

# Written Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill

**31<sup>st</sup> July 2015**

## **1.0 Introduction**

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

NICCY has scrutinized ongoing developments in relation to the introduction of mental capacity legislation since the Department of Health and Social Services and Public Safety (DHSSPS) first introduced its draft policy proposals in 2009. NICCY has had continuing engagement with and provided advice to both the DHSSPS and the Department of Justice (DoJ) throughout the development of the legislation and given evidence to the Northern Ireland Assembly Committee for Health, Social Services and Public Safety with regard to the progression of the Mental Capacity Bill.

NICCY has consistently expressed its concern regarding the proposed application of the Mental Capacity Bill only to those aged 16 and over, thus denying young people under 16 access to the protections and safeguards under the Mental Capacity Bill.

Given the Commissioner's remit, NICCY is concerned with the provisions proposed for all young people aged under 21 years. This written evidence therefore considers provisions

in the Mental Capacity Bill which apply to young people aged 16 and over and provisions which will amend the Mental Health (Northern Ireland) Order 1986 which will be retained for under 16s.

## 2.0 Background and Context

The Mental Capacity Bill provides a number of important safeguards and protections for people who lack decision making capacity. There is a recognition that the current mental health legislation in Northern Ireland, the Mental Health (Northern Ireland) Order 1986 is in places not compliant with the European Convention on Human Rights (ECHR).<sup>1</sup> A comprehensive review of mental health and learning disability – the Bamford Review of Mental Health and Learning Disability (the Bamford Review) was carried out in Northern Ireland in 2002. The Bamford Review made a number of recommendations regarding necessary reform of the system of mental health and learning disability in Northern Ireland in order to render it human rights compliant.

As stated above, it is proposed that children under 16 will be excluded from the scope of the Mental Capacity Bill and a retained and amended Mental Health (Northern Ireland) Order 1986 will remain in place for this group as an interim measure pending a review of the Children (Northern Ireland) Order 1995 to include compulsory powers of detention for mental illness. This will mean that solely on the basis of age, under 16s will not be able to access the protections and safeguards contained in the new Mental Capacity Bill which will be afforded to those over 16 who lack capacity as a result of a mental illness or learning disability. The retention of the Mental Health (Northern Ireland) Order 1986 for any of the population was not recommended by the Bamford Review, in particular children and young people for whom it recommended additional safeguards and protections.

As highlighted above, the UNCRC must serve as the underpinning framework for all decisions concerning children's lives. The Convention is an international human rights treaty which provides children and young people with a comprehensive set of rights and places obligations on governments to ensure these are realised. A number of these rights are particularly relevant to the Mental Capacity Bill, indeed, the Bamford Report, "*A Vision of a Comprehensive Child and Adolescent Mental Health Service*" stated that,

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<sup>1</sup> The Bamford Review of Mental Health and Learning Disability. A Comprehensive Legislative Framework (2007), p.47.

*“Any proposals for a comprehensive child and adolescent health service need to take account of the rights contained in the UNCRC”.<sup>2</sup>*

NICCY has consistently detailed its concerns to Government with regard to the proposal to exclude under 16s from the Mental Capacity Bill and has emphasised the need to ensure that any new legislation conforms with the UNCRC, particularly Articles 2 – non-discrimination, 3 – best interests of the child, 6 – right to survival and maximum development, 12 – right to be heard and have views taken into account, 23 – right of a disabled child to a full and decent life and 24 – highest attainable standard of healthcare. NICCY does not believe that the exclusion of children and young people under the age of 16 with mental health difficulties or a learning disability from the protections and safeguards contained within the new legislation have the best interests of the child as a primary consideration, or ensure children’s rights without discrimination. NICCY is also concerned that the exclusion of under 16s from the scope of the Mental Capacity Bill may not be compliant with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), in particular Article 7, which refers to the right of children with disabilities to enjoy all human rights and fundamental freedoms on an equal basis with other children and Article 12 which states that the aim of the UNCRPD is full and equal legal capacity for everyone.

The rationale for the exclusion of under 16s from the scope of the Mental Capacity Bill is the belief that the test of capacity contained in the Mental Capacity Bill cannot be applied to children in the same way as adults because of their developmental stage. This approach is compliant with Article 12 of the UNCRC which requires the state to actually assess the capacity of each individual child to form an autonomous opinion and emphasises that State Parties cannot begin with the assumption that all children under 16 lack capacity.<sup>3</sup>

The Bamford Review Report, “A Comprehensive Legislative Framework” looked specifically at the issue of children and young people with mental illness or learning disabilities. The Review recognised that children reach decision making capacity at different stages in their development, that the capacity of children and young people is evolving and that,

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<sup>2</sup> *Ibid*, Introduction.

<sup>3</sup> General Comment 12 The Right of the Child to be Heard (2009), UN Committee on the Rights of the Child, CRC/C/GC/12 1 July 2009, para. 20.

*“The implications of a capacity approach to all substitute decision-making legislation would require the same basic approach to be applied for children. While most people would agree that parents be substitute decision-makers for children up to the age of 10 or 12, consideration might be given to a rebuttable presumption of capacity between 12 and 16.”<sup>4</sup>*

The “Comprehensive Legislative Framework” report recognised the need for children and young people who lack capacity to have equal access to the protections and safeguards of any new mental health and capacity legislation.<sup>5</sup> The current approach, where under 16s are excluded from the Bill is not in line with the Bamford Review recommendations.

NICCY has a number of concerns with the interim retention of an amended Mental Health (Northern Ireland) Order 1986 for under 16s pending a review of the Children (Northern Ireland) Order 1995. DHSSPS officials have stated that that the retention of the Mental Health (Northern Ireland) Order 1986 for under 16s is a “temporary measure” however they also indicated that reform of the Children (Northern Ireland) Order 1995 to include provisions on the compulsory assessment or treatment of under 16s with mental ill health would potentially be a bigger undertaking than the mental capacity legislation itself and would take considerable time to complete.<sup>6</sup> It is therefore extremely unlikely that a review of the Children (Northern Ireland) Order 1995 will be concluded within the next Assembly mandate and it is wholly uncertain whether this work will be a priority under future Ministerial arrangements. It is therefore extremely likely that the retention of the Mental Health (Northern Ireland) Order 1986 for under 16s will remain in the medium to possibly long term.

NICCY believes that in the absence of any consultation on an amended Children (Northern Ireland) Order 1995 it is untenable to exclude all children and young people under 16 from the scope of the Mental Capacity Bill.

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<sup>4</sup> *Op cit 1.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Evidence from DHSSPS Official to DHSSPS Committee – Mental Capacity Briefing, 22<sup>nd</sup> January 2014.

### 3.0 Part 1 – Principles (Clauses 1 – 8)

#### 3.1 Principles

NICCY notes that the Mental Capacity Bill includes the two principles of capacity and best interests. While we appreciate that these two principles will be beneficial to persons aged 16 and over who lack capacity they are in stark contrast to and fall short of the four key principles which had been proposed to underpin the Mental Capacity Bill as adopted from the Report of the Bamford Review of Mental Health and Learning Disability<sup>7</sup> (The Bamford Report). These were,

- Autonomy - respecting the person's capacity to decide and act on his own and his right not to be subject to restraint by others;
- Benefit - promoting the health, welfare and safety of the person while having regard to the safety of others;
- Justice - applying the law fairly and equally, and;
- Least Harm - acting in a way that minimises the likelihood of harm to the person.

The Bamford Report recommended that these four principles be embedded in the legislation.<sup>8</sup> However, the inclusion of the two principles of capacity and best interests in the Mental Capacity Bill deviates substantially from the Bamford Report recommendation. NICCY is aware that it was the original intention of the DHSSPS to use these comprehensive principles as the cornerstone of the legislation so that they would inform the development and interpretation of the legislation but also, that once enacted, decision makers would be required to take account of them, when making decisions about the health or welfare of an individual in a manner which respects the dignity of the individual. The absence of the principles of 'justice', 'benefit' and 'least harm' in the Mental Capacity Bill reduces the potential for adequate cognisance to be taken of these principles, their translation into the provisions of the Bill and consequently into practical implementation. In addition, the Bamford Report emphasised the importance of paying sufficient regard to all of these principles to ensure that where tensions exist between principles that the correct balance can be struck<sup>9</sup>. NICCY is concerned that the fundamental deviation from the four principles recommended by Bamford will undermine the effective operation of the Bill. This

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<sup>7</sup> *Op cit* 1, Pg.4 and Chapter 5.

