Next Steps on the Mental Capacity Act (Northern Ireland) 2016

 May 2020

Introduction

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) and (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 Commissioner’s remit includes 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 carrying out her functions, the Commissioner’s paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (“UNCRC”).

NICCY has scrutinized ongoing developments in relation to the introduction of mental capacity legislation since the then Department of Health and Social Services and Public Safety (“DHSSPS”) first introduced its draft policy proposals in 2009. NICCY has had ongoing engagement with and provided advice to both the then DHSSPS and the Department of Justice (“DoJ”) throughout the development of the legislation and given written and oral evidence to the then Northern Ireland Assembly Committee for Health, Social Services and Public Safety and the Ad Hoc Committee on the Mental Capacity Bill with regard to the progression of the legislation. This advice does not replace previous advices issued by the Commissioner but is intended as an addendum in light of recent developments.

Background to Legislation

A comprehensive review of mental health and learning disability – the Bamford Review of Mental Health and Learning Disability - was carried out in Northern Ireland in 2002. The Bamford Review made a number of recommendations regarding necessary reform of the system of mental health and learning disability in Northern Ireland in order to render it human rights compliant.

The Mental Capacity Act (Northern Ireland) 2016 (“MCA”) emerged from that review and it provides a number of important safeguards and protections for people who lack decision-making capacity. The MCA 2016 will, when fully commenced, fuse together mental capacity and mental health law for those aged 16 years and over as recommended by the Bamford Review. The MCA 2016 was partially commenced on 2 December 2019.

The parts of the MCA that are currently in force provide a statutory framework to deprive anyone of the age of 16 and above of their liberty in Northern Ireland if certain conditions apply. The MCA does not currently apply to any decisions made about the care or treatment of the person in the place to which the authorisation relates.

To ensure human rights are protected, the MCA 2016 defines a deprivation of liberty (“DOL”) as having the same meaning as under Article 5(1) of the European Convention on Human Rights (“ECHR”). In order for someone to be deprived of their liberty the following conditions apply:

* A deprivation of liberty for the purposes of Article 5 of ECHR comprises three components:
	+ First, there must be confinement to a particular restricted place for a length of time which is not negligible;
	+ Second, there ,must be a lack of valid consent;
	+ Thirdly, the State must be responsible for the deprivation of liberty.
* A DoL must be in a place where Deprivation of Liberty Safeguards (“DoLS”) apply. The 2016 Act provides for short and longer term authorisations depriving people of their liberty for the purposes of assessment and treatment;
* The person deprived of their liberty must meet DoLS criteria. These include the potential risk of causing serious harm to themselves or others, the person lacks capacity (which need to be assessed through a diagnostic and functional test) and it is in the person’s best interests.

The Mental Health Order (Northern Ireland) 1986 (“MHO”) is focused on compulsory admission to hospital either for assessment or treatment and is not based on mental capacity. Not every hospital admission will amount to a deprivation of liberty e.g. in circumstances where the young person is receiving life-saving medical treatment. However, deprivation of liberty is likely to occur if the three ECHR criteria above are met.

The MHO can apply to 16/17 year olds who have the capacity to decide admission and decline to. Likewise it can be applied to 16/17 year olds without capacity to be admitted in a manner that deprives them of liberty.

In order to manage the commencement of the MCA, a dual system is currently in place whereby both the MCA and the MHO 1986 provide a statutory framework for the deprivation of liberty. When the MCA is fully commenced the MHO 1986 will be repealed for all those who are 16 years of age and over.

NICCY’s Position

NICCY has consistently expressed its concern regarding the proposed application of the Mental Capacity Act (Northern Ireland) 2016 only to those aged 16 and over, thus denying young people under 16 access to the protections and safeguards under the Act. More recently, NICCY expressed serious concerns in its response to the consultation on the draft Children’s Chapter of the Code of Practice in April 2017 about the position of 16 and 17 year olds under the Act.[[1]](#footnote-1) NICCY was particularly concerned about parents being able to authorise a deprivation of liberty for 16 and 17 year olds in which circumstances young people would not have access to the legal protections afforded by the MCA 2016. NICCY was also concerned about some 16 and 17 years olds being placed on adult wards which were not suitable for them.

