

# **RESPONSE TO A CONSULTATION BY THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY AND DEPARTMENT OF JUSTICE ON THE DRAFT MENTAL CAPACITY BILL**

**August 2014**

## **1.0 Introduction**

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2)(3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The remit of the Office is children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services.

In determining how to carry out her functions, the Commissioner's paramount consideration is the rights of the child and NICCY is required to base all its work on the United Nations Convention on the Rights of the Child (UNCRC).

NICCY has undertaken to monitor ongoing developments in relation to the introduction of mental capacity legislation, since the Department of Health and Social Services and Public Safety (DHSSPS) first introduced draft proposals in 2009. NICCY has engaged with the DHSSPS during the ongoing development of the proposals and served as a member of the DHSSPS and Department of Justice (DoJ) Mental Capacity Reference Groups. NICCY has also provided advice to the DHSSPS and presented evidence to the NI Assembly Health Committee with regard to the position of under 16 year olds in the legislation.

As previously stated, NICCY recognises the important provisions and protections which are proposed through the Bill and which potentially, will benefit those individuals who come within the remit of the legislation. Efforts to reduce the stigma associated with separate mental health legislation by combining mental health and mental capacity in a single legislative framework are also to be welcomed although these provisions will only be made available to individuals aged 16 years and over.

Given the Commissioner's remit, NICCY is necessarily concerned with the provisions proposed for all young people aged 21 years and under. This response will therefore consider provisions made for young people aged 16 years and over within the scope of the draft Mental Capacity Bill and proposals concerning young people aged 16 years and under who will not be covered by the draft Bill.

### **1.1 Children and mental health Issues**

Children and young people experiencing mental ill health are often extremely vulnerable and frequently encounter additional challenges and difficulties in relation to other aspects of their lives such as their physical health, relationships, education and employment. Families may also face considerable challenges in terms of managing children's care and in accessing quality integrated support and services. Throughout her period in office, the Commissioner has highlighted the profound impact of mental illness on children and young people and monitored the provision of services and support in terms of their availability, accessibility and integration<sup>1</sup>.

NICCY is also aware of the over-representation of children and young people with mental health issues within the criminal justice system. Various inspection and research reports have highlighted the high levels of need and particularly vulnerable circumstances of these young people whilst also identifying gaps and shortfalls in the services and support available to them.<sup>2</sup>

### **1.2 The United Nations Convention on the Rights of the Child (UNCRC)**

As highlighted above, the UNCRC serves as the underpinning framework for all of NICCY's work. The Convention is an international human rights treaty which provides children and young people with a comprehensive set of rights and places obligations on governments to ensure these are realised. A number of these rights are particularly relevant to the proposals for mental capacity legislation including those relating to non-discrimination, health and social care, best interests and the right to be heard. Indeed, the Bamford Report, 'A Vision of a Comprehensive Child and Adolescent Mental Health

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<sup>1</sup>[http://www.niccy.org/uploaded\\_docs/2012/Publications/Adolescent%20Suicide%20Report%20\(adult\)%20final%20Nov%202012.pdf](http://www.niccy.org/uploaded_docs/2012/Publications/Adolescent%20Suicide%20Report%20(adult)%20final%20Nov%202012.pdf);

<http://www.niccy.org/makeitright/childrensmentalhealth>

<http://www.niccy.org/search-results/?keywords=mental%20health>

[http://www.niccy.org/uploaded\\_docs/1\\_71784\\_NIC71784%20Childrens%20Rights%20Text%205.pdf](http://www.niccy.org/uploaded_docs/1_71784_NIC71784%20Childrens%20Rights%20Text%205.pdf)

<sup>2</sup> <http://www.cjini.org/CJNI/files/dd/dd10f7eb-30f6-4519-9838-33946097ee62.pdf>

<http://www.cjini.org/CJNI/files/24/24d6cd45-20bb-4f81-9e34-81ea59594650.pdf>

[http://www.rqia.org.uk/cms\\_resources/RQIA%20CAMHS%20Report%2022%20Feb%2011.pdf](http://www.rqia.org.uk/cms_resources/RQIA%20CAMHS%20Report%2022%20Feb%2011.pdf)

Service' stated that 'Any proposals for a comprehensive child and adolescent health service need to take account of the rights contained in the UNCRC'.<sup>3</sup>

Article 2, enshrines the principles of non-discrimination, fairness and equality. In the context of the current proposals, it is critically important that all children and young people have access to the same level and quality of services and support that will be made available to adults. Article 24 states that children have a right to the highest standard of health and social care. The UN Committee on the Rights of the Child made specific reference to the mental health of children and young people in Northern Ireland in its Concluding Observations in 2008. It noted that 'due to the legacy of the conflict, the situation of children in this respect is particularly delicate' (para.56). It went on to recommend that 'additional resources and improved capacity be employed to meet the needs of children with mental health problems throughout the country, with particular attention to those at greater risk including children deprived of parental care, children affected by the conflict, those living in poverty and those in conflict with the law (para.57)<sup>4</sup>. Article 3 of the UNCRC addresses the best interests of the child and states that in all actions concerning the child this should be a primary consideration. If the proposed legislative proposals are to comply with this Article, they must recognise best interests as being of paramount consideration in any decision taken during judicial or administrative proceedings regarding the child or young person.