<sup>8</sup> *Ibid*, Pg.4.

<sup>9</sup> *Ibid*, Pgs.4 and 5.

change to the Principles of the Bill is also extremely disappointing given that the four Bamford Principles were widely consulted upon by both the Bamford Review and the DHSSPS and to NICCY's knowledge did not occur as a result of any consultation process carried out on the Bill to date.

NICCY is also concerned about the failure to date of both Departments to publish and consult on the Codes of Practice for the Mental Capacity Bill, including consultation with children and young people. The Codes of Practice will contain a lot of the necessary detail which is required to ensure the effective operation of the Bill. Throughout the Bill there are a number of areas where the necessary level of detail has not been provided with many areas, including clarification and explanation of the intended operation of some key concepts being left to the Codes of Practice, which have yet to be finalised or consulted upon. This is addressed in greater detail at page 33 below.

NICCY also has similar concerns about the large number of issues in the Bill, the detail relating to which will be provided by future Regulations to be developed by either the DHSSPS or DoJ. It is difficult to provide fully informed comment about the clauses of the Bill which will impact on children and young people without sight of the content of the proposed Regulations. In addition, NICCY has concerns that due to the legislative process relating to the passage of Regulations, there may be less scope to influence the content of Regulations. It will be vitally important in the development of Regulations which relate to the Bill that there is adequate consultation on the Regulations at the earliest possible stage, including direct consultation with children and young people.

### 3.2 'Lacks Capacity' Test

**Clause 3** details the test for determining whether someone 'lacks capacity' for the purpose of making decisions. While it is clear from the Bill that it applies only to those aged over 16 it is NICCY's understanding that the reason for this age threshold is that the proposed capacity test cannot be applied to children and young people in the same way as adults because of their developmental stage. While NICCY appreciates that there may be challenges to the application of the capacity test to children under 16, there are many practical examples of determinations being made by a range of professionals regarding the capacity of children to make decisions which impact on their lives. With regard to the Government's obligations under the UNCRC, Article 12, one of the principles of the Convention, requires the state to assess the capacity of each individual child to form an

autonomous opinion and is clear that State Parties cannot begin with the assumption that all children under 16 lack capacity.

## 4.0 Part 2 – Lack of Capacity: Protection from Liability, and General Safeguards (Clauses 9 – 66)

### 4.1 Chapter 1 - Protection from Liability and Safeguards (Sections 9 - 12)

Children and young people who will come within the scope of the Bill are extremely vulnerable and require additional protections and safeguards to be put in place, as recommended by the Bamford Review which was clear that given the special vulnerabilities and developmental needs of children and young people, this group requires special rights and protections<sup>10</sup>. Consequently NICCY would be supportive of an amendment to this part of the Bill to place a greater emphasis on the protection of the person who lacks capacity - the child or young person over 16, rather than on the protection of the intervener from prosecution or from civil liability for the commission of an act.

### 4.2 Restraint

**Clause 12** of the Bill addresses acts of restraint and outlines restraint safeguards which permit the use of restraint only when a person using, instructing or authorising the use of restraint reasonably believes that it is necessary to prevent harm and that any restraint used is proportionate to the likelihood and seriousness of the harm. These safeguards only apply to those over the age of 16 and it is extremely concerning that the Bill does not include equivalent restraint safeguards for under 16s. While NICCY appreciates that in some cases the use of restraint may be necessary, particularly where it is being used to protect the young person, the use of restraint is a serious infringement of the rights of a child or young person. It is therefore vital that the Mental Capacity Bill provides maximum protections and safeguards for all children and young people who may be subject to restraint. It is essential that both the provisions relating to restraint and any information on the use of restraint which will be contained in the Codes of Practice take adequate cognisance of the young person's rights and that they fully protect against restraint which could amount to torture or cruel, inhuman or degrading treatment or punishment in line with Article 37a of the UNCRC, Article 15 of the UNCRPD and Article 3 of the European

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<sup>10</sup> *Op cit* 1.

Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998. The restraint provisions and Codes of Practice should also ensure adequate cognisance is taken of the right to protection of the integrity of the person under Article 17 of the UNCRPD and the child's right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation under Article 19 of the UNCRC.

Following the last examination of the UK Government's compliance with its obligations under the UNCRC in 2008 the Committee on the Rights of the Child urged the State Party to ensure that restraint against children is used only as a last resort and exclusively to prevent harm to the child or others and that all methods of physical restraint for disciplinary purposes be abolished.<sup>11</sup> Given that the Government is bound through ratification of the UNCRC to give effect to its obligations under the UNCRC and to comply with the recommendations of the Committee on the Rights of the Child, this should also be a central consideration for the provisions on restraint and the Codes of Practice for all children and young people who may be subject to restraint.

#### 4.3. Chapter 4 - Additional Safeguard: Authorisations (Clauses 19 – 34)

**Clauses 19 – 34** of the Bill detail a number of acts which must be authorised by Trust Panels in line with the procedure set out in **Schedule 1** of the Bill. These acts include deprivation of liberty, the imposition of an attendance or community residence requirement, the provision of treatment with serious consequences where the nominated person objects, the provision of treatment with serious consequences where the person lacking capacity resists, or the act is done while the person is being deprived of their liberty or is subject to either an attendance requirement or a community residence requirement.

Given the seriousness of the acts outlined to which this section on authorisation applies, it is concerning that the Bill does not put in place a regional system for Trust Panels and will allow for a lack of consistency with regard to the operation of the panel authorisation process in each of the Health and Social Care Trusts. NICCY recommends an amendment to the Bill which will allow for the introduction of a regional system for Trust Panels as without the operation of a consistent Trust Panel process there is obvious potential for inconsistencies in decision making.

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<sup>11</sup> United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20<sup>th</sup> October 2008, Para. 39.

#### 4.4 Deprivation of Liberty Safeguards (Clauses 24 – 27)

**Clauses 24 – 27** of the Bill outline the process for the deprivation of liberty. The deprivation of an individual's liberty is an extremely serious issue and the Bill outlines safeguards relating to the deprivation of liberty to ensure compliance with the ECHR and the European Court of Human Rights judgment in *HL v United Kingdom*<sup>12</sup> 2004 (the Bournemouth case). This section of the Bill includes details of when and how the deprivation of liberty of an individual over 16 who lacks decision making capacity may be authorised. NICCY welcomes the inclusion of deprivation of liberty safeguards in the Bill as they will provide vital legislative protection for individuals who lack capacity. NICCY is aware that what will constitute a deprivation of liberty will have to be assessed on a case by case basis. NICCY expects that additional information and guidance on the circumstances which may amount to a deprivation of liberty will be provided in the Codes of Practice. Given the seriousness of depriving an individual of their liberty and the lack of clarity around what will amount to a deprivation of liberty under the Bill, this further illustrates the pressing need for the publication of, consultation on and finalisation of the Codes of Practice so that they can be introduced at the same time as the Bill is enacted. Consultation on the Codes of Practice should include direct consultation with children and young people in line with Article 12 of the UNCRC and section 75 of the Northern Ireland Act 1998.

Given that the Bill applies everyone over 16 NICCY recommends the Bill being amended to include all of the facilities within which young people may have their liberty deprived including children's homes, supported housing facilities and boarding schools for children and young people with additional needs. This is extremely important to ensure that young people are protected with regard to the authorisation of the deprivation of their liberty in all possible settings and also to prevent the need to make an application to the High Court which will be required if all relevant facilities and settings are not included in the Bill. Such applications would result in delays in the authorisation of deprivations of liberty. There will also be cost implications associated with making an application to the High Court and as discussed below legal aid must be made available for such matters, especially if a young person wants to challenge a deprivation of their liberty.

