

Oral Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill Clauses 276 - 295 of the Mental Capacity Bill

19th October 2015

Under **clause 276** the Departments must prepare and issue Codes of Practice for the Mental Capacity Bill which will contain the necessary detail relating to many parts of the Bill. Examples include fundamental issues such as clarity on the gateway provisions of the Bill such as what is meant by an impairment or disturbance in the functioning of the mind or the brain in determining whether someone, ‘lacks capacity’ and the level and type of support which should be given to help an individual make a decision and also the level and type of encouragement required to ascertain what is in an individual’s best interests. It is vital for the effective operation of the Bill that the Codes of Practice are in operation from the outset. NICCY wants to see the Codes of Practice being urgently published for widespread public consultation, including consultation with children and young people in line with Article 12 of the UNCRC and section 75 of the Northern Ireland Act 1998, so that they can be published at the same time that the legislation is enacted.

The Bamford Review was very critical of the delay in the publication of the Codes of Practice and failure to deliver an associated training programme when bringing forward the Mental Health Order. It was very clear that lessons should be learned and stated that,

“The new legislation, the Codes of Practice and related training programmes must be introduced at the same time.”¹

It is very important in bringing forward the Mental Capacity Bill that these mistakes are not repeated.

For the purposes of the realisation of the rights enshrined in the UNCRC, Article 1 of the UNCRC states that, “...a child means every human being below the age of eighteen years”. While NICCY welcomes the inclusion of 16 and 17 year olds within the scope of the Mental Capacity Bill, it is important to bear in mind that 16 and 17 year olds are still

¹ The Bamford Review of Mental Health and Learning Disability. A Comprehensive Legislative Framework (2007), Pg 5.

children and require special protections. NICCY has a number of concerns with regard to the ability of 16 and 17 year olds with capacity to make unwise decisions which may not be in their best interests, particularly where such decisions may be life-threatening or cause permanent injury. In order to adequately protect 16 and 17 year olds from irreversible harm NICCY recommends that the DHSSPS in its Code of Practice replicates section 19.71 of the Code of Practice for the Mental Health Act 1983² which is currently in operation in England and Wales. Section 19.71 deals with life-threatening emergencies and under 18s and states that,

“If the failure to treat a child or young person would be likely to lead to their death or to severe permanent injury, treatment may be given without their consent, even if this means overriding their refusal when they have the competence (children) or the capacity (young people and those with parental responsibility), to make this treatment decision. In such cases, the courts have stated that doubt should be resolved in favour of the preservation of life, and it will be acceptable to undertake treatment to preserve life or prevent irreversible serious deterioration of the child or young person’s condition.”

Such treatment must be no more than necessary and in the best interests of the child or young person.

The definition of ‘mental disorder’ at **clause 292** of the Mental Capacity Bill will include conditions caused by personality disorder and conditions related to alcohol or drugs. Under the definition of ‘mental disorder’ within the Mental Health Order conditions caused by personality disorder and dependence on alcohol and drugs are specifically excluded.³ NICCY recommends that an amendment is made to the Mental Health Order to include conditions caused by personality disorder and conditions related to alcohol or drugs.

² Mental Health Act 1983: Code of Practice, Department of Health, 2015.

³ Article 3(2) Mental Health (Northern Ireland) Order 1986.