Article 12 of the UNCRC provides that State parties shall assure the child capable of forming his or her own views, the right to express these views freely in all matters affecting them, the views being given due weight in accordance with the age and maturity of the child. This Article further states that 'the child shall, in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with procedural rules of national law'<sup>5</sup>. This Article is especially relevant to the conceptual arguments regarding children and young people's evolving capacity and proposals to provide advocacy services through new and amended legislation. NICCY would encourage the DHSSPS to take account of the details of this Article and also consider the content of General Comment No.12 on the right of the child to be heard.<sup>6</sup>

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<sup>3</sup> DHSSPS (2005) *A Vision for a Comprehensive child and Adolescent Mental Health Service*, November 2005.

<sup>4</sup> <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

<sup>5</sup> Ibid.

<sup>6</sup> <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

Article 7 of the United Nations Convention on the Rights of People with Disabilities (UNCRPD) makes specific provisions for children with disabilities, which broadly mirror those included in the UNCRC. This includes the right of children with disabilities to ‘enjoy all human rights and fundamental freedoms on an equal basis with other children’, the ‘best interests of the child being a primary consideration’ and the obligation on governments to ‘ensure that children with disabilities can express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity on an equal basis with other children and to be provided with disability and age-appropriate assistance to realise that right’.<sup>7</sup> NICCY would urge the DHSSPS to also consider the relevant provisions in the UNCRPD relating to children and young people and ensure that the legislative proposals comply fully with the obligations outlined in the Convention.

NICCY’s response to this consultation will include;

- general comments regarding the proposals outlined in the draft Mental Capacity Bill;
- a review of the provisions made for young people aged 16-21 years within the draft Bill;
- consideration of the provisions which are proposed for young people aged under 16 years, through amendments to the Mental Health (NI) Order (1986);
- comments on the proposals put forward by the Department of Justice in relation to provisions for children and young people who come into contact with the criminal justice system, and;
- a brief consideration of a range of relevant equality issues.

## **2.0 General Comments**

### **2.1 The Bamford Report**

In 2002, the DHSSPS commissioned an independent review of mental health and learning disability in Northern Ireland. The aim of the Bamford Review, as it became known was to review the delivery of mental health and learning disability services and law and policy underpinning these services. Through a series of reports, the Bamford Review made a comprehensive list of recommendations for the reform of legislation and services, including the introduction of new mental capacity legislation in the form of a single bill. As well as recommending the inclusion of enhanced protections for people unable to make decisions for themselves and a set of principles which would seek to protect individuals’ human

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<sup>7</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>

rights, the Review recommended special protections for children and young people. These included the need to ensure access to age appropriate accommodation, education, information and the right to representation at mental health tribunal hearings and to participate in decision making regarding their treatment and care.

The Review stated that 'The implications of a capacity approach to all substitute decision-making legislation would require the same basic approach to be applied to all children. While most people would agree that parents be substitute decision-makers for children up to the age of 10 or 12, *consideration might be given to a rebuttable presumption of capacity between 12 and 16*' (our emphasis)<sup>8</sup>. The Review also stated that 'if parents' views are to be over-riden or if the child is without parents and no parental responsibility has been given, the special needs of the child must be recognised and protected in arrangements for advocacy and representation'.<sup>9</sup>

Commented on existing mental health legislation, the Bamford Review concluded that '...it has become clear that aspects of the Mental Health (NI) Order 1986 may not be human rights compliant. Neither is it in keeping with developments in good practice, which emphasise partnership between patients and professionals and a holistic approach to care and treatment'.<sup>10</sup>

The proposals which are outlined in the current consultation document have shifted substantially from what was envisaged by the Bamford Review with under 16 year olds now being excluded from the legislation and a proposal to retain the Mental Health (NI) Order. Up until October 2013, the DHSSPS had suggested that under 16s detained for treatment, would be included within the scope of the Bill's provisions. However, the Department then revised its position and removed young people in this category from the Bill, introducing instead, new proposals to retain the Mental Health (Northern Ireland) Order 1986, and to provide for children and young people under 16 years through this statute with the insertion of some additional provisions and protections.

## 2.2 Detail of the Proposals

The consultation document notes that a decision was made to proceed with a consultation on the civil provisions of the Bill while work is continuing on the remaining issues relating to criminal justice and children. It is regrettable that the issues concerning children and

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<sup>8</sup> The Bamford Review of Mental Health and Learning Disability. A Comprehensive Legislative Framework (2007), p.47. <http://www.dhsspsni.gov.uk/legal-issue-comprehensive-framework.pdf>

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

young people and relating to criminal justice are outstanding and will not proceed alongside the current consultation. NICCY had anticipated a greater level of detail regarding proposed amendments and additional draft clauses for inclusion in the Mental Health (Northern Ireland) Order which will make provision for under 16s, who are detained for treatment.