In creating robust deprivation of liberty safeguards and in ensuring compliance with both with the ECHR, as incorporated by the Human Rights Act 1998 and the Bournemouth

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<sup>12</sup> HL v UK 45508/99 (2004) ECHR 471

case,<sup>13</sup> NICCY would strongly suggest that the Bill is amended to extend the deprivation of liberty safeguards to children and young people under the age of 16. Neither the Bournemouth case nor the ECHR, as incorporated by the Human Rights Act 1998, make any distinction between the rights of those under and over 16 to have safeguards put in place to guard against an unjustified deprivation of their liberty as protected by Article 5 of the ECHR. NICCY believes that as Article 5 of the ECHR applies to everyone, regardless of age, so should the deprivation of liberty safeguards be extended to all.

As currently drafted, the Bill does not include deprivation of liberty safeguards for under 16s including scrutiny, monitoring of or the need to justify a deprivation of their liberty. Under 16s, who have their liberty deprived due to their compliant nature, as opposed to as a result of detention, therefore have no means of challenging the deprivation of their liberty. Also, the deprivation does not have to be justified as would be the case if they were over 16 and as they are voluntary patients there will be no easy way to challenge their deprivation of liberty either to a Mental Health Review Tribunal or to the High Court. If an individual wishes to challenge a deprivation of their liberty they will ultimately have to bring the matter before the High Court. As it is intended that the deprivation of liberty safeguards will protect some of the most vulnerable individuals in society, the safeguard is weakened if legal aid is not available to all who want to challenge a deprivation of their liberty, regardless of financial eligibility for legal aid. We would urge the Department of Justice to address this issue by ensuring the availability of legal aid so that this safeguard is available to all.

NICCY would urge the Departments in bringing forward the Mental Capacity Bill to take cognisance of the experience of England and Wales in introducing deprivation of liberty safeguards under the Mental Capacity Act 2005. It will be important for the effective implementation of deprivation of liberty safeguards in Northern Ireland that lessons are learned from England and Wales and that the errors in the operation and implementation of deprivation of liberty safeguards are not replicated in Northern Ireland. These errors were starkly highlighted in the House of Lords post legislative scrutiny debate where it was recommended that the introduction of deprivation of liberty safeguards should begin again.<sup>14</sup>

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<sup>13</sup> *Ibid*

<sup>14</sup> Mental Capacity Act 2005: post-legislative scrutiny, House of Lords, 13<sup>th</sup> March 2014, p.7.

## 5.0 Part 3 – Nominated Person (Clause 67 – 83)

**Clauses 67 – 83** of the Bill deals with nominated persons. This is an important part of the Bill in that the nominated person is appointed by an individual over 16 to act in the future on their behalf when they lose capacity. The nominated person procedure has been introduced to address the incompatibility of the nearest relative provisions with Article 8 of the ECHR as incorporated by the Human Rights Act 1998 as highlighted in case law including *JT v UK*<sup>15</sup>. It is therefore concerning that the nearest relative provisions in the Mental Health (Northern Ireland) Order 1986 will be retained for under 16s with some amendments, particularly given that the ECHR, as incorporated by the Human Rights Act 1998 applies to everyone regardless of their age.

The Nearest Relative provisions which will apply to young people under 16 are addressed at page 27 below.

## 6.0 Part 4 – Independent Advocates (Clauses 35 - 36 and 84 – 94)

**Clauses 35 – 36** and **84 – 94** of the Bill cover the appointment of Independent Advocates who will be put place to assist in the determination of what is in the best interests of a person lacking capacity. The appointment of an independent advocate is an extremely important safeguard and one which NICCY firmly believes should be available to all young people regardless of their age.

In the definition of the advocate's role, no mention is made of the advocate actually supporting the individual who lacks capacity to make their views and wishes known. It is important that the advocate assists in facilitating the voice of the young person and ensuring this is accurately represented in decision-making regarding their care and treatment. An advocate should not speak in place of the individual but on their behalf, and fully and accurately represent their views.

Throughout the Bill reference is made to an 'independent advocate', however **clauses 84 (1) – (4)** are clear that an 'independent advocate' will either be employed by a Health and Social Care Trust or contracted in by the Trust. Given the major role of Health and Social Care Trusts in appointing or contracting in advocates and providing payment for their services, NICCY has a number of concerns about how truly independent advocates are

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<sup>15</sup> 26494/95 (2000) ECHR 133.

likely to be. This has added significance when one considers that advocates may be required in certain circumstances to challenge decisions made by Trusts which presents an obvious conflict of interests, whether real or perceived. It is vitally important that young people who require the services of an advocate are confident that the service they are receiving is operating in an entirely independent manner without any sense of real or perceived monitoring or interference by a Health and Social Care Trust. Therefore NICCY is concerned that young people who require the advocacy service may lack confidence in the service and may choose not to avail of it. Furthermore, if advocates are only appointed through or contracted in by a Health and Social Care Trust, this will clearly limit the ability of a young person to employ the services of an advocate of their choosing and potentially prevent them from availing of the services of an advocate already known to them, whom they have an existing relationship of trust with and are comfortable with. This is potentially very damaging and undermining with regard to the strength of this safeguard which is extremely necessary, particularly when one considers the vulnerability of the young people to whom this Bill and the advocacy safeguard will apply.

There is also a worrying lack of clarity around the actual operation of independent advocates, including a failure to provide a clear definition of what an independent advocate actually is. In addition, the Bill also provides the DHSSPS with the power to make future regulations about the functions of and arrangements relating to independent advocates. This has resulted in only a partial understanding being possible of the advocacy safeguard under the Bill and has hampered NICCY's ability to make fully informed comment about what is proposed regarding the advocacy provisions under the Bill. NICCY believes that it would have been much more helpful if sufficient information on the definition and functions of an independent advocate, as well as the arrangements relating to advocacy could have been provided in the draft Bill.

**Clause 86** of the Bill sets out the proposed procedure for ensuring that an independent advocate is instructed. It is clear from this procedure that a request for the instruction of an independent advocate cannot be made by the young person requiring the services of an advocate, but rather must be made by an appropriate healthcare professional. This is in contrast to **clause 88** which gives a young person the right to declare that no independent advocate is to be instructed and **clause 91** which provides the young person with the right to discontinue their involvement with the independent advocate. While these are important rights, it is concerning that the right to withdraw or not engage with an advocate rests with

the young person who is over 16 and lacks capacity, yet the right to request the instruction of an advocate does not.

In addition, the circumstances under which an independent advocate may be instructed are extremely limited. For example, an independent advocate will only be instructed under **clause 35** of the Bill when a serious intervention is being proposed and where both the young person and their nominated person are objecting to the serious intervention and where a health care professional has requested the Trust to instruct an advocate in order to determine whether the act, i.e. the serious intervention, will be in the best interests of the young person who is over 16 and lacks capacity. This is extremely disappointing and is a significant dilution of the vision of advocacy envisaged in the Bamford Review. The Human Rights and Equality Report<sup>16</sup> of the Bamford Review highlighted children as one group which requires specific support to address their needs.<sup>17</sup> It concluded that the objective should be to have in place a range of independent advocacy support services delivered by a range of providers; support for people with mental health difficulties or a learning disability in exercising their rights; services which are compliant with all legal requirements in Northern Ireland; a coherent, co-ordinated, regional strategic framework which will provide people with mental health difficulties or a learning disability with access to advocacy support; an advocacy support service which is available both in hospital and in community settings; advocacy support services that will extend to those undergoing assessment and treatment voluntarily and involuntarily and which will reflect the diverse needs of people with mental health difficulties or a learning disability and advocacy support services which will pay particular attention to the circumstances where the autonomy and self-determination of individuals may be restricted or denied.<sup>18</sup> NICCY wants to see the provision of advocacy services to all children and young people which reflect the vision of advocacy as detailed by Bamford.

An additional concern is that the Bill appears to provide for advocacy services based on each decision or the consideration of each single act. It is NICCY's understanding that once the decision about whether an act is in the best interests of an individual has been taken that the individual will no longer have access to the independent advocate and it is only where the specific circumstances as discussed above arise again in relation to another single decision will the individual have access to the advocacy service again. It does not appear that the individual will have any right to request the continuation of the

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<sup>16</sup> October 2006

<sup>17</sup> *Ibid*, Pg 43.

