

Oral Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill

Clauses 256 - 262 of the Mental Capacity Bill

19th October 2015

NICCY has consistently expressed its concern regarding the proposed application of the Mental Capacity Bill only to those aged 16 and over.

It is proposed for under 16s that a retained and amended Mental Health Order will remain in place for this group as an interim measure pending a review of the Children Order to include compulsory powers of detention for mental illness. This means that solely on the basis of age, under 16s will not be able to access the protections and safeguards contained in the 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 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 not compliant with Article 12 of the UNCRC which requires the state to assess the capacity of each individual child and emphasises that State Parties cannot begin with the assumption that all children under 16 lack capacity.¹

The Bamford Review 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. The current approach, where under 16s are excluded from the Bill is not in line with Bamford.

DHSSPS officials have stated that that the retention of the Mental Health Order for under 16s is a “temporary measure” however they also indicated that reform of the Children Order 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

¹ 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.

capacity legislation itself and would take considerable time to complete.² It is therefore very likely that the retention of the Mental Health Order 1986 for under 16s will remain in the medium to possibly long term. This position is far from ideal. NICCY wishes to see children of all ages coming within the scope of the Mental Capacity Bill.

Clause 256 of the Bill introduces 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. This is a capacity based offence and in order to have access to the protection of the new offence it must be possible to test whether the person lacks or is believed to lack capacity. The reason under 16s have not been included in the Mental Capacity Bill is due to the DHSSPS's belief that capacity cannot be measured in under 16s due to their developmental immaturity. NICCY has consistently stated its belief that capacity in under 16s can be measured and that they should be included in the Bill. Although this was not previously the case, NICCY has been assured by the DHSSPS that this offence will apply to everyone, regardless of age.³ 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 means that the DHSSPS now intends to test capacity in under 16s. NICCY has 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.⁴ **While the assessment of a lack of capacity in under 16s on a case by case basis is welcome it raises significant questions about the rationale for the exclusion of under 16s from the scope of the remainder of the civil provisions of the Mental Capacity Bill. It appears that for the purposes of this offence under the Bill, capacity in under 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.**

² Evidence from DHSSPS Official to DHSSPS Committee – Mental Capacity Briefing, 22nd January 2014.

³ Correspondence between DHSSPS and NICCY staff, 28th and 30th July 2015.

⁴ Correspondence from DHSSPS to NICCY, 30th July 2015.