The proposals put forward by the DoJ in the consultation document are relatively general and do not contain details of draft legislation. Rather, DoJ provides an update in relation to criminal justice policy developments, outlines key positions and states that consideration is currently being given to amending existing pieces of criminal justice legislation or to delivering provisions substantively through the Bill itself. In order to consider the potential impact of these proposed changes on children and young people in the criminal justice system more fully and holistically, it would have been beneficial to have had sight of the proposed draft amendments to existing criminal justice legislation.

### **2.3 Code of Practice and Training**

Throughout the consultation document, there is reference to the Code of Practice which it is anticipated will contain additional information and guidance to support the implementation of the legislation. Given that this will be a key document for practitioners and service users, the Code of Practice should have been developed in tandem with the legislation and issued for consultation at the same time. Clearly it will be important that the core principles and provisions enshrined in the legislation are effectively translated into an accessible and detailed Code of Practice in order that these can be fully implemented through services and practice. NICCY assumes that a comprehensive training strategy will be developed and implemented to support all professionals and practitioners who will be responsible for delivering the provisions outlined in the draft Bill. Such training should be readily accessible and wholly effective, and consideration should be given to providing accreditation to all participants.

### **3.0 Health-related provisions for young people included in the Bill**

NICCY recognises the important provisions contained in the draft Mental Capacity Bill which will be extended to young people aged 16 to 21 years and to the considerable merits of introducing a 'fused' Bill, which combines mental health and mental capacity legislation. However NICCY wishes to highlight a number of issues which it believes warrants further consideration and review.

### 3.1 Principles (Clauses 1-6)

Earlier versions of the draft policy proposals identified four key principles which it was proposed would underpin mental capacity legislation. These were adopted from the Bamford Report;<sup>11</sup>

- *Autonomy*- respecting the person's capacity to decide and act on his own and his right not to be subject to restraint by others;
- *Benefit* - promoting the health, welfare and safety of the person while having regard to the safety of others;
- *Justice* - applying the law fairly and equally, and;
- *Least harm* - acting in a way that minimises the likelihood of harm to the person.

Indeed, the Bamford Report recommended that these be embedded in the legislation.<sup>12</sup> However, the draft Bill explicitly references only two principles; capacity and best interests. While the consultation document references personal autonomy, there is no explicit reference to it in the draft Bill. The focus instead, is on capacity. Best interests has replaced benefit and least harm and justice have been removed altogether. The alteration to the original principles underpinning the legislation is disappointing and clearly deviates from the recommendations of the Bamford Review. The original intention had been to begin with these comprehensive principles that they might inform the development of the legislation but also, that once enacted, decision makers would be required to take account of them, when making decisions about an individual's health or welfare. The absence of 'justice' and explicitly 'benefit' and 'least harm' reduces the potential for these to be translated into the provisions of the Bill and consequently into its practical implementation.

### 3.2 Deprivation of Liberty Safeguards (Clauses 22-27)

NICCY welcomes the inclusion of deprivation of liberty safeguards in the draft Bill. These will be beneficial in terms of providing legislative protection for individuals who lack capacity, reducing the stigma of having separate procedures for individuals requiring mental health treatment, potentially extending existing safeguards and ensuring Northern Ireland has human rights compliant legislation in place. The consultation document indicates that further information regarding definitions of what constitutes a deprivation of liberty will be provided in the Code of Practice. It will be important that the definitions which eventually issued, are sufficiently clear and particularly since it suggested that each case may have to be assessed on an individual basis. It is also critical that all relevant

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<sup>11</sup> Ibid.

<sup>12</sup> [http://www.dhsspsni.gov.uk/legal\\_issues\\_consultation\\_report.pdf](http://www.dhsspsni.gov.uk/legal_issues_consultation_report.pdf)

practitioners and stakeholders receive adequate information and training to ensure they comply with the legislation.

In the draft Bill, deprivations of liberty are only defined as occurring in hospitals or care homes. However, in practice, it would appear that a person could be deprived of their liberty in many other settings. In the case of young people aged 16-17 years, this could occur in children's homes, supported housing facilities and potentially in foster care. In creating robust safeguards around the deprivation of liberty, NICCY would strongly suggest that the DHSSPS ensures these protections are not restricted only to young people aged over 16 years but also extended to children and young people under 16 years of age. Young people who, due to their compliant nature (rather than through formal detention), have their liberty deprived are particularly at risk. In the absence of clear protections in relation to the deprivation of liberty for under 16 year olds through the draft Bill or the Mental Health (NI) Order, the DHSSPS should indicate how a similar level of safeguarding for children and young people will be provided through existing legislation or common law.

### **3.3 Independent Advocate (Clauses 35-36 and 83-92)**

Provision is made within the draft Bill for the appointment of independent advocates who 'must be in place when determining what would be in the best interests of a person lacking capacity and where practicable and appropriate, consulted and his/her views taken into account (in relation to what would be in the person's best interests)'. The appointment of an independent advocate is an important safeguard and one which will provide important protections for young people aged 16 years and above, who require additional support to ensure their views are effectively communicated and their rights protected.