<sup>18</sup> *Ibid*, Pgs. 43 and 44.

advocacy service or the appointment of the same advocate in the determination of future decisions. This will undermine any relationship of trust that has been established between the young person and their independent advocate and potentially make decision making more difficult and take more time in order to build up a relationship of trust with a new advocate, rather than strengthening an existing relationship that has already been established. NICCY does not believe that the approach to advocacy as contained in the Bill is in the best interests of the young person who requires the services of an advocate.

Independent advocacy as provided for in the Mental Capacity Bill falls far short of that which was envisaged by Bamford. Young people of all ages, both in the Mental Capacity Bill and under a retained and amended Mental Health (Northern Ireland) Order 1986, should be able to request the services of their chosen advocate to assist them where they require such services. It is imperative that advocacy services which are provided to children and young people with mental ill-health or a learning disability are based on need and give effect to the Government's obligations under Article 12 of the UNCRC. NICCY believes that the role of the advocate, their independence, procedures for appointment and reappointment, the definition of advocacy, the functions and arrangements relating to advocacy, the circumstances for the instruction of engagement in and disengagement from advocacy services as well as the issue of continuation of advocacy services all require substantial consideration and revision in order to establish an advocacy service in line with the recommendations of the Bamford Review and the best interests of children and young people.

Independent advocacy for young people under 16 is addressed at page 25 below.

## 7.0 Part 5 – Lasting Powers of Attorney (Clauses 95 – 110)

Part 5 of the Mental Capacity Bill details the procedures relating to lasting powers of attorney and it is clear from this part of the Bill that it is not intended to extend lasting powers of attorney to 16 and 17 years olds, but rather to adults over the age of 18 only as detailed under **clause 97(1)** of the Bill. While NICCY does not believe that children and young people should ever be engaged in hazardous occupations, such as the armed forces, the law as it currently stands allows for 16 and 17 year olds to serve in the army. In such circumstances it may be in the best interests of 16 and 17 year olds to be legally permitted to make a lasting power of attorney.

## 8.0 Part 9 – Power of Police to Remove Person to Place of Safety (Clauses 137 – 159)

It is NICCY's understanding that both parts 9 and 10 of the Mental Capacity Bill will apply to all age groups and the exercise of the powers contained therein will not be restricted to over 16s, as is the case with the civil provisions in the Bill. While this is welcome as it does not assume a lack of capacity in all under 16s, NICCY has a number of concerns with regard to the operation of the criminal justice provisions in practice. In particular, NICCY has concerns that the criminal justice provisions will apply to all age groups but that the care and treatment of young people in the criminal justice system will be determined by the civil provisions of the Bill, will be capacity based and governed either by the Mental Capacity Bill or by the retained and amended Mental Health (Northern Ireland) Order 1986 depending on the age of the young person. In addition, we have a number of concerns about the lack of availability of appropriate facilities for under 18s in Northern Ireland which will make the practical outworkings of the application of the criminal justice provisions to all age groups very difficult to implement.

Part 9 of the Mental Capacity Bill provides a power for the Police Service of Northern Ireland (PSNI) to remove a person from a public place to a place of safety. Article 130, which contains the current place of safety power of the Mental Health (Northern Ireland) Order 1986 will be repealed by the Bill so that this place of safety power will apply to everyone, regardless of age. **Clause 137** details the circumstances within which such a removal can be made and these include that the person must lack capacity, the failure to remove the person would create a risk of serious harm to the person or serious physical harm to other persons, where removing the person is a proportionate response to the likelihood of harm and where their removal is in the best interests of the individual. **Clause 143** provides a welcome power to transfer a young person from one place of safety to another within the maximum 24 hour detention period where discharge is not suitable and there is appropriate care or treatment available in the new place of safety which is not available in the place where the young person is being detained and where this would be in the best interests of the young person. NICCY appreciates that for some young people the exercise of the use of the 'place of safety' power by the PSNI will be necessary in order to protect the young person and others.

In order for the police to use the power to remove a person to a 'place of safety' certain conditions need to be met. One of these conditions as detailed in **clause 137(2)(c)** is,

*“...because of an impairment of or disturbance in the functioning of the mind or brain (temporary or permanent, and however caused), the person is unable to make a decision for himself or herself as to whether he or she should be taken to a place of safety”.*

While this test is not an identical test to the test for ‘lacks capacity’ it is worth comparing the two tests and noting that under **clause 158** of the Bill, the definition of ‘unable to make a decision’ is stated as the same as the test for ‘lacks capacity’, a test which only applies to those over the age of 16.

The test for ‘lacks capacity’ in **clause 3** of the Bill is,

*“3.—(1) For the purposes of this Act, a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

*(2) It does not matter—*

*(a) whether the impairment or disturbance is permanent or temporary;*

*(b) what the cause of the impairment or disturbance is.*

*(3) In particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability”*

Despite the obvious similarities in the test to remove a person to a place of safety, a test which is replicated in the power to transfer a person from one place of safety to another at **clause 143** of the Bill and the ‘lacks capacity’ test at **clause 3** of the Bill, the place of safety test will be applied to everyone, regardless of age and the test for ‘lacks capacity’ will not due, according to the DHSSPS, to difficulties in assessing capacity in under 16s because of their developmental immaturity. This raises obvious significant questions about the rationale for the exclusion of under 16s from the scope of the civil provisions of the Bill.

**Clause 158** provides a definition of a ‘place of safety’ for the purposes of the power of the PSNI to remove a person over 16 from a public place and includes both a hospital and a police station. NICCY does not believe that a police station is a suitable place of safety for a young person. The use of a police station as a ‘place of safety’ is entirely inappropriate and in the case of an extremely vulnerable, mentally ill young person implies that a criminal justice response is appropriate and necessary, which it is not. We want to see

police stations being removed from the Mental Capacity Bill from the definition of a 'place of safety' for children and young people.

As this new definition and associated power will apply to all age groups, the use of the JJC as a place of safety under the Mental Health (Northern Ireland) Order 1986<sup>19</sup> will cease. This is a welcome development.

With regard to the amount of time that a young person can be detained in a 'place of safety', we welcome the reduction in the maximum amount of time a person aged over 16 can be detained in a 'place of safety' from 48 to 24 hours in the Mental Capacity Bill. This reduction to 24 hours is in line with the legislation in Scotland<sup>20</sup> and is more in line with the UNCRC requirement under Article 37(b) of the UNCRC that a deprivation of liberty should be for the shortest appropriate period of time and as recommended by the Committee on the Rights of the Child<sup>21</sup>.

## 9.0 Part 10 – Criminal Justice (Clauses 160 – 247)

An extremely significant proportion of children and young people who come into contact with the criminal justice system have serious mental health needs. They are therefore a particularly vulnerable group who require additional protections and safeguards and it is vital that every effort is made to ensure they can access these where and when they are required. The approach taken by DoJ with regard to the criminal justice provisions in the Bill differs markedly from its consultation on proposals for the Mental Capacity Bill in 2014 where the Department consulted on its policy statement and stated that it did not intend to introduce stand alone criminal justice clauses, but rather to bring forward amendments to various pieces of criminal justice legislation. Therefore while NICCY welcomes the legislative changes to be taken forward through the Bill it is very disappointing that the criminal justice clauses in the Mental Capacity Bill have not been consulted upon previously in line with the Department's statutory equality obligations under section 75 of the Northern Ireland Act 1998. In addition, NICCY is concerned, given the current advanced stage of the legislative process, that significant amendments which the DoJ is intending to bring forward, including the repeal of Part III of the Mental Health (Northern Ireland) Order 1986, have not been included in the provisions of the draft Bill. This raises a

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<sup>19</sup> The JJC will remain a 'place of safety' for other pieces of criminal justice legislation including Article 39 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

<sup>20</sup> Mental Health (Care and Treatment) (Scotland) Act 2003

<sup>21</sup> *Op cit* 11, Para 78b).

number of questions about the ability of those commenting on the current version of the draft Bill to influence its content and to have confidence in the version currently published for comment.

