

include YOUTH

Response to Draft Mental Capacity Bill (NI) August 2014

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“Yes, young people should be listened to and have a say in such a major issue. From the age of 13 I felt like the doctors had all the say on the rest of my life.”

“No, because of my age I didn’t know what was going on. My family and the doctors made all the decisions between them, I had no say. I had nobody to speak to.”

For further information contact Paula Rodgers
Policy Co-ordinator, Include Youth, Alpha House, 3 Rosemary Street, BELFAST, BT1 1QA

028 9031 1007 Paula@includeyouth.org
www.includeyouth.org twitter.com/includeyouth

Include Youth

Include Youth is an independent non-governmental organisation that actively promotes the rights, best interests of and best practice with disadvantaged and vulnerable children and young people.

The young people we work with and for include those from socially disadvantaged areas, those who have had poor educational experiences, those from a care background, young people who have committed or are at risk of committing crime, misusing drugs or alcohol, undertaking unsafe sexual behaviour or other harmful activities, or of being harmed themselves.

The Give and Take Scheme aims to improve the employability and increase the self-esteem of young people in need or at risk from across Northern Ireland. The Scheme works with approximately 145 young people from a care or criminal justice background. The Scheme aims to support young people to overcome particular barriers that prevent them from moving into mainstream training or employment and towards independent living. Seventy-five per cent of young people on the Scheme are care experienced, while over a third has a background in offending.

Include Youth also delivers an Employability Service on behalf of two of the Health Trusts for young people aged 16 + who have had experience of the care system. This service is designed to offer tangible and concrete opportunities to assist young people leaving care to prepare for, and engage in work.

The organisation also leads on the collaborative initiative START which operates across several sites in Northern Ireland, working with community based organisations to improve education, employment and training outcomes for the most disadvantaged young people.

Include Youth's Young Voices project is a way of delivering participative democracy to marginalised young people in Northern Ireland. Its main aim is to support marginalised young people at risk or with experience of the criminal justice system, to become involved in decision making processes which impact on their lives, particularly in social welfare, education and criminal justice matters. The project works with a range of groups of young people in the community, in Woodlands Juvenile Justice Centre and in Hydebank Wood Young Offenders Centre.

Include Youth's policy advocacy work is informed by relevant international human rights and children's rights standards, is evidence based, including that provided by young people and practitioners and is based on high quality, critical analysis.

Reflecting the profile of the young people we work with and with our service provision, Include Youth's two main policy priority areas are employability and youth justice. In light of this we have approached this consultation through the lens of those two areas as it were, as that is where both our expertise and interests lie.

We believe we have a vital contribution to make to this consultation, given the profile of many of the young people we work with. Of the young people who participated in our Give and Take scheme between 1 April 2013 and 31st March 2014:

- 59% had experienced mental and emotional health problems
- 19% had a learning or physical disability
- 35% were from risk of suicide or self-harm
- 44% had an offending background

General Comments

Include Youth welcome the opportunity to comment on the draft Mental Capacity Bill. We welcome the development of a single legislative framework for the reform of mental health legislation and the introduction of mental capacity legislation in NI as was recommended by the Bamford Review. We welcome the fact that Northern Ireland will be the first place in the world to bring together mental health and mental capacity under one single piece of legislation. This is a ground breaking piece of legislation and will afford the necessary protections and safeguards for some individuals who lack decision making capacity.

We agree with the recommendation from Bamford that any new legislative framework should apply to all members of society, including those people involved in the criminal justice system. For that reason we welcome the partnership approach taken by the DHSSPS and the DoJ. We fully support the steps to strengthen protections for those people who lack capacity to make decisions for themselves and wish to see those protections extended to all, regardless of age.

We are disappointed that the two departments do not appear to be working to the same time schedule. While the DHSSPS has provided us with draft clauses, the DoJ are not yet at this stage of development and have instead provided us with a set of policy proposals. Consultees who are particularly interested in the application of the Bill to the criminal justice system are therefore at a disadvantage as we do not have full access to comprehensive proposals and how they will translate into draft clauses. We would have expected the DoJ to have been at a more advanced stage of development at this time in the legislative process.