In the definition of the advocate's role, no mention is made of the advocate actually supporting the individual who lacks capacity to make their views and wishes known. It is important that the advocate assists in facilitating the voice of the young person and ensuring this is accurately represented in decision-making regarding their care and treatment. An advocate should not speak in place of the individual but on their behalf, and fully and accurately represent their views.

The draft Bill refers throughout to an 'independent advocate'. However Clause 83 appears to propose that an advocate will be instructed by a Health and Social Care Trust (Clause 83 (1)), may receive payment from the Health and Social Care Trust ((83 (2)) and that an independent advocate means a person 'appointed by a Health and Social Care Trust. Therefore given the major role of Health and Social Care Trusts in appointing or



contracting in advocates and providing payment for their services, it is questionable how 'independent' advocates are likely to be. Since advocates may be required in some circumstances to challenge decisions made by Trusts, the proposed appointment and contractual arrangements are likely to significantly compromise their independence. Clearly, it is essential that individuals appointed as independent advocates can be confident they are perceived to be operating in an entirely independent manner without any sense of monitoring or interference by a Health and Social Care Trust. Also, a young person may question the independence of an advocate appointed by the same authority which is providing their treatment or care and opt not to avail of this service. Furthermore, if advocates are only appointed through the Trust, this will clearly limit young people's choice and potentially prohibit them from appointing an advocate already known to them, whom they trust and are comfortable to disclose to. NICCY would suggest a more appropriate and transparent approach would be to commission advocacy services through the Health and Social Care Board in order that advocates can be regarded as genuinely impartial and independent from Health and Social Care Trusts.

NICCY believes it would have been helpful if more information could have been provided in relation to the nature of advocacy services which will be available through the provisions of the draft Bill. For example, will an advocate be able to act on behalf of a young person over a sustained period of time or will the young person be expected to accept a different advocate each time they require advocacy support? If a young person were to establish a positive, trusting relationship with a particular advocate in relation to one particular matter, it is likely to be in their best interests if they can avail of the services of the same advocate when further matters arise.

### **3.4 Offences (Clauses 133 -138)**

The draft Bill makes provision for the introduction of range of new offences including what is described as a 'main new offence' of ill treatment and wilful neglect. According to the consultation document, this will apply to anyone caring for a person of any age who lacks capacity or is believed to lack capacity, in relation to all or any matters concerning their care. Although the document employs the phrase 'a person of any age' this is not replicated in the draft Bill. NICCY therefore understands that this significant safeguard is not available to under 16s who are currently excluded from the draft legislation. Children and young people under 16 years with mental health issues are clearly extremely vulnerable and therefore are equally deserving of the same level of protection and safeguarding as those aged 16 and above. NICCY would therefore strongly urge the DHSSPS to also consider introducing similar safeguards for this age group.

### **3.5 Other Proposed Provisions**

NICCY has already addressed a number of other issues referenced in the proposals for the draft Bill in Section 3 in its comments relating to the Mental Health (NI) Order. Issues considered include the importance of providing suitable accommodation (In-patients under 18: duties of hospital managers, Clause 146) and the timing of referrals to the Mental Health Review Tribunals (Duty of the HSC Trusts to refer cases to the Tribunal, Clause 48). The DHSSPS notes that it is considering access to educational provisions in the draft Bill but does not provide any additional information. NICCY would therefore direct the Department to its comments on educational provisions in Section 3.

## **4.0. Draft Proposals for under 16 year olds**

### **4.1 Exclusion of under 16s from the draft Mental Capacity Bill**

NICCY has consistently expressed concerns regarding the exclusion of under 16 year olds from the proposed legislation, because vulnerable children and young people will not be given the special consideration they require nor enjoy equal access to the protections and safeguards proposed for those aged 16 years and over. In relation to the issue of capacity, this response has already referenced the Bamford Review's recommendations to recognise emerging capacity in children and young people and its desire to create a comprehensive legislative framework to address issues of mental capacity and decision making rights. During its engagement with the DHSSPS, NICCY has raised the issue of emerging capacity and drawn attention to relevant articles enshrined in the UNCRC and the UNCRPD which recognise evolving capacity in children and their right to participate in decision-making about issues affecting them.

In making alternative provisions for children and young people, a key concern for NICCY is that they do not experience any disadvantage and that they are able to access the equivalent level and quality of protections, safeguards and services which will be made available to those aged over 16 years, through the draft Bill. As already highlighted, NICCY believes it is essential that vulnerable young people experiencing mental health issues are adequately and effectively protected and provided for.

Notwithstanding these concerns, NICCY wishes to comment on the provisions for under 16 year olds who are detained for assessment or treatment. NICCY does not regard the decision to retain the Mental Health (NI) Order (1986) as acceptable. As noted earlier, the Order has been described as outdated, 'not in keeping with developments in good practice' and not compliant with human rights standards. Furthermore, NICCY believes

that the proposal to revise existing legislation, which was created primarily for adults, to now include provisions for children and young people is entirely inappropriate. Ongoing engagement with the DHSSPS has served to re-emphasise the unique circumstances of under 16s and therefore it should be a priority to develop comprehensive legislation which clearly and appropriately addresses these children and young people's particular needs and issues.