There are a number of general issues which exist in relation to the criminal justice provisions in the Mental Capacity Bill which cause NICCY some concern and it is unclear how these issues have been or will be addressed. As NICCY has previously highlighted to DoJ, the exclusion of under 16s from the scope of the civil provisions of the Mental Capacity Bill due, according to the DHSSPS, to difficulties in assessing capacity in under 16s because of their developmental immaturity causes confusion when one considers in Northern Ireland that a child of 10 years of age is presumed to have the capacity to commit a crime. There are also issues with regard to the operation of disposals in the criminal justice system which require a young person to admit guilt and / or give their informed consent, for example, in order to participate in youth conferences. It is extremely unclear how the issue of young people under 16 not being included in the civil provisions of the Mental Capacity Bill due to their developmental immaturity can be rationalised with the obligation, and consequent assumption of capacity, for young people aged 10 and over to admit guilt and / or give their informed consent in order to avail of certain criminal justice disposals. NICCY believes that it is vitally important that the tension between these policy positions is clarified as a matter of urgency.

There is also a related issue around the operation of two pieces of legislation - the Mental Capacity Bill and the Mental Health (Northern Ireland) Order 1986, which will apply to the care and treatment of children and young people in the criminal justice system based on their age, i.e. the civil provisions of the Bill. Since the civil provisions of the Mental Capacity Bill will only apply to young people aged 16 years and above, this may present challenges for example, for both staff and young people detained in the Juvenile Justice Centre in relation to their treatment, care and welfare. Given the potential age range of young people in the Centre, it is likely that the provisions and protections offered through the Bill will be available to some young people but not others. There will also be implications for other criminal justice agencies including the PSNI and the Youth Justice Agency who will have to operate two different systems in the care and treatment of children and young people that they come into contact with based on their age, which may not always be possible to ascertain. It will be vitally important that staff from all relevant agencies and service providers are fully trained with regard to the operation of both the Mental Capacity Bill, including running the capacity test itself and the Mental Health

(Northern Ireland) Order 1986 as amended. There are likely to be implications for young people within the criminal justice system through the operation of two separate pieces of legislation and it is vital that appropriate and robust training and guidance is provided to all professionals working with young people within policing and the justice systems in line with Articles 4 and 42 of the UNCRC, the UN Committee's General Comment 5 and its Concluding Observations following its examination of the UK Government's compliance with its obligations under the UNCRC in October 2008.<sup>22</sup>

The term 'mental disorder' is used on a number of occasions in the criminal justice section of the Mental Capacity Bill. NICCY recommends that the language of the entire Bill, particularly in relation to the criminal justice section of the Bill, should be urgently reviewed to ensure that it adheres to Bamford's vision to eliminate the stigma surrounding mental health issues. Words or phrases, such as 'mental disorder' should therefore be removed from the Bill.

The Mental Capacity Bill introduces a number of new court disposals relating to health care which will apply to everyone, regardless of their age. These new disposals will be available to a court when sentencing anyone, regardless of age. In practice this means that a court can make these disposals in cases involving young people of all ages if it believes they may be beneficial to the young person. However, NICCY is concerned about the lack of availability of the necessary appropriate facilities for under 18s in Northern Ireland which make the practical outworkings of the use of these disposals for young people under 18 very difficult to implement or not practically available to under 18s despite their legal availability to the court for young people of all ages.

Within the new court disposals, it is proposed that young people can be referred to an in-patient facility for treatment. However, there is no in-patient forensic treatment unit for young people under the age of 18 in Northern Ireland and as a result it is unclear where young people who require in-patient forensic treatment will be referred to. NICCY is concerned about legislative provisions being progressed which will impact on young people of all ages which cannot be used but agrees that there is a pressing need for the availability of an appropriate in-patient forensic facility in Northern Ireland for children and young people. The lack of appropriate in-patient facilities for young people under 18 in Northern Ireland is also an issue in relation to the provisions in the Bill which relate to the

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<sup>22</sup> *Ibid*, Para 21.

transfer of prisoners as well as the courts powers to remand an accused person to hospital for examination or treatment. In the absence of a forensic in-patient facility for under 18s in Northern Ireland NICCY is concerned that young people of all ages may be remanded for treatment or examination to an unsuitable facility. In addition, where a young person cannot be remanded to a forensic in-patient facility in Northern Ireland there is the possibility that very vulnerable, mentally-ill young people may be refused bail and remanded to the JJC in the absence of any alternative to the court. NICCY does not believe that in the case of a child this would ever be in their best interests.

All of these possible scenarios would cause NICCY significant concern in relation to the Government's compliance with its obligations under the UNCRC, particularly with regard to the best interests of the child (Article 3), the right to be protected from discrimination (Article 2), the right of a disabled child to a full and decent life (Article 23), the right to the highest attainable standards of health and health care (Article 24), the right to be detained separately from adults (Article 37c) and for the use of custody as a measure of last resort and for the shortest appropriate period of time (Article 37b) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), in particular the right of children with disabilities to enjoy all human rights and fundamental freedoms on an equal basis with other children (Article 7). Removal of young people for treatment outside of the jurisdiction because of a lack of an appropriate facility in Northern Ireland also causes NICCY concern with regard to compliance with the right to private and family life (Article 8) of the ECHR. It is vital that the Department provides information which outlines clearly its intended plan for the provision of in-patient forensic treatment for children and young people where such treatment is necessary.

As the Mental Capacity Bill will introduce a capacity based model for care and treatment of people aged 16 and over within the criminal justice system the courts will be required to take account of the capacity of a defendant over 16 when making certain determinations. This will mean that where a person aged over 16 who has capacity refuses a treatment based court disposal the court will have to respect this refusal even when it believes that this is the best and most appropriate option for the person in question. This will have serious implications for the operation of the courts, which currently makes treatment based disposals without having regard to the issues of capacity or consent. It will also have serious implications for the young person concerned with regard to ensuring that they are receiving the best and most beneficial disposal in their particular case. While the courts will be obliged to also consider the best interests of the young person by virtue of the principle

of 'best interests' in the Bill, there appears to be potential for conflict where a young person with capacity decides not to agree to a determination which the courts believe would be in their best interests. In addition, as the treatment based court disposals will be available to young people of all age groups, it is very unclear what action the court will take where an under 16 refuses a treatment based court disposal. Even if the court finds that a young person under 16 is Gillick<sup>23</sup> competent, i.e. able to, "*...make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision,*"<sup>24</sup> as this only allows the competent young person to consent and not to refuse treatment. NICCY believes that further information is required as to how the issue of refusal by a young person of a treatment based court disposal will operate in practice in order to allow for fully informed comment and to address concerns such as these.

There is also a lack of clarity around the issue of unfitness to be tried as dealt with in **clauses 202 – 207** of the Bill. While the Bill as currently drafted does not extend the test of unfitness to be tried to the Youth Court to under 16s or to 16 and 17 year olds, we understand that the DoJ is awaiting the findings of the English Law Commission's review of Unfitness to Plead before making a decision on amending this area of law. It is vital that the extent of the application of the test of unfitness to be tried with regard to under 16s and 16 and 17 year olds is clarified as soon as possible as there will be a range of issues which will require consideration depending on its application.

## 10.0 Part 12 – Children (Clauses 254 - 255)

Part 12 of the Mental Capacity Bill relates to children. NICCY has consistently expressed concerns regarding the exclusion of under 16 year olds from the Mental Capacity Bill, because vulnerable children and young people will not be given the special consideration that they require, nor enjoy equal access to the protections and safeguards proposed for those aged 16 years and over who will come within the scope of the Mental Capacity Bill. In relation to the issue of capacity, this submission has already referenced the Bamford Review's recommendations to recognise emerging capacity in children and young people and its desire to create a comprehensive legislative framework to address issues of mental capacity and decision making rights. During its engagement with the DHSSPS, NICCY has raised the issue of emerging capacity and drawn attention to relevant articles enshrined in

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<sup>23</sup> Gillick v West Norfolk and Wisbech Area Health Authority, 1986 AC112.

<sup>24</sup> Lord Scarman, *Ibid*.

the UNCRC and the UNCRPD which recognise evolving capacity in children and their right to participate in decision-making about issues affecting them.