We have worked closely with our colleagues in the Children's Law Centre in the development of our position on the Draft Bill and we wish to fully endorse the submission made by Children's Law Centre to this consultation.

In preparation for our submission to this consultation we spoke to seven young people participating in our Give and Take Scheme. These young people have experienced mental health difficulties and have attended the child and adolescent in-patient unit at Beechcroft. They talked to us about how they were involved in decisions about their care and treatment. Their views are extremely informative and have helped inform our position on the Draft Bill.

Our primary area of concern with regards to the Draft Bill is the proposed exclusion of under 16s. We are opposed to the decision to not include under 16s and disagree with the assumption that because of their age they do not have the capacity to take decisions about their care and treatment.

Specific Comments

Consultation Process

Given the significance of the changes to children and young people we would be keen to hear how both Departments have engaged with children and young people throughout the consultation process. Given the wealth of experience that the young people we spoke to imparted on the subject it is clear that young people have much to bring to this debate. In particular, we are keen to hear how young people in the juvenile justice system been consulted with?

We welcome the Easy Read Version of the consultation document but were disappointed that this was not made available at the same time as the full

consultation document. We would also have liked to have seen a child accessible version developed.

Children and young people under 16

It is deeply concerning that children and young people under 16 will be excluded from the scope of the Bill purely because of their age and will therefore not be afforded the protections and safeguards contained in the Bill. Article 1 of the United Nations Convention on the Rights of the Child (UNCRC) defines the child as “every human being below the age of 18 years”. Include Youth believe that the exclusion of under 16s is not in keeping with the recommendations from Bamford and is a breach of the UNCRC, especially Article 2 (non discrimination), Article 3 (best interests of the child), Article 6 (right to survival and maximum development), Article 12 (right to be heard and have views taken into account), Article 23 (right of a disabled child to a full and decent life and 24 (highest attainable standard to healthcare). Excluding children and young people under the age of 16 with mental health difficulties or a learning disability from the protection and safeguards of the new legislation is not in children’s best interests.

Article 12 of the UNCRC states that the Government shall assure the right to be heard of every child “capable of forming his or her own views” which places an obligation on the State to assess the capacity of the child and to enable them as much as possible to form an autonomous opinion. State parties are not to begin with an assumption that the child cannot express their view. Article 12 imposes no age limit on the right of the child to express their view but states that the views must be “given due weight in accordance with the age and maturity of the child”. This is echoed in the Children (NI) Order 1995. General Comment on Article 12 notes that children’s level of understanding cannot always be linked to their age and for this reason the views of the child have to be assessed on a case-by-case basis.

Article 7 (3) of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) obliges State parties “to ensure that children with disabilities have the right to 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 realize that right”.

It is widely recognised that there are a high number of under 18 year olds experiencing mental health problems in Northern Ireland and it is therefore

concerning that only 16 and 17 year olds are being given the right to be involved in decisions with regards to their care.

We are also aware that many under 16s experience considerable difficulties in decisions around their care and treatment and feel that they do not have a say regarding their treatment. Several young people we spoke to who had been under the age of 16 when they were detained in Beechcroft expressed their dissatisfaction at the lack of involvement they had.

“I had no say at all in the decision to be detained or in my care and treatment.”

“Family and the doctors, I had no say at all.”

“No I had no say in my care plan nor was I allowed to attend my review meetings. I was held down and forced to take medication. It wasn’t explained to me.”

“I didn’t really have a say in decisions, can ask for things you want but you didn’t usually get it.”

“Your rights go.”

When asked if she felt she had a say in the treatment she received another young woman who had been in Beechcroft when she was 14 years old said:

“No – because of my age I didn’t know what was going on. My family and the doctors made all the decisions between them, I had no say. I had nobody to speak to.”

This young woman went on to say that she would like to have been more involved and that if she had been given the proper support she would have felt able to have a say in her treatment.

“No it had nothing to do with me – it was between my family and the doctors. My mum and my granny had all the control ... Oh aye, I would have loved to have went to the meetings and have a say in what was going on in my life. I would loved to have somebody to speak to, to see what was going on like a key worker or co-worker.”