The DHSSPS has indicated that the retention of the Mental Health (NI) Order will be a temporary measure, however if the draft proposals are implemented, there appears to be little opportunity to revisit these arrangements and for any alternative provision to be made in the short to medium term. Given the current legislative timetable and the end of the current Northern Ireland Assembly mandate in 2016, it is highly unlikely there will be any imminent change to the current situation.

The consultation document also references the Department's proposal to initiate a separate project to explore the evolving capacity of children and young people. This has been proposed in order to address the challenges arising from the interface between the draft Mental Capacity Bill and the Children (NI) Order 1995. A review of the Children (NI) Order is an important and welcome proposal. Although, despite being first mooted in 2012, the project has not been advanced and the consultation document proposes it 'is likely to be a commitment for the next Assembly mandate'. There is however, no guarantee that the next Health Minister appointed, will be minded to take such a project forward. It will also require the willing participation and co-operation of other government departments. In the event that a Health Minister appointed during the next Assembly mandate did decide to initiate such a project, this would clearly take some considerable time to complete. Therefore, NICCY would strongly advocate that plans are urgently put in place for this project, that appropriate resources are identified and allocated and that consultation with key stakeholder groups is initiated as soon as possible, while there is a commitment to advance this important work.

#### **4.2 Proposed Amendments to the Mental Health (NI) Order 1986**

In the absence of appropriate, alternative provision for under 16s who require detention for assessment or treatment and pending the outcome of the legislative project described above, there is an intention by the DHSSPS to retain the Mental Health (NI) Order 1986. On a general note, the language of the Order should be carefully reviewed to ensure that it adheres to Bamford's vision to eliminate the stigma surrounding mental health issues. Words or phrases, such as 'mental disorder' and 'insanity' should therefore be removed. The proposals outlined in the consultation document refer to specific safeguards and

general provisions attached to each. However it will be important to have sight of the draft clauses which will articulate these in the Mental Health (NI) Order and NICCY would strongly suggest that stakeholders should be given the opportunity to provide comment on these.

- i. *Best interests principle.* The insertion of a best interests principle as an additional safeguard in the Mental Health (NI) Order is an important proposal. NICCY welcomes the Department's statement that this will be 'more child focussed in line with the UNCRC and UNCRPD'. It would have been useful to have had sight of the draft 'best interests' clause so that more constructive comments could be provided. However, in its absence, NICCY would suggest that the principle closely reflects the content of Article 3 of the UNCRC, which states that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

As the consultation document states, an assessment of the child's best interests should include taking their views into account and every effort should be made to ensure they are supported to express their views, if they wish to do so. Article 12 of the UNCRC, which provides for the child's right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child, is therefore complimentary to Article 3. Indeed the Committee on the Rights of the Child in its General Comment No.14 states that there are 'inextricable links' between Articles 3 and 12 to the degree that 'Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met'<sup>13</sup>. The additional features of the best interests assessment; provision of appropriate advice and information, consultation with persons with parental responsibility and enabling the child to participate as fully as possible, are integral to the effective implementation of the best interests principle. In this regard, NICCY would encourage the DHSSPS to provide clear and robust wording for the best interests principle clause and a clear explanation of how this principle can be enacted in the accompanying Code of Practice.

The consideration given to taking children and young people's views into account when determining their best interests is to be welcomed, particularly as it does appear to take account of the evolving capacity of children and their ability to participate in decision

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<sup>13</sup> [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

making about their health. NICCY would also suggest that the principle of support in decision making (Clauses 3 and 4) in the Bill should be included in the Mental Health (NI) Order. This would serve to support and facilitate a child or young person to participate in decision making, thus fulfilling their rights as enshrined in the UNCRC (Article 12) and the UNCRPD (Article 12 (3)). It would complement and strengthen the implementation of the features of the best interest principle detailed by the Department in the consultation document and referenced in the paragraph above.

- ii. *Consultation with an independent advocate.* This is an important and positive safeguard which, as the consultation document states, is closely linked to determining a child or young person's best interests. Again, proposals for this safeguard are extremely brief and NICCY would welcome more details and sight of the draft clause(s) pertaining to advocacy provision in order to provide a fuller response. However in determining how advocacy services will be provided, NICCY recommends that a number of issues are carefully considered. Given the extremely vulnerable circumstances of many children and young people it is important that if required, they can access support from an independent advocate who will ensure their access to fair and equal treatment, that decisions are taken with due consideration of their views and wishes, that their rights are upheld and that all options are considered. In hospital settings, access to advocacy should be available equally to voluntary and detained patients thus ensuring that the child or young person's views are always considered and that they remain at the centre of care and treatment decisions.