In making alternative provisions for young people under 16, NICCY's primary concern is that they do not experience any disadvantage and that they are able to access at least equivalent safeguards and protections as will be available to over 16s under the Mental Capacity Bill. As already highlighted, NICCY believes it is essential that vulnerable young people experiencing mental ill-health are adequately and effectively protected and provided for.

Notwithstanding these concerns, NICCY wishes to comment on the provisions for under 16 year olds who are detained for assessment or treatment. NICCY does not regard the decision to retain the Mental Health (NI) Order 1986 as acceptable. As noted earlier, the Order has been described as outdated, 'not in keeping with developments in good practice' and not compliant with human rights standards. Furthermore, NICCY believes that the proposal to revise existing legislation, which was created primarily for adults, to now include provisions for children and young people is entirely inappropriate. Ongoing engagement with the DHSSPS has served to re-emphasise the unique circumstances of under 16s and therefore it should be a priority to develop comprehensive legislation which clearly and appropriately addresses the particular needs and issues of these children and young people.

### 10.1 In-patients under 18: duties of hospital managers

**Clause 254** applies to young people aged over 16 but under 18 and places a duty on the managing authority of a hospital to ensure that the hospital environment is suitable having regard to the age of the young person. While it is welcome that this duty will be introduced through the Bill, NICCY believes that it does not go far enough in providing firm assurances that the practice of admitting children onto adult psychiatric wards will cease. The admission of children and young people to adult wards is an issue of serious concern which NICCY and other agencies have repeatedly highlighted over a considerable period.<sup>25</sup> The risks to children in terms of their protection and safety and the potentially detrimental impact on their social and emotional wellbeing are significant and consequently NICCY believes it is wholly unacceptable that children are ever placed on

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<sup>25</sup>Baseline Assessment of the Care of Children Under 18 Admitted to Adult Wards in Northern Ireland, RQIA, December 2012; Strengthening Protection for Children and Young People when accessing goods, facilities and services, Summary Report, ECNI and NICCY, October 2013

adult psychiatric wards. NICCY recommends an amendment to this clause to place an unequivocal duty on hospital managers to ensure that all children and young people under 18 will never be placed on adult psychiatric wards and will receive treatment in age appropriate and developmentally appropriate settings. NICCY believes that this stronger obligation is the only way to ensure compliance with international children's rights standards which requires that children and young people are not detained with adults (Article 37c) and have their best interests upheld (Article 3). The treatment of children on adult psychiatric wards was also raised by the United Nations Committee on the Rights of the Child in its Concluding Observations following its examination of the UK Government's compliance with its obligations under the UNCRC in 2008.<sup>26</sup>

**Clause 255** covers the proposed amendments to the Mental Health (Northern Ireland) Order 1986 which will apply to young people under the age of 16. Given the advanced stage of the Bill and the need to ensure that all children and young people with mental ill-health are sufficiently protected and have access to at least equivalent safeguards to those available to over 16s it is vital that a retained and amended Mental Health (Northern Ireland) Order 1986 is fit for purpose and contains robust protections.

**Clause 255** outlines the three areas which the Mental Capacity Bill aims to address with regard to children and young people under 16 in making amendments to the Mental Health (Northern Ireland) Order 1986. These are, making provisions for independent advocates for children, requiring decision makers to have the best interests of the child as the primary consideration and other amendments to the Order.

In its response to the consultation on proposals for the Mental Capacity Bill in 2014, NICCY expressed its desire to have sight of the proposed clauses which will amend the Mental Health (NI) Order 1986. It is disappointing that NICCY has not been given the opportunity to provide comment on these at an earlier stage in the legislative process.

## 10.2 Best Interests Principle

NICCY welcomes the insertion of a best interests principle at **Schedule 8 paragraph 3A** of the Bill which must be the primary consideration when making decisions about the treatment or care of a patient under 16. This will provide a welcome and necessary additional safeguard in the Mental Health (Northern Ireland) Order 1986 for young people

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<sup>26</sup> *Op cit* 11, para. 56.

under 16 who have mental-ill health. The determination of a patient's best interests is detailed in **Schedule 8 paragraph 3B** of the Bill. This determination is very unclear and NICCY does not believe that it adequately reflects the wording of Article 3 of the UNCRC, which states that,

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

While NICCY appreciates that in determining what is in the best interests of a young person under 16, the young person must be encouraged and helped to participate in a decision about their care and that special regard must be given to the wishes, feelings, beliefs and values of the young person **Schedule 8 paragraph 3B** does not state that the views and wishes of the young person should be taken into account in making a determination of what is in the young person's best interests. This is in marked contrast to **Schedule 8 paragraph 3B 7(a) and (b)** which state that 'relevant people' must be consulted about what would be in the best interests of the young person and that their views must be taken into account in making a determination about what is in the best interests of the young person. The UN Committee on the Rights of the Child's General Comment 14<sup>27</sup> provides some insight into what is meant in giving effect to the right of the child to have his or her best interests taken as a primary consideration. General Comment 14 is clear that in ensuring the best interests of the child are a primary consideration, adequate weight must be given to Article 12 of the UNCRC, the right of the child or young person to have their views heard and taken into account. The Committee is clear that Article 3 cannot be correctly applied if the requirements of Article 12 are not met.<sup>28</sup>

It is clear from the Committee's General Comment that hearing the views of the child or young person and crucially, taking their views into account in determining what is in their best interests, are integral in giving effect to Article 3 of the UNCRC. The General Comment also outlines the obligation on State Parties to ensure appropriate arrangements, including representation, when appropriate, for the assessment of best interests.<sup>29</sup> The General Comment is also clear that even though a child may be very young or in a vulnerable situation this does not deprive the child of the right to express

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<sup>27</sup> General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' United Nations Committee on the Rights of the Child, CRC/C/GC/14, 29th May 2013

<sup>28</sup> *Ibid*, para 43

<sup>29</sup> *Ibid*, para.44.

their views, nor should it reduce the weight given to the child's views in determining what is in their best interests.<sup>30</sup> NICCY recommends an amendment should be made to the Mental Health (Northern Ireland) Order 1986 to ensure that young people are adequately facilitated to have their views heard, including through the provision of a representative to do so where appropriate and that the views expressed by a young person are taken into account and given due weight in line with the age and maturity of the child. We would therefore recommend the inclusion in the Mental Health (Northern Ireland) Order 1986 of a provision similar to that contained in **clause 5** of the Bill which contains an obligation to provide support in decision making. This would serve to facilitate and support a child or young person to participate in decision making, in line with Article 12 of the UNCRC and Article 12 (3) of the UNCRPD.

### 10.3 Independent Advocates

In relation to advocacy services for under 16s, the Bill contains very little information on how advocacy services will operate and what services will be available to whom in what circumstances. The advocacy provisions under **Schedule 8 paragraph 3C** are extremely vague and **Schedule 8 paragraph 3C (2)** states that,

*“An “independent advocate” means a person who has been appointed by a HSC trust, in accordance with the regulations, to be a person to whom the trust may from time to time offer instructions to represent and provide support to a patient who is under 16 in relation to matters specified in the instructions”.*

It is very difficult given the lack of detail provided in the Bill to make informed comment on advocacy for under 16s as most of the necessary information required to make an assessment of advocacy for under 16s has not been provided and appears to be being left to Regulations which the Department will make at some point in the future. It is however clear from **Schedule 8** that advocates for under 16s will be appointed by a Health and Social Care Trust and the same concerns exist as expressed above in relation to advocacy services for over 16s with regard to the real or perceived independence of the advocates, their ability to challenge decisions made by Trusts as well as the impact their employment by the Trust will have on the level of confidence young people have in the service and their resultant willingness to avail of it. Again, this will significantly undermine

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<sup>30</sup> *Ibid*, para.54.

the strength of this vital safeguard for some of our most vulnerable children and young people.

Given the lack of detail regarding advocacy services for under 16s in the Bill it is unclear whether the same issues will exist with regard to advocacy services for under 16s as for over 16s with regard to the circumstances where advocacy will be made available, the procedures for the appointment and reappointment of an advocate, the circumstances for the instruction of engagement in and disengagement from advocacy services as well as the issue of continuation of advocacy services. It is also unclear whether advocacy services will be available to under 16s in the community and/or upon discharge from hospital and whether under 16s will be able to access an advocate of their choosing.