Some of the young people spoke of their frustration at not being supported to get involved in decisions about their treatment and explained their sense of powerlessness, sometimes made worse by the power imbalance between staff and patients. They said that the staff inside were not as helpful and that their attitude was *'really cheeky'* and they used *'one piece of paper to control you'*.

On the other hand *'outsiders helped/listened'* and *'understood better'*. A couple of young people talked about the *'power imbalance'*.

"you're not well – staff take advantage of this."

"some staff are nice – you need to give them respect too."

The experiences of the young people we spoke to who have direct experience of receiving treatment when under 16 years of age clearly demonstrates the need for under 16s to be included within the scope of the Bill. These young people feel that their voices are not being heard and they are largely disempowered from engaging in decisions regarding their care and treatment.

The need to include this age group and address the issues they face has also been demonstrated both by the caseload of the Children's Law Centre and the Northern Ireland Commissioner for Children and Young People (NICCY).

Cases referred to NICCY's Legal and Complaints Team involving a child or young person under 16 years old have included:

- The length of a child's stay as an in-patient;
- The lack of appropriate mental health services and facilities for young people in the community, which means longer stays in hospital;
- The use of seclusion or keeping a young person in isolation due to behaviour which is a result of the mental health;
- The lack of independent advocacy services for a child being treated in a mental health facility.¹

¹ NICCY Response to DHSSPS policy consultation 'A Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland'

Presumption of Capacity

We note the rationale presented for the exclusion of under 16s in the consultation document, that the test for capacity contained in the draft Bill cannot be applied to children because of their developmental stage. As such the Departments are beginning with the assumption that ALL children under 16 lack capacity. The consultation document gives the example of a 2 year old and states that in this instance it would be wrong to assume capacity. Clearly we are not suggesting that there should be a presumption of capacity for very young children and Bamford was not suggesting that either. Rather, Bamford recognised that the capacity of children is evolving and “while most people would agree that parents be substitute decision makers for children up to the age of 10-12, consideration might be given to a rebuttable presumption of capacity between 12-16”.² Bamford envisaged any new capacity based legislation as giving children and young people lacking capacity equal protection and safeguards as that given to adults.

The young people we spoke to feel strongly that children under 16 who have mental ill health are capable of getting involved in decisions about their care.

“It should be open to all young people to have a say, they should have the right or option to have a say in decisions made about them.”

“Yeah they should be able to give their point of view and be listened too. They know what they need in some ways but not in others but they should be listened too.”

“It depends how ill they are.”

“They should at least be told and explained why.”

“At least they should have a say.”

“It is important to let young people have a say if they are going to be locked up.”

“Talking to me and listening to my views would have helped me.”

“Yes, young [people should be listened to and have a say in such a major issue.”

² Bamford Review Report, A Comprehensive Legislative Framework , August 2007, page 47

“From the age of 13 I felt like the doctors had all the say on the rest of my life. I was capable, I knew what I was going through, I was scared. I wanted to be listened to, to be involved in my care and what medication I was receiving.”

The anomalies of how different parts of the current system deals with the capacity of children and young people under the age of 18 are extremely relevant to this debate. We believe that it is not possible to look at the current proposals regarding the age limitation to which the legislation will apply, without comparing it with how children’s capacity is assessed in other areas of policy and legislation. One of the most significant and contradictory areas of current legislation is the minimum age of criminal responsibility in Northern Ireland, which deems children as young as 10 to have the capacity to commit a crime. Include Youth have long argued for an increase in the minimum age of criminal responsibility, as recommended by the Youth Justice Review Team.

We currently have a situation where the Department of Justice is about to implement mental health and capacity legislation which states that a young person does not have capacity until they are 16, alongside an existing minimum age of criminal responsibility which presumes they have capacity to commit a crime at 10 years of age. It is clear to us that there are currently children and young people within the criminal justice system under the age of 16, who have and are experiencing mental health problems or learning disabilities who are deemed in law to have the capacity to be convicted of a crime, but simultaneously will not be assumed to have the capacity to access the safeguards and protections contained with the Mental Capacity Bill. This anomaly, coupled with the current proposals presents the Department of Justice with a significant challenge with how it intends to meet the needs and fulfil the rights of children over the age of 10 but under the age of 16 who have mental health problems or learning disabilities within the criminal justice system.