Advocacy for children and young people is recognised as a specialist area and as the consultation document rightly states, independent advocates appointed will necessarily specialise in children's advocacy and have undergone appropriate training in advocacy approaches, child protection procedures and the UNCRC and children's rights. It will be important that advocates have received quality, accredited training. Further consideration should be given to how independent advocates will be identified and how a child or young person's preferences will be considered in this respect. Also, more information is required in terms of how services will be implemented and sourced.

NICCY's comments in relation to the provisions for the appointment of independent advocates in the draft Bill should also be considered alongside these comments. These are contained in paragraph 3.3 of this response.

- iii. *Extension of the disregard provision in Article 10.* NICCY welcomes the intention to extend this provision to include periods of treatment and would request that it is also

extended to include 17-18 year olds who will be included under the remit of the draft Bill.

- iv. *Insertion of a provision requiring consent and second opinion for Electro-convulsive therapy (ECT) for detained patients under 16 years.* NICCY understands that ECT is rarely administered to young people and should not be given to children at all. Additional safeguards in the form of consent requirements are welcomed, however NICCY would have significant concerns about the use of ECT on young people in any circumstances, given the associated health risks and significant ethical issues.
- v. *Amendment of the nearest relative provisions.* The amendment of these provisions to ensure compliance with the European Convention of Human Rights is welcomed. In addition to the provisions proposed in the consultation document, NICCY would suggest that consideration be given to young people being able to apply to the Mental Health Review Tribunal for the displacement of an unsuitable nearest relative. This would be a quicker process and also align with the provisions made for young people aged 16 and over in the draft Bill. NICCY would also propose that young people be permitted to identify a person not currently included on the official list if they are deemed suitable and willing to act. It may be the case that a young person has established a positive relationship with another person who they believe will act effectively as a 'nearest relative'<sup>14</sup>.
- vi. *Placing a duty on hospital managers in respect of age appropriate accommodation (akin to Clause 146).* The admission of children and young people to adult wards is an issue of concern which NICCY and other agencies have repeatedly highlighted over a considerable period.<sup>15</sup> The risks to children in terms of protection and safety and the potentially detrimental impact on their social and emotional wellbeing are significant and consequently NICCY believes it is wholly unacceptable that they are placed in adult wards. Reflecting international children's rights standards, Articles 37 (c) and 3 of

<sup>14</sup> In 2012, NICCY commissioned research into the role of significant adults in the lives of young people. This highlighted the importance of non-family members in supporting and mentoring young people during difficult periods in their lives.

[http://www.niccy.org/uploaded\\_docs/2012/Publications/Sign%20Adults%20Reports/NICCY%20Significant%20Adults%20Report%2011%20Dec%2012.pdf](http://www.niccy.org/uploaded_docs/2012/Publications/Sign%20Adults%20Reports/NICCY%20Significant%20Adults%20Report%2011%20Dec%2012.pdf)

<sup>15</sup> [http://www.rqia.org.uk/cms\\_resources/Under%2018s%20on%20Adult%20Hosp%20Wards%20Overview%20Report%20Web%2012%20Dec%2012.pdf](http://www.rqia.org.uk/cms_resources/Under%2018s%20on%20Adult%20Hosp%20Wards%20Overview%20Report%20Web%2012%20Dec%2012.pdf);

<http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Age-children-and-young-people-summary.pdf>

the UNCRC require that children and young people are placed in age appropriate facilities.

The consultation document notes that this provision will be 'akin to clause 146' in the draft Bill, but does not provide any additional information in relation to the insertion of a specific clause within the Mental Health (NI) Order. Clause 146 applies to inpatients under 18 years however the language differs from that used in relation to the Mental Health (NI) Order, in that it states that 'the managing authority of the hospital must ensure that...the person's environment is *suitable* having regard to his or her age' (our emphasis). The term 'suitable' is open to interpretation and NICCY would therefore strongly advocate the insertion of an unambiguous phrase clearly stating that 'no young person under 18 years of age should be detained in an adult psychiatric ward. Further details are required in relation to the procedures hospital managers will be expected to follow in order to fulfil this duty, the proposed location of age appropriate accommodation and alternative procedures which will apply in the event that no child in-patient facilities are available.

- vii. *Access to Educational provisions.* The consultation document merely notes that the Department is considering this issue and no further information is provided. In the absence of definitive proposals it is difficult to comment further, however there are a number of issues which NICCY would urge the DHSSPS to consider in relation to educational provision. Firstly, children and young people regardless of whether they are formally detained or voluntary inpatients, should have equal access to the same educational provision as their peers who are educated in schools, colleges or elsewhere. The Bamford Review highlighted the right of children to 'have access to a practical and effective education'<sup>16</sup> while Article 23 of the UNCRC recognises the right of disabled children to a full and decent life including access to education. In addition, Articles 28 and 29 of the UNCRC and Article 24 of the UNCRPD detail the right of children/persons to an effective education.<sup>17</sup> When expanding the nature of education provisions which will be provided, the DHSSPS should include sufficient detail concerning the range and extent of educational facilities and services planned.