NICCY raised these concerns at a meeting, the then Director of Mental Health, Older People and Disability with the Department of Health (DoH) on 26th January 2018. At this meeting NICCY received assurances that “unintended consequences caused during the legislative drafting process” would be rectified through the identification of a new legislative vehicle. This issue has been overtaken by the recent Supreme Court judgement in respect of *Re D*[[2]](#footnote-2) (see below) but the matter does not yet appear to have been entirely resolved. The current version of the Mental Capacity Act Code of Practice does not appear to fully address the position of 16 and 17 year olds.

NICCY previously asked DoH to undertake a comprehensive programme of direct consultation with children and young people in order to ensure that their views are heard and taken into account in the development of the new legal framework for children and young people with mental illness and /or learning disability in Northern Ireland. NICCY remains concerned about the continuing lack of engagement with children and young people in this process.

**Supreme Court Judgement in Respect of re D**

The Supreme Court made clear in the case of *In the Matter of D (A Child)* 2019 (“*Re D*”) that no person can consent on behalf of a young person aged 16/17 and, that unless that young person gives consent to that confinement, there will be a deprivation of liberty requiring authorisation. This judgement supports the NICCY’s longstanding position on this issue. . **NICCY recommends that** **the Mental Capacity Act Code of Practice needs to be amended as a matter of urgency to take account of this judgement.**

Lady Black also noted that the Court of Appeal found that exercise of parental responsibility does not end at the child attaining a fixed age, but upon attaining *Gillick* capacity.[[3]](#footnote-3) Lord Scarman in *Gillick* held that:

*“The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until [the child] reaches such an age as to be able to look after himself and make his own decisions.”*

The essence of *Gillick* remains unchanged. That had been set out in that case by Lord Scarman:

*“… as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand full what is proposed.”*

Whilst the Supreme Court ruling resolves some issues others remain to be addressed.

**Inclusion of Children and Young People under Age of 16 in Mental Capacity Act 2016**

*Overlap between MCA 2016 and MHO 1986*

As indicated above, the partial commencement of MCA 2016 creates an interface between it and MHO 1986. This is to some extent remedied by “The Mental Capacity (2016 Act) (Commencement No.1) Order (Northern Ireland), 2019 (“Commencement Order”), (Article 3). The Commencement Order sets out that DoLS do not apply where deprivation of liberty may be authorised by Part 2 or Part 3 of MHO 1986. The Code of Practice further sets out that if detention is by virtue of MHO 1986, the MHO 1986 “framework must be applied”. This suggests if there is overlap, first regard should be to whether MHO 1986 detention criteria are met. If MHO criteria are not met DoLS can then be used. However, NICCY has significant concerns with regard to the current system.

**Areas of concern**

MCA 2016 contains substantive safeguards designed to apply Article 5(1)(e) of the ECHR. This allows for detention of persons of “unsound mind” etc. It has procedural safeguards in respect of Article 5(4) ECHR (which confirms that detained persons may challenge the lawfulness of detention).

One key area of concern is whether DoLS under the MCA 2016 or the MHO 1986 may be applicable, as these can lead to different outcomes. Article 5(1) ECHR requires an interference to be formulated precisely enough so that people can regulate their conduct. However, the Code of Practice confirms that if detention is possible under MHO 1986, then that is the framework to be applied. In continuing to use the MHO 1986 it is important to note that there are currently no treatment safeguards in Northern Ireland other than those within the common law. In these circumstances it is likely that a case will be brought to the High Court in this regard. Problems may also arise if practitioners start using DoLS instead of the MHO 1986, because they see them as less restrictive.

**Issues Raised in Supreme Court Judgement (“Re D”)**

In the Supreme Court judgement of *Re D*, Lady Hale in her judgement held that while her conclusions regarding liberty were for those over the age of 16, she accepted that they : *“Logically … also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age, but that question does not arise in[[4]](#footnote-4) this case…. I therefore prefer to express no view upon the question.”*

In light of Lady Hale’s comments, NICCY with the Commissioner for Children, England commissioned an opinion from Counsel on whether the Mental Capacity Act 2016 could be extended to cover children under the age of 16. Counsel’s opinion can be found in Appendix 1.

Counsel has advised that there is a real prospect that Courts will find parents cannot consent to confinement of any child of any age. In considering the matter one would need to determine whether the restrictions upon the child were such as society would expect for a child of ordinary maturity without disability.

Given the decisions which have been taken by the Courts, and the comments of Lady Hale in the *Re D* judgement, there is a strong argument for including children and young people under the age of 16 in the Mental Capacity Act. If the Courts in future find that parents cannot consent to the confinement of a child of any age then the government will be obliged to do so. It would be sensible for the government to pre-empt any such judgements by considering how children and young people should be included in the MCA 2016.

