

Oral Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill Clauses 160-247 of the Mental Capacity Bill

12th October 2015

The criminal justice clauses in the Bill have not been consulted upon previously in line with the Department's statutory equality obligations under section 75 of the Northern Ireland Act. NICCY is concerned that significant amendments, including the repeal of Part III of the Mental Health (Northern Ireland) Order 1986, are not included in the provisions of the draft Bill.

Under 16s are excluded from the scope of the civil provisions of the Bill due, according to the DHSSPS, to difficulties in assessing their capacity because of their developmental immaturity. There is obvious tension when compared to the minimum age of criminal responsibility in Northern Ireland where a child of 10 is presumed to have the capacity to commit a crime. It is also unclear how the exclusion of under 16s from the civil provisions of the Bill can be rationalised with assumption of capacity in young people aged 10 and over to admit guilt and / or give their informed consent in order to avail of certain justice disposals e.g. youth conferencing.

As the civil provisions of the Bill will only apply to young people over 16 this may present challenges for staff and young people in the JJC in relation to their treatment, care and welfare. Given the age range of young people in the JJC, it is likely that the protections offered through the Bill will be available to some young people but not others. There will also be implications for other justice agencies including the PSNI and the Youth Justice Agency in operating two different systems in the care and treatment of children and young people based on their age, which may not always be possible to ascertain. Staff from all agencies must be fully trained on the operation of both the Mental Capacity Bill, including running the capacity test and the Mental Health Order as amended.

The term 'mental disorder' is used throughout the justice section of the Bill. NICCY recommends that the language of the Bill is reviewed to ensure that it adheres to Bamford's vision to eliminate the stigma surrounding mental ill-health.

The Bill introduces a number of new court disposals relating to health care which will apply to everyone, regardless of their age. 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. Within the new court disposals, it is proposed that young people can be referred to an in-patient facility for treatment. However, as there is no in-patient forensic treatment unit for under 18s in Northern Ireland it is unclear where young people who require in-patient forensic treatment will be referred. NICCY is concerned about legislative provisions being progressed which will impact on young people which cannot be used but we do agree that there is a pressing need for the availability of an appropriate in-patient forensic facility in Northern Ireland for children and young people. This is also an issue in relation to the transfer of prisoners as well as the courts powers to remand a person to hospital for examination or treatment. 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 facility.

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 drafted does not extend the test of unfitness to be tried to the Youth Court to anyone under 18, 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 urgently clarified as there will be a range of issues for consideration depending on its application.