

Further Written Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill Clauses 24-27 of the Mental Capacity Bill

14th September 2015

1.0 Introduction

NICCY is grateful for the opportunity to give further evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill. This should be read in conjunction with our detailed written submission on the Mental Capacity Bill submitted to the Committee on the 31st July 2015. We have been tasked with commenting only on clauses 24–27 of the Mental Capacity Bill. Clauses 24-27 of the Mental Capacity Bill deal with the Deprivation of Liberty Safeguards. The intention behind the safeguards is to provide protection in law for individuals who lack capacity who are being deprived of their liberty for reasons of their own safety. Section 4.4 (pages 9 and 10) of our detailed written submission addresses our main concerns with regard to the Deprivation of Liberty Safeguards. We will not reiterate these in this short paper, the purpose of which is to provide further information and context with regard to Deprivation of Liberty Safeguards which we hope will be helpful to the Committee.

2.0 The Need for the Inclusion of Under 16s

Clauses 24-27 of the Mental Capacity Bill include details of when and how the deprivation of liberty of an individual over 16 who lacks decision making capacity may be authorised. Authorisation of a Deprivation of someone's liberty is necessary to ensure compliance with the European Convention on Human Rights (ECHR) and to comply with the ruling in the case of *HL v United Kingdom*¹ 2004 (the Bournemouth case).² NICCY firmly believes that under 16s should also have access to the Deprivation of Liberty Safeguards under the Mental Capacity Bill. The deprivation of someone's liberty is a serious infringement of their rights and must be authorised and justified, regardless of someone's age. This would be in compliance with Article 5 of the ECHR, as incorporated by the Human Rights Act 1998 – the right to liberty and security of person, which applies to everyone regardless of their age. The proposed non application of the Deprivation of Liberty Safeguards to under 16s is an area which we believe will be subject to future legal challenge.

¹ *HL v UK* 45508/99 (2004) ECHR 471

² *Ibid.*

3.0 The Operation of Deprivation of Liberty Safeguards in England and Wales

In Northern Ireland we are proposing to mirror much of the Deprivation of Liberty Safeguards model which is currently in operation in England and Wales. We know from examining their operation in England and Wales that the Deprivation of Liberty Safeguards are not working effectively. The House of Lords Select Committee on the Mental Capacity Act 2005 scrutinized the Act in 2014 and in the Post Legislative Scrutiny Report the Select Committee stated that,

*“...the legislative provisions and their operation in practice are the subject of extensive and wideranging criticism. The provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act. The safeguards are not well understood and are poorly implemented. Evidence suggested that thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law, and therefore without the safeguards which Parliament intended. Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned. **The only appropriate recommendation in the face of such criticism is to start again.**”* (Our emphasis)

4.0 The Cheshire West Case

The recent case of *P v Cheshire West & Chester Council; P & Q v Surrey County Council*³ (Cheshire West case) triggered a surge in referrals in England and Wales. Local authorities have seen Deprivation of Liberty Safeguards caseloads rise more than ten-fold.⁴ The Cheshire West case in effect lowered the threshold for what constitutes a deprivation of liberty in care. The court said that a person who lacks capacity to consent to their care arrangements was deprived of their liberty, under Article 5 of the ECHR, if they were under continuous supervision and control; they were not free to leave, and their care arrangements were the responsibility of the state. The ruling rendered irrelevant factors that had been allowed for in the past, such as whether the person objected to their care arrangements. The Supreme Court also made clear that such a deprivation of liberty would

³ [2014] UKSC 19

⁴ Community Care, 12th May 2015, <http://www.communitycare.co.uk/2015/05/12/deprivation-liberty-safeguards-caseloads-rose-ten-fold-year-supreme-court-ruling/>

apply in domestic settings, as well as in health or social care placements. The judgement meant that, many people in care homes, hospitals and supported living arrangements suddenly met the threshold to have their care arrangements assessed or reassessed to see if they were deprived of their liberty and, if so, whether or not this was in their best interests. Figures submitted to the health and social care information centre from 116 of 152 local authorities in England showed that 113,300 Deprivation of Liberty Safeguards applications were received in 2014-15, more than ten times the 10,900 cases the councils handled in 2013-14. Local authorities have been unable to process the influx of cases with 54% of applications made in 2014-15 not being signed off or withdrawn. In the previous year just 3% of cases had not been processed or were withdrawn.⁵ This raises serious issues for the operation of Deprivation of Liberty Safeguards in Northern Ireland and our ability to resource and effectively implement a system which is failing in England and Wales.

5.0 Law Commission's Consultation on Deprivation of Liberty Safeguards

The Law Commission in England is currently consulting on the Deprivation of Liberty Safeguards. The consultation closes in November 2015 and concludes that the Deprivation of Liberty Safeguards are 'deeply flawed'. It proposes that they be replaced with an entirely new system, to be called 'Protective Care'. It is vital 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 the Deprivation of Liberty Safeguards are not replicated in Northern Ireland.

6.0 Practical Implications

NICCY is also extremely concerned about the practical implications if the Deprivation of Liberty Safeguards apply only to those over 16. In the current climate of limited resources and budget cuts to services, where there are staff shortages it is likely that under 16s will have their liberty deprived in instances where over 16s would not as the deprivation of the liberty of a child under 16 will not have to be authorized. One example would be in the case of a residential facility for under 18s with severe learning difficulties. Where there are staff shortages and difficult decisions regarding care have to be taken, it is likely that the young people in the facility who are under 16 may have their liberty deprived, for example through raising the sides of their beds, to contain this group in a manner which would not

⁵ *Ibid.*

occur with over 16s. This is due to the fact that depriving over 16s of their liberty would involve making an application for such a deprivation to be authorized. In such instances, there will be an unacceptable impact on the care of very vulnerable under 16s as well as on the realization of their right to liberty under Article 5 of the ECHR, as incorporated by the Human Rights Act 1998, which is not age based.

7.0 Assessment of Capacity in Under 16s and Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards are significant safeguards contained in the Bill. Like the new offence of ill-treatment or wilful neglect of someone who lacks capacity, or is believed to lack capacity, in relation to all or any matters concerning their care, it is vital that everyone has access to these important safeguards. Unlike the Deprivation of Liberty Safeguards, the Department is now proposing that the new offence will apply to everyone, regardless of age.⁶ This is extremely welcome as it means that this new criminal offence will provide equal protection to all age groups. However, it also means that DHSSPS intends to test the capacity of young people under the age of 16, something we had been informed that the DHSSPS could not do due to the developmental immaturity of children under 16. The DHSSPS has informed us 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.⁷ 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 civil provisions of the Mental Capacity Bill. It appears that for the purposes of the 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 see no reason why under 16s should be excluded from the Deprivation of Liberty Safeguards and also, more generally, from the scope of the capacity based civil provisions of the Bill.**

⁶ Correspondence between DHSSPS and NICCY staff, 28th and 30th July 2015.

⁷ Correspondence from DHSSPS to NICCY, 30th July 2015.