NICCY accepts that including children under the age of 16 in the MCA 2016 may be problematic for two reasons:

* Legislation for those aged 16 and above expressly cite functional inability to make a decision. Scientific evidence shows that the human brain continues to develop after the age of 18. Pushing concepts of mental capacity below the age of 16 could cause raise difficulty in differentiating between a child being able to make a decision for Mental Capacity Act purposes and a decision for other reasons.
* Presumptions of capacity for the Mental Capacity Act would push the effective age of majority downwards. This may not be societal consensus for such a move.

Counsel argues that there could be a codification of decision-making capacity for those under the age of 16 along the lines down by Re S (Child as Parent: Adoption: Consent) [12017] EWHC 2729 (Fam). He advises that it would be possible to do this by amending the Mental Capacity Act 2016 to say that the legislation applies to those under 16 withthe exceptions that: there is no statutory presumption of mental capacity; and the so called diagnostic limb would not apply (i.e. the test to determine if the young person has a disturbance in the functioning of their mind or brain). It would therefore be very clear that professionals would need to apply to ask whether the child was functionally capable of making the decision in questions.

We accept that this this is a complex issue and that there are a number of ways to extend the provisions of the MCA 2016 to under 16s. NICCY would welcome a discussion with the Department and be happy to share draft amendments that Counsel has developed.

When MCA 2016 is fully in force there will be no difference in safeguards between mental health patients and others – the MHO 1986 will be repealed for all those over the age of 16. NICCY believes that the MHO 1986 also needs to be repealed for those aged 15 and under and the MCA should include those aged 15 and under. This would ensure that young people under the age of 15 would be have access to the safeguards in the Act and any deprivation of liberty would be consistent with Article 5 of ECHR. The protections afforded by Article 5(1) are not contingent on age and NICCY is strongly of the view the MHO 1986 is not an appropriate vehicle for depriving these young people of their liberty as it is not compatible with Article 5(1).

**NICCY recommends that the government repeal MHO 1986 for all children and young people including those under the age of 16. NICCY also recommends that the Department of Health should review the incidents of a child under the age of 16 being deprived of their through the MHO, 1986. This should inform the way that the MCA, 2016 is expanded to include under 16s.**

**Application of MCA 2016 to Medical Treatment of Children and Young People**

The Supreme Court made clear that they were not ruling on the operation of parental responsibility in respect of other areas in respect of children under the age of 18 including decisions around medical treatment. The judgement did not impact on the issue of Gillick competence. The Court in their judgement ruled that:

* *Gillick* did not extend the boundaries of parental responsibility.
* Instead, *Gillick* was concerned with the issue of consent by a person under the age of 16 for medical treatment, where that treatment was opposed by parents.
* The *Gillick* decision was in respect of parental responsibility as applied in respect of persons under the age of 16, and the Court decided that drawing that decision in to apply to persons aged 16/17 would not be appropriate.

The Age of Majority Act 1969 provides that the consent of a minor who has attained the age of 16 years is effective to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass upon the person. However, the Act does not explain what would constitute consent for these purposes or how to decide whether the young person is able to give that consent. It is generally understood that a necessary part of the test to determine consent is set out in the MCA 2016. However, subsequent case law judgement and some of the comments expressed in the re D case have made this less clear.

A number of challenges have to be overcome:

* Doubt with regards to what test can be applied to determine effective consent under the 1969 Act. In Northern Ireland it is not clear whether G*illick* competence or common law tests will apply;
* Medical professionals continue to have a choice of how to proceed where the young person cannot give consent. In Northern Ireland that is between the doctrine of necessity or relying on a person who has parental responsibility;
* A “best interests” decision under MCA 2016 would consider matters from the subject person’s point of view. A parent exercising parental responsibility would need to consider the best interests of the child, but is not applying any statutory tests of such interests and they are not obliged to consider matters from the point of view of their child. If they were acting within their parental responsibility there could be no referral to Court;
* It is doubtful whether somebody with parental responsibility can override the decisions of a young person who has capacity. Lady Hale described the proposition as “controversial” in Re D.

In light of the uncertainty surrounding this issue, it is important that Department of Health clarifies the matter urgently. It is important for medical professionals and their patients to understand what the test of consent is and what tests apply to which age groups. NICCY is of the strong view that parents should not be able to override the decisions of a young person who has capacity.