In addition, particular account should be taken of young people who may have special educational needs and require additional provision. Again the Bamford Review commented that 'particular attention needs to be paid to ensuring that children and

<sup>16</sup> [http://www.dhsspsni.gov.uk/human\\_rights\\_and\\_equality\\_report.pdf](http://www.dhsspsni.gov.uk/human_rights_and_equality_report.pdf), p.21

<sup>17</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>,  
<http://www.un.org/disabilities/convention/conventionfull.shtml>

young people with mental health difficulties or a learning disability who present challenges to educational services because of the severity or complexity of their disability enjoy equal access to education'.<sup>18</sup>

On discharge from hospital, children and young people should be effectively supported in returning or transferring to their school or place of education and all relevant documentation, including statements of special needs, should be effectively communicated to the appropriate education authorities including Education and Library Boards, in order to ensure their transition to the community setting is as smooth as possible.

### 4.3 Additional Amendments

NICCY has identified a number of additional amendments which should be considered in relation to the Mental Health (NI) Order.

- i. Mental Health Review Tribunal.* In terms of provisions concerning the Mental Health Review Tribunal, (Articles 71-74), children and young people under 16 years should have right of access to the Tribunal as early as possible including during their assessment period. Within the current arrangements, under 16 year olds may only apply to the Mental Health Review Tribunal once during every six months period. It would be a positive step if this restriction could be reviewed and young people permitted to make multiple applications, at the discretion of the Mental Health Review Tribunal, if appropriate.
- ii. Offence of ill-treatment of patients.* Article 121 of the Mental Health (NI) Order relates to the ill-treatment of patients. NICCY strongly recommends that the DHSSPS consider inserting additional safeguards to reflect the new offence included in the draft Bill, which applies to anyone caring for a person of any age, who lacks capacity. Commentary provided in paragraph 3.4 is also relevant in this regard.
- iii. Places of Safety.* Article 130 refers to the removal of 'mentally disordered persons found in public places' to a place of safety. Article 129 identifies the meaning of a place of safety which includes a police station. NICCY does not believe that a police station is a suitable place of safety for a young person with mental health issues. The Juvenile Justice Centre (Woodlands) which has been used for similar purposes is also not appropriate. Neither location should be included in the legislation. Furthermore,

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<sup>18</sup> Ibid.



NICCY would suggest that consideration be given to reducing the amount of time a young person can be detained in a place of safety from 48 to 24 hours. The legislation in Scotland only allows for 24 hours detention and NICCY would suggest this is a more appropriate period of time<sup>19</sup>

NICCY notes that there are no proposals outlined in the consultation document to amend any of the provisions included in Part III of the Mental Health (NI) Order which focuses on 'Patients concerned with criminal proceedings or under sentence'. While it may be unlikely that these clauses will apply to young people under 16 years, it would be helpful if the DoJ could clarify whether all of Part III should be retained or if the policy proposals outlined in the consultation document are intended to offer sufficient legislative provision to this age group.

## **5.0 Criminal Justice Provisions**

As highlighted in the Introduction, it is widely acknowledged that a significant proportion of children and young people who come into contact with the criminal justice system have serious mental health needs. They are therefore a particularly vulnerable group who will require additional protections and safeguards and it is vital that every effort is made to ensure they can access these where and when they are required.

Again, as previously noted, the proposals concerning the criminal justice provisions appear to be a detailed policy statement however no information is provided to indicate which pieces of criminal justice legislation are likely to require amendment or what the nature of these amendments might be. NICCY would suggest however that if the legislation is genuinely seeking to reduce stigma, any legislative changes required should be undertaken through the draft Bill. Irrespective of how this is taken forward, it will be important that consultees are afforded the opportunity to comment on draft changes to the legislation once the policy proposals are translated into new or amended clauses in the legislation.

The consultation document acknowledges that in terms of applying the Bill to the criminal law there will be 'particular challenges for the criminal justice system within that way forward'. As the document notes, the current minimum age of criminal responsibility is 10

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<sup>19</sup>[http://www.scottish.parliament.uk/S1\\_Bills/Mental%20Health%20\(Care%20and%20Treatment\)%20\(Scotland\)%20Bill/b64bs1.pdf](http://www.scottish.parliament.uk/S1_Bills/Mental%20Health%20(Care%20and%20Treatment)%20(Scotland)%20Bill/b64bs1.pdf)

years of age although it appears that the DoJ proposals will apply only to those aged 16 years and above. The proposals do not appear to include any intention to review Part III of the current Mental Health (NI) Order, therefore it is assumed that the existing criminal justice provisions will apply, where appropriate to under 16 year olds.

NICCY has previously highlighted the confusion arising around the dichotomy of different age thresholds, where a child of 10 years of age is presumed to have the capacity to commit a crime but not to have the capacity to access safeguarding and protection provisions contained in the draft Bill, should they come into contact with the criminal justice system. It is vitally important that the Department of Justice clarifies the tension in its existing policy position. Since it is currently proposed that the legislation only applies to young people aged 16 years and above, this may present challenges for example, when applied to young people detained in the Juvenile Justice Centre. Given the potential age range of young people in the Centre, it is likely that the provisions and protections offered through the Bill will be available to some young people but not others.