One welcome development is that it does appear in limited circumstances that advocacy services may be available to under 16s who are voluntary patients as well as detained. This is important as NICCY believes that it is vital that all children have access to the maximum protections and safeguards as possible, regardless of them being voluntary or detained patients. What is disappointing however is the lack of clarity around the purpose, circumstances and processes which relate to advocacy services for under 16s which make it difficult to ascertain whether the provision of advocacy services will be fit for purpose and will provide as robust a safeguard as was intended by Bamford and is necessary for children under 16 with mental ill health. It is vital that advocacy services for all children and young people are as comprehensive as possible and that independent advocacy is provided to children and young people in the community where detention is being considered in order to facilitate the child to express their views as per Article 12 of the UNCRC and in some circumstances to circumvent the need for detention to occur, as well as upon discharge from hospital. This should ensure that young people have their right to express their views upheld and also to provide support for children in the community, thus contributing positively to their successful rehabilitation in a community setting.

Advocacy for children and young people is a specialist area and any independent advocates working with children and young people with mental ill-health should be equipped with the necessary skills and expertise and have undergone appropriate training in advocacy approaches, child protection procedures and the UNCRC and children's rights. It will be important that advocates have received quality, accredited training in line with Articles 4 and 42 of the UNCRC, the UN Committee's General Comment 5 and its

Concluding Observations following its examination of the UK Government's compliance with its obligations under the UNCRC in October 2008.<sup>31</sup>

#### 10.4 Electroconvulsive Therapy

**Schedule 8 paragraph 63B** inserts a requirement for consent and a second opinion for electroconvulsive therapy (ECT) for under 16s who are detained in hospital. NICCY understands that ECT is rarely administered to young people. An additional safeguard in the form of the consent requirement is welcome, however NICCY has serious concerns about the use of ECT on young people in any circumstances, given the associated health risks and significant ethical issues.

#### 10.5 Nearest Relative Provisions

**Schedule 8 paragraph 3D** amends the nearest relative provisions of the Mental Health (Northern Ireland) Order 1986 for children under 16. NICCY has concerns that the proposed amendments to the nearest relative provisions of the Mental Health (Northern Ireland) Order 1986 will not ensure compliance with the ECHR and given the importance of the role of the nearest relative we recommend additional amendments being made which would provide greater protections for under 16s with regard to their nearest relative.

While we are encouraged to note the proposed amendment to the Mental Health (Northern Ireland) Order 1986 which will add the patient to the list of persons with a right to apply to the County Court for displacement of their nearest relative and the insertion of a new ground of, 'not a suitable person to act' as a nearest relative for the purposes of displacement we would be supportive of further amendments being made which would allow applications for displacement to be made to the Mental Health Review Tribunal as opposed to the County Court. This would be more a more cost effective and expedient process which is in line with the rights afforded to over 16s under the Mental Capacity Bill. We would also want to see under 16s being afforded the right to choose their nearest relative who is not on the statutory list under Article 32 of the Mental Health (Northern Ireland) Order 1986 and under 16s being afforded the right to choose a suitable nearest relative from the list, regardless of the order they come on the list. This would be in line with Article 8 of the ECHR, the right to private and family life, Article 5 of the UNCRC,

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<sup>31</sup> *Op cit* 11, Para 21.

which introduces the concept of the evolving capacity of children and Article 12 of the UNCRC which places an obligation on the Government to ensure respect for the views of the child and the meaningful involvement of the child in decisions which impact on their lives. Currently, mature minors who are under 16 and who are deemed to be ‘Gillick competent’<sup>32</sup> can and do have a say in their medical treatment without the consent of their parents.

NICCY also believes that additional amendments should be made to the Mental Health (Northern Ireland Order) 1986 which will allow under 16s who are in the care of the state, i.e. children who are ‘looked after’ or detained in the JJC, which will allow them to displace the state. For example, a young person should be permitted to displace the Director of the JJC or the relevant Health and Social Care Trust as their nearest relative and choose a more suitable nearest relative if they wish to do so. These young people are particularly vulnerable and given the importance of the role of the nearest relative as a significant safeguard for children who are detained under the Mental Health (Northern Ireland) Order 1986 it is particularly important that the child is happy with the person who is acting as his/her nearest relative.

In the event of an application for displacement of the nearest relative being made by a child the suitability of the nearest relative will ultimately be determined by the County Court, in the absence of an amendment being made to the Mental Health (Northern Ireland) Order 1986 which would allow applications to be made to the Mental Health Review Tribunal as discussed above. NICCY believes that this process will ensure adequate oversight of the suitability of the nearest relative.

## 10.6 Inpatients under 16: duties of hospital managers.

**Schedule 8 paragraph 3D** places a duty on hospital managers in respect of age appropriate accommodation for young people under 16 to ensure that the hospital environment is suitable having regard to the age of the young person. This is very similar to the duty contained at **clause 254** of the Bill which places a duty on hospital managers in respect of age appropriate accommodation for young people aged 16 and 17 year olds as discussed at page 22 above. While it is welcome that this duty will be introduced through the Bill, NICCY has the same concerns as those expressed above regarding young people aged 16 and 17. NICCY does not believe that the duty as currently drafted goes far

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<sup>32</sup> *Op cit* 23.

enough in providing firm assurances that the practice of admitting children onto adult psychiatric wards will cease. This concern is heightened when one considers the level of vulnerability of young people under 16 who are receiving care and treatment for mental ill-health in a hospital environment. The admission of children and young people to adult wards is an issue of serious concern which NICCY and other agencies have repeatedly highlighted over a considerable period.<sup>33</sup> The risks to children in terms of their protection and safety and the potentially detrimental impact on their social and emotional wellbeing are significant and consequently NICCY believes it is wholly unacceptable that children are ever placed on adult psychiatric wards. NICCY wants to see an amendment to this clause to place an unequivocal duty on hospital managers to ensure that all children and young people under 16 will never be placed on adult psychiatric wards in order to guarantee that all children receive treatment in age and developmentally appropriate settings. NICCY believes that this stronger obligation is the only way to ensure compliance with international children's rights standards which requires that children and young people are not detained with adults (Article 37c) and have their best interests upheld (Article 3). The treatment of children on adult psychiatric wards was also raised by the United Nations Committee on the Rights of the Child in its Concluding Observations following its examination of the UK Government's compliance with its obligations under the UNCRC in 2008.<sup>34</sup>

## **11.0 Other amendments required to the Mental Health (Northern Ireland) Order 1986**

### **11.1 Extension of the Disregard Provision in Article 10 of the Mental Health (Northern Ireland) Order 1986 to include Periods of Detention for Treatment**

In its response to the consultation on proposals for the Mental Capacity Bill in 2014, NICCY warmly welcomed the DHSSPS's stated intention to extend the disregard provision in Article 10 of the Mental Health (Northern Ireland) Order 1986 to include periods of detention for treatment for young people under 16. Due to the extremely detrimental impact the obligation to declare periods of detention for treatment for a mental illness has on children and young people with regard, for example, to employment, travel and insurance NICCY had recommended that the disregard provision be extended further to include all children under the age of 18 and apply retrospectively to all periods of detention

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<sup>33</sup> *Op cit* 25.

<sup>34</sup> *Op cit* 11, para. 56.

for treatment in childhood. It is extremely disappointing that despite the Department's stated intention to extend the disregard provision in Article 10 of the Mental Health (Northern Ireland) Order 1986 this extension of the disregard provision for children and young people of any age is not included in **Schedule 8** of the Bill.

The obligation to declare periods of detention for treatment for a mental illness has a significant adverse impact on children and young people in terms of their life chances and ability to access opportunities in the same way as children and young people who have never been detained for treatment for a mental illness. NICCY believes that it is vital that the stigmatising impact of the obligation to declare periods of detention for treatment for a mental illness is negated through the extension of the disregard provision to all children and young people under 18 and that this should apply retrospectively to everyone detained for treatment of a mental illness in childhood.

