

Oral Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill Clauses 254 - 255 of the Mental Capacity Bill

5th October 2015

NICCY has consistently expressed concerns about the exclusion of under 16s from the Mental Capacity Bill. Their exclusion means that vulnerable children will not enjoy equal access to the protections and safeguards as young people 16 and over who come within the scope of the Mental Capacity Bill. The Department's rationale for the exclusion of under 16s is that a lack of capacity cannot be determined in a child as being as a result of a mental illness or learning disability or as a result of their developmental immaturity. We now know that for the purposes of the new offence at clause 256 of the Bill, the Department is proposing to measure capacity in under 16s as this offence will apply to all regardless of age. **If the Department is proposing to assess capacity in under 16s, NICCY can see no reason why under 16s should be excluded from the scope of the rest of the Bill.**

Clause 254 applies to young people aged 16 and 17. It 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. NICCY does not believe that this duty goes far enough in ensuring that the practice of admitting children onto adult psychiatric wards will cease. The admission of children to adult wards is an issue of serious concern and the risks to the safety of children and the potentially detrimental impact on their social and emotional wellbeing are significant. We recommend 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 and developmentally appropriate settings. 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). There is a similarly worded proposed amendment to the Mental Health Order which will apply to under 16s set out at Schedule 8, para 3(D) and we would reiterate this recommendation regarding the wording of the duty on hospital managers relating to this even more vulnerable group of children and young people.

Clause 255 covers the proposed amendments to the Mental Health (Northern Ireland) Order 1986 which will apply to under 16s.

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. The determination of a patient's best interests as detailed in **Schedule 8 paragraph 3B** is very unclear. We do not believe that there is adequate emphasis on the need to facilitate young people to express their views about what is in their best interests and to have their views taken into account. Such emphasis is necessary to ensure compliance with Article 3 of the UNCRC.

In relation to advocacy services for under 16s, the Bill contains very little information on how they will operate and what services will be available to whom in what circumstances. The advocacy provisions under **Schedule 8 paragraph 3C** are extremely vague however it is clear that advocates for under 16s will be appointed by a Health and Social Care Trust. NICCY has concerns with regard to the perceived independence of the advocates, their ability to challenge decisions made by Trusts as employees of the Trusts as well as the impact this will have on the young people's confidence in the service and their willingness to avail of it.

NICCY wishes to see Independent advocacy being available to all children who require it under both the Mental Capacity Bill and the Mental Health Order, when they require it and at their request, both in the community, prior to the consideration of detention and on discharge, and in a hospital setting. Children should be able to choose their advocate.

Schedule 8 paragraph 3D amends the nearest relative provisions of the Mental Health Order under 16s. NICCY has concerns that the proposed amendments to the nearest relative provisions of the Mental Health Order will not ensure compliance with the ECHR.

NICCY wants 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 Order 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 the ECHR and the UNCRC.

NICCY also believes that additional amendments should be made to the Mental Health Order 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. 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 Order 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 be determined by the County Court. This process will ensure adequate oversight of the suitability of the nearest relative.

In its consultation on the Mental Capacity Bill in 2014, the Department stated its intention to extend the disregard provision in Article 10 of the Mental Health Order to include periods of detention for treatment for young people under 16. This would have meant that under 16s would not have to declare a period of detention for either treatment or assessment of a mental illness. The obligation to declare a period of detention for treatment for a mental illness has an extremely detrimental impact on young people with regard to employment, travel and insurance. NICCY firmly recommends the extension of the disregard provision to include periods of detention for treatment for all children and young people under 18. This should be applied retrospectively to everyone detained for treatment of a mental illness in childhood. 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.

Also in its consultation, the Department 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 Order 1986 contain any education clauses for children. 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.

NICCY also wishes to see amendments being made to the Mental Health Order to address its stigmatising language to ensure that it adheres to Bamford's vision of eliminating the stigma surrounding mental health issues.

The Mental Health Order should include safeguards and protections which are at least equivalent to those which young people over 16 will be able to access under the Mental Capacity Bill. These should include a statutory recognition of the views of carers, restraint safeguards and legal protection to a person providing care or treatment for someone who lacks capacity. These safeguards should be available to both voluntary and detained patients.

NICCY also recommends that an amendment is made to the Mental Health Order to include conditions caused by personality disorder and conditions related to alcohol or drugs in the definition of 'mental disorder' in line with the definition proposed for over 16s at clause 292 of the Bill.