**NICCY calls on the Department of Health to clarify the existing legislative framework as appropriate to ensure there is clarity around the test for consent when children and young people aged 18 and under are undergoing surgical, medical or dental procedures.**

There is one important caveat. In order to adequately protect children and young people from irreversible harm NICCY recommends that the Department in its Code of Practice on the Mental Capacity Act replicates section 19.71 of the Code of Practice for the Mental Health Act 1983 which is currently in operation in England and Wales. Section 19.71 deals with life-threatening emergencies and under 18s and states that,

*“A life-threatening emergency may arise when treatment needs to be given but it is not possible to rely on the consent of the child, young person or person with parental responsibility and there is no time to seek authorisation from the court or (where applicable) to detain and treat under the Act. If the failure to treat the child or young person would be likely to lead to their death or to severe permanent injury, treatment may be given without their consent, even if this means overriding their refusal when they have the competence (children) or the capacity (young people and those with parental responsibility), to make this treatment decision. In such cases, the courts have stated that doubt should be resolved in favour of the preservation of life, and it will be acceptable to undertake treatment to preserve life or prevent irreversible serious deterioration of the child or young person’s condition.”*

**Independent Advocacy Safeguards**

One of the key safeguards of the Mental Capacity Act is the provision of independent mental capacity advocates for people who lack capacity as provided for by Chapter 5 of the Mental Capacity Act. NICCY has consistently called for the extension of the provision of independent advocacy services to children and young people with learning disabilities and / or mental ill health as and when required. In particular, we have called on the Government to provide independent advocacy services to children and young people when admission to hospital is being considered in the community to ensure that if possible, formal detention can be avoided and courses of action which cause least harm can be progressed.

Under Article 12 of the UNCRC, children and young people have a right to have their views heard and taken into account in matters which impact on their lives. In addition, Article 7 of the UNCPRD places an obligation on Government to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. State Parties must ensure that children with disabilities have the right to express their views freely on all matters affecting them and their views are to be given due weight in accordance with their age and maturity on an equal basis with other children.

NICCY is aware that of the Department’s intention to commence the MCA 2016 in stages, with the provisions relating to advocacy coming later in the commencement process. The Department stated in its letter of 26th February 2019 that as the Independent Mental Capacity Advocates will require additional legislation in the form of Regulations that, *“…it is not feasible to commence these provisions before the second half of 2021 at the earliest.”*

The commencement of the MCA 2016 without the advocacy safeguard raises concerns. It is NICCY’s view that such an approach raises serious questions around the compatibility of the MCA 2016 with the ECHR and UNCRPD. The Department stated in its letter of 26th February,

*“During the Assembly process the Bill (and subsequently the Act) was determined as being compatible with all international obligations, such as European Convention on Human Rights and the United Nations’ Convention on the Rights of Persons with Disabilities. Without such compliance the Assembly would not have had the competence to legislate and the passage of the Bill would have been stopped, either through procedures in the Assembly itself or by the Supreme Court. As this did not happen competence was assured and the Bill received Royal Assent.”*

The commencement of the Act without the advocacy service was not something that was considered when the Act was being subjected to scrutiny with regard to ECHR compatibility. NICCY believes that the commencement and implementation of the Act without the advocacy safeguards now raises the question of ECHR compatibility. As outlined above, access to independent advocacy is fundamental in the realisation of children’s rights under the Act. **NICCY therefore strongly recommends that the advocacy provisions are commenced at the earliest opportunity.**

**Next Steps**

**NICCY calls on the Department of Health to take into account the recommendations made in this paper, which we provide in compliance with the Commissioner’s statutory advice capacity under Article 7(4) of The Commissioner for Children and Young People (Northern Ireland) Order’ (2003). We also call on the Department of Health to consult extensively with children and young people on the Mental Capacity Act provisions and how they might apply to them as part of this process.** We hope that the comments contained in this submission are helpful to the Department and we look forward to engaging further in the development of the Code of Practice on the Mental Capacity Act (Northern Ireland) 2016.

NICCY looks forward to continuing to engage with the Department and the NI Assembly to discuss its concerns outlined in this submission and get clarity on the Department’s position regarding 16 and 17 year old children and young people under the Mental Capacity Act.

1. <https://www.niccy.org/publications/2019/february/22/mental-capacity-act/> [↑](#footnote-ref-1)
2. <https://www.supremecourt.uk/cases/uksc-2018-0064.html> [↑](#footnote-ref-2)
3. <http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk.htm> [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)