

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

21st September 2015

Clauses 24-27 of the Bill outline the process for the deprivation of an individual's liberty. To deprive someone of their liberty is a serious issue with stringent checks and balances in place in all areas of life where an individual can legally be deprived of their liberty, including under criminal justice, mental health legislation and under the Children Order in relation to children in secure care. This is a reflection of how fundamental the right to liberty is and how any infringement of this right must be strictly warranted.

Clauses 24-27 provide legal protection for individuals who lack capacity who are being deprived of their liberty for reasons of their own safety and this is very welcome. These safeguards are being introduced to ensure compliance with the right to liberty under Article 5 of the European Convention on Human Rights and the European Court judgment in the *Bournewood* case. It is not intended that the deprivation of liberty safeguards will apply to anyone under 16 i.e. depriving an under 16 of their liberty will not have to be authorised, despite the fact that the right to liberty applies to all regardless of age. Nowhere else can a child be deprived of their liberty without adherence to strict legislative frameworks. We wish to see the Bill being amended to include everyone of all ages in the deprivation of liberty safeguards.

We also have serious concerns about the practical implications of the exclusion of under 16s from the deprivation of liberty safeguards with regard to the possibility of inferior standards of care for those under 16.

It is proposed to mirror the Deprivation of Liberty Safeguards model currently in operation in Britain. We know from examining their operation that the Safeguards are not working effectively. The Law Commission is currently consulting on the Safeguards and proposes that they be replaced with an entirely new system.

What constitutes a deprivation of liberty will be assessed on a case by case basis. We expect that additional information and guidance on deprivation of liberty will be provided in the Codes of Practice illustrating the urgent 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.

We also wish to see 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 and boarding schools for children and young people with additional needs.

The Deprivation of Liberty Safeguards are significant safeguards which we believe all age groups should have access to. NICCY understands that for the purposes of the new offence of ill-treatment or wilful neglect of someone who lacks capacity, all age groups will be included. Both the deprivation of liberty safeguards and the new offence are capacity based protections. If the Department is now proposing that the new offence will apply to everyone, regardless of age¹ and that capacity in under 16s can be assessed for this purpose, we see no reason why capacity cannot be similarly assessed in under 16s to allow them to access the deprivation of liberty safeguards and, more generally, be included in the scope of the capacity based protections and safeguards in the Bill.

¹ Correspondence between DHSSPS and NICCY staff, 28th and 30th July 2015.