of the Mental Capacity Act should be amended to provide that a person may be deprived of liberty to enable life sustaining treatment or action believed necessary to prevent a serious deterioration in the person's condition if there is a reasonable belief that the person lacks capacity to consent to the steps being taken, and: (1) there is a question about whether the decision-maker is authorised to deprive the person of liberty and a decision is being sought from the court; (2) a responsible body is determining whether to	Accepted	We believe it important for clinicians and care providers to be able to act quickly in emergency situations to provide care. The current system of urgent authorisations can be confusing and overly bureaucratic. We accept this proposal, and observe that adequate written records of decision making are essential to guard against misuse.

	authorise arrangements which would give rise to a deprivation of P's liberty (and it does not matter if the steps taken by D which deprive P of P's liberty as mentioned in subsection (1) do not correspond to the arrangements which the responsible body is determining whether to authorise); or (3) it is an emergency.		
45	A person should be able to bring civil proceedings against the managers of a private care home or an independent hospital when arrangements giving rise to a deprivation of their liberty have been put in place and have not been authorised under the Mental Capacity Act, the Mental Health Act or by an order of a court.	Accepted in principle	We agree that private care providers should be held to account. Currently CQC, HIW or CIW monitor DoLS as they operate in England and Wales, and are responsible for taking enforcement action when care providers are not meeting their duties. We will consider carefully how effectively private care providers are held to account under the current system, and whether allowing civil proceedings against private care providers would be an effective way to improve accountability.
	Coroners		
46	Section 48 of the Coroners and Justice Act 2009 should be amended to provide that a person is not in State detention if the compulsory detention, to which he or she is subject, arises as a result of arrangements which are authorised under Liberty Protection Safeguards, section 4B of the	Accepted	This provision was amended by s 178 of the Policing and Crime Act 2017.

	Mental Capacity Act or a provision of an order made under section 16 of the Mental Capacity Act.		
47	If the Department of Health decides not to introduce its proposed reform to require a medical examiner or medical practitioner to refer a case to a coroner if the death was attributable to a failure of care, measures should be put in place to ensure that deaths of people subject to the Liberty Protection Safeguards or deprived of their liberty pursuant to an order of the Court of Protection are notified to the coroner.	Accepted in principle	Secretary of State for Health and Social Care still remains committed to introducing medical examiners. The Government's response to consultation will be published shortly.