It is unclear why the extension of the disregard provision in Article 10 of the Mental Health (Northern Ireland) Order 1986 has not been included in the Bill however NICCY understands that the DHSSPS is currently seeking legal advice regarding the legislative competence of the Northern Assembly in relation to some of the pieces of legislation this provision will impact upon. Pending the outcome of this advice, NICCY would urge the DHSSPS to extend the disregard provision to include periods of detention for treatment for all children and young people under 18 and to apply this retrospectively to everyone detained for treatment of a mental illness in childhood. NICCY believes that this is a vital safeguard to ensure that everyone who has been detained for treatment for a mental illness in childhood is not discriminated against and is able to access the full range of lifetime opportunities and chances as all other children.

## 11.2 Access to Education

In its consultation on proposals for the Mental Capacity Bill in 2014, the DHSSPS stated that it was considering access to educational provision for children and young people. It is extremely disappointing that neither the Mental Capacity Bill nor the amendments to the Mental Health (Northern Ireland) Order 1986 contain any education clauses for children and young people. NICCY recommends that amendments are made to both pieces of legislation to contain strong education provisions that oblige the Department to ensure that children and young people have equal access to the same educational provision as their peers who are educated in schools, colleges or elsewhere. The Bamford Review

highlighted the right of children to, “...have access to a practical and effective education”<sup>35</sup> while Article 2 of the UNCRC recognises the right of the child to be protected for all forms of discrimination, Article 23 recognises the right of disabled children to a full and decent life including access to education, Articles 28 and 29 of the UNCRC, Protocol 1, Article 2 of the ECHR and Article 24 of the UNCRPD recognise the right of children/persons to an effective education.

In addition, particular account should be taken of children and young people who may have special educational needs and require additional provision. Again the Bamford Review commented that,

*“...particular attention needs to be paid to ensuring that children and young people with mental health difficulties or a learning disability who present challenges to educational services because of the severity or complexity of their disability enjoy equal access to education”.*<sup>36</sup>

The legislation should also ensure that on discharge from hospital, children and young people are adequately and fully supported in returning or transferring to their school or place of education and all relevant documentation, including statements of special needs, should be effectively communicated to the appropriate education authorities including Education and Library Boards, in order to ensure their transition to the community setting is as smooth as possible.

### 11.3 Further Amendments

Other areas where NICCY recommends that amendments are made to the Mental Health (Northern Ireland Order) 1986 include -

*Stigmatising Language* - The language of the Mental Health (Northern Ireland Order) 1986 should be carefully reviewed to ensure that it adheres to Bamford’s vision to eliminate the stigma surrounding mental health issues.

*Mental Health Review Tribunal* - In terms of provisions concerning the Mental Health Review Tribunal, (Articles 71-74 of the Mental Health (Northern Ireland Order) 1986),

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<sup>35</sup> Pg. 21, Human Rights and Equality of Opportunity – The Bamford Review, October 2006.

<sup>36</sup> *Ibid.*

children and young people under 16 can currently only apply to the Mental Health Review Tribunal once every 6 months for a review of their detention. Given the seriousness of the issue of the detention of a child, NICCY wants to see this restriction being removed and the inclusion of a provision to allow for multiple applications to be made, if necessary, with the leave of the Mental Health Review Tribunal.

*The offence of ill treatment or neglect of those who lack capacity* - Article 121 relates to the offence of ill treatment of patients. This needs to be amended to mirror the offence of ill treatment or neglect of those who lack capacity in the Mental Capacity Bill.

*Equivalent Safeguards and Protections* - The legislation should include a list of safeguards and protections which are at least equivalent to those which young people over 16s will be able to access under the Mental Capacity Bill. These include a statutory recognition of the views of carers and restraint safeguards and should be available to both voluntary and detained patients.

## 12.0 Part 13 – Offences (Clauses 256 – 262)

**Clauses 256 – 262** of the Bill makes provision for the introduction of range of new offences, including at **clause 256**, a new offence' of ill treatment or wilful neglect which will apply to anyone caring for a person who lacks capacity or is believed to lack capacity, in relation to all or any matters concerning their care. Although this was not previously the case, NICCY has now been assured by the DHSSPS that this offence will apply to everyone, regardless of age.<sup>37</sup> This is extremely welcome as it is vital that this new criminal offence provides equal protection to those under the age of 16 as well as to those aged 16 and over, however it is unclear from the Bill how the DHSSPS intends to establish a lack of capacity in under 16s as the capacity test in the Bill does not apply to this age group. We have been informed by the DHSSPS that as, 'lack of capacity' is not defined in the Bill for under 16s, the establishment of a lack of capacity in this age group will be determined in accordance with the common law and further guidance in a Code of Practice.<sup>38</sup> **While the assessment of a lack of capacity in under 16s on a case by case basis is welcome it also raises significant questions about the rationale for the exclusion of under 16s from the scope of the civil provisions of the Mental Capacity Bill. It appears that for the purposes of this offence under the Bill, capacity in under**

<sup>37</sup> Correspondence between DHSSPS and NICCY staff, 28<sup>th</sup> and 30<sup>th</sup> July 2015.

<sup>38</sup> Correspondence from DHSSPS to NICCY, 30<sup>th</sup> July 2015.

**16s can and will be assessed. If the DHSSPS is proposing to assess capacity in under 16s, NICCY can therefore see no reason whatsoever why under 16s should be excluded from the scope of the capacity based civil provisions of the Mental Capacity Bill.**

### **13.0 Part 15 – Supplementary (Clauses 276 – 295)**

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 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. The Bamford Review was clear about the reduced impact that the principles of the Mental Health (Northern Ireland) Order 1986 had as a result of the delay in the publication of the Codes of Practice and failure to deliver an associated training programme. It states that,

*“The impact of the principles in the Code of Practice for the 1986 Order was reduced because of delay in publication and a failure to deliver an associated training programme. Principles must be incorporated into the new law and elaborated upon in Codes of Practice. The new legislation, the Codes of Practice and related training programmes must be introduced at the same time.”<sup>39</sup>*

It is very important that in bringing forward reform to mental health and mental capacity legislation in Northern Ireland that lessons are learned and taken cognisance of to ensure that they are not repeated. Therefore, 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.

It is vital for the effective operation of the Bill that the Codes of Practice are in operation from the outset. 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

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<sup>39</sup> *Op cit* 1, Pg 5.

*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 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 1983<sup>40</sup> which is currently in operation in England and Wales. Section 19.71 deals with life-threatening emergencies and under 18s and states that,

*"A life-threatening emergency may arise when treatment needs to be given but it is not possible to rely on the consent of the child, young person or person with parental responsibility and there is no time to seek authorisation from the court or (where applicable) to detain and treat under the Act. If the failure to treat the 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 is qualified in section 19.72 which states that the treatment given must be no more than necessary and in the best interests of the child or young person.

NICCY understands that 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 (Northern Ireland) Order 1986 conditions caused by personality disorder and dependence on alcohol and drugs are specifically excluded.<sup>41</sup> NICCY recommends that an amendment is made to the Mental Health (Northern Ireland) Order 1986 to include conditions caused by personality disorder, and while dependence on alcohol or drugs are not included in the Mental Capacity Bill (**clause 292(2)**) as coming within the definition of a 'mental disorder',

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<sup>40</sup> Mental Health Act 1983: Code of Practice, Department of Health, 2015.

<sup>41</sup> Article 3(2) Mental Health (Northern Ireland) Order 1986.

an amendment should be made to the Mental Health (Northern Ireland) Order 1986 to include conditions related to alcohol or drugs.

#### **14.0 Conclusion**

NICCY recognises that the Mental Capacity Bill is an extremely complex piece of legislation which is made even more so by the variances in approaches with regard to under and over 16s and the application of the criminal justice clauses in the Bill to all age groups but a capacity based approach to the civil provisions. NICCY is disappointed that under 16s have not been included in the scope of the Bill as we believe that this approach is not compliant with international children's rights and human rights standards as outlined above. NICCY appreciates that reform of mental health and mental capacity law in Northern Ireland is urgently required and we hope that the Mental Capacity Bill, with the amendments we have recommended, is progressed before the end of this mandate. NICCY is keen to give oral evidence to the Committee on the Mental Capacity Bill and we would be happy to discuss anything in this submission or provide clarification or further information to Committee members if required.