Within the context of the wider justice system, it is vital that the Department provides further clarification as to how it anticipates a capacity based approach will be implemented in tandem with the application of a broad range of criminal justice powers and disposals affecting children and young people of all ages and which require their consent. In addition, the issue of transition for young people from one legislative framework to another should be carefully considered. This could occur when young people aged 15-16 years experiencing mental health issues reach an age where they can access the provisions within the draft Bill and will therefore transfer from governance under the Mental Health (NI) Order. It will be important that appropriate preparations are put in place for this transition and that the process is wholly understood by all key stakeholders and carefully managed on behalf of the young person concerned.

The consultation document indicates that the DoJ is seeking to reflect a capacity based approach throughout three key phases of the criminal justice process; the police 'place of safety' power; court disposals; and prison transfer powers. NICCY has already raised concerns, regarding the proposals pertaining to a place of safety and specifically in relation to the use of police stations for this purpose and the period of time for which a person may be detained.

Amongst the court disposals proposed are a number of new court disposals relating to health care, including 'in-patient treatment orders', 'in-patient direction orders', 'community residence orders' and 'restriction orders'. The Department notes it is also considering the

introduction of a 'protection order'. It is proposed that these new disposals will be available to a court when sentencing a person aged 16 years and over, however, apart from the restriction order which is contained within the Mental Health (NI) Order, they will not be available to a court when sentencing a young person under 16 years of age. In practice this means that a court will be prohibited from making these disposals in cases involving under 16 year olds, even if it believes they may be beneficial to the young person. NICCY would suggest that the DoJ gives further consideration to the potential disadvantage this may create for young people under 16 years and explores how beneficial elements of these disposals can be extended to under 16 year olds through amendments to the Mental Health (NI) Order or other relevant legislation.

From NICCY's understanding of the new court disposals, it is proposed that 16-17 year olds who come within the scope of the draft Bill could be referred to an in-patient facility for treatment. In the absence of an appropriate in-patient forensic treatment unit for young people in Northern Ireland, it is unclear where this group of young people would be referred to for treatment. The lack of appropriate in-patient facilities for young people aged 16-17 years is also an issue in relation to the proposals outlined under the transfer of prisoners. It would therefore be helpful if the Department could indicate where it anticipates these young people would receive in-patient treatment. Information should similarly be shared regarding how young people under 16 years will be provided for, should they require in-patient treatment or examination in the same circumstances.

Clearly, it will be important that all relevant agencies and service providers are fully briefed on the Bill's contents and provisions and the implications of these for young people within the criminal justice system and appropriate training and guidance provided to professionals working within policing and the justice system.

## **6.0 Equality Issues - Section 75**

The consultation document states that the initial Equality Impact Assessment (EQIA) completed by the DHSSPS in 2010 has been updated and that the DoJ has carried out a separate EQIA. NICCY wishes to make a number of observations in relation to associated equality and human rights issues.

NICCY is concerned that the EQIAs from both departments do not cover the whole remit of the policy proposals and lack sufficient detail with regard to their content. The consultation document notes that additional provisions in the Mental Health Order for under 16s and changes to existing criminal justice legislation have yet to be agreed and drafted and work

is continuing on these issues. Furthermore, the code of practice which it is proposed will accompany the draft legislation has not yet been issued for consultation.

The proposal to retain and make amendments to the Mental Health (NI) Order with the intention that provision is made for children and young people under 16 years, is a new policy proposal which was first introduced by the DHSSPS late in 2013. NICCY has expressed its concerns about the proposed retention of this legislation and the potentially adverse impact this will have on children and young people's equality of opportunity. It is therefore incumbent on both the DHSSPS and the DoJ to conduct an EQIA to assess the impact of these proposed policy developments, and to undertake meaningful consultation with children and young people who are most likely to be affected by the policy changes.

On a general level, it is disappointing that both the DHSSPS and DoJ EQIA relies on fairly limited data which is not always disaggregated or Northern Ireland specific. In particular, there is an absence of relevant, comprehensive data concerning the numbers of young people with mental ill health, or who have disabilities and the type of disability they experienced as well as information in relation to sexual orientation.

In taking forward such a significant piece of legislation it is essential that a comprehensive and robust EQIA is undertaken by both the DHSSPS and the DoJ in order that a full and detailed assessment of the impact on various Section 75 groups can be completed. Evidently, NICCY's key concern is the impact of the legislative and policy proposals on children and young people. Given the significant proportion of young people experiencing mental health issues in Northern Ireland it is vital that any new or revised legislation will provide them with adequate and effective safeguards and protections and ultimately contribute towards improving their health and well-being.

## **7.0 Conclusion**

NICCY would like to thank the DHSSPS and DoJ for the opportunity to respond to this consultation and trusts that its response will be constructive and helpful in informing the ongoing work of the two departments on this important issue.