Retention of Mental Health (NI) Order 1986

Include Youth do not support the interim measures to retain the Mental Health Order with some amendments for under 16s, with a view to reviewing the Children (NI) Order 1995. Bamford made it clear that the Mental Health Order was not fit for purpose. It is unfair that under 16s are not going to be afforded the safeguards and protections as envisaged by Bamford. Bamford made it clear that the Mental Health (NI) Order was not in places compliant with the European Convention on Human

Rights (ECHR) and should not be retained for anyone least of all children and young people.

The proposed changes to the Mental Health Order are confusing and unclear and as such we are unable to comment in length about the proposed impact for under 16 year olds.

Specific comments on proposed amendments to Mental Health (NI) Order:

Best Interests

We particularly welcome the intention to insert the best interests principle into the Mental Health (NI) Order and acknowledge the elements of the best interests assessment, as outlined in the consultation document.³ We would like further detail on where this clause will be placed in the Order and an exact description of the wording of the clause. The consultation document notes that ‘the child must be helped and encouraged to participate as fully as possible in the determination of what is in his/her best interests as far as it *is practicable and appropriate* to do so.’ We would seek further clarification on what occasions it would be deemed to be not appropriate or practicable.

Independent Advocacy

We also welcome the intention to insert duty to consult with an independent advocate. The views expressed below from the young people leave us in no doubt of the need for independent advocacy.

We asked young people with experience of Beechcroft to tell us:

- if they were happy or unhappy about their level of involvement in decisions about their care
- how they thought they could be better supported to make decisions about their treatment and care
- who they thought could best support them and act as their advocate
- and what aspects of their care did they think they would like to have more of a say in.

(i) Feelings on their care and level of involvement in decisions

³ Para 3.11, page 39

It is clear from the young people's responses that they would have liked to have had more of a say.

"Yeah, it would have been good to let me have a say in decisions to see if I could have coped. They had all the control."

"No-one, I didn't have anyone."

"Yes, nothing was explained and the doctors and police had all the say I was never asked."

"Yes, I had no say and wasn't given any information."

"Yes, I never had a say or explanation about what was happening. My medication and my detention was all agreed behind my back."

"I would have liked to have a say and to feel I had been listened to."

When asked if there was anything about the care and treatment they received that they were not happy about the young people replied:

"Everything, every single bit of it, especially not knowing what was going on and what decisions were being made. Language being used by the doctors wasn't child friendly; I didn't know what I was signing up too."

"I didn't like being followed about everywhere."

"I wasn't allowed to smoke, this was hard."

"They changed my medication without telling me. I had no privacy, someone stayed with me in the shower when I went to the toilet. I had to eat with my hands, I didn't go to school."

When asked if they felt they were able to talk about those concerns they replied:

"No, I didn't get a chance to talk or give my views or say how I feel."

"Not a bit, well I felt I didn't and other people I know didn't as well."

“No they don’t, they tell you before you go in that you do have a say and you are an equal but you don’t. They just give you a page of new rules every week and if you break any you loose your privileges, like smokes.”

“No – I didn’t have a say, was just brought into hospital.”

“No, an ambulance and police van were waiting for me after an appointment with my social worker, I knew nothing about it.”

“No, I never had a voice.”

Sadly, there were several young people who felt like there was no point in trying to give their opinion because they would not be listened to anyway.

“I stopped caring – might as well give up.”

“There wasn’t any point as wasn’t going to win anyhow.”

(ii) Who could advocate for them

The young people expressed different views about who they would have liked to act as their advocate.

“Parent or a Guardian ad Litem or solicitor.”

“My Granny because she listens to me and tries to work things out or sees the best way to improve things, she understands me.”

“My mum and dad.”

For some young people it was important to have someone from outside speaking up for them. One young woman spoke positively about her VOYPIC worker who “spoke for me”.

“Outsiders helped/ listened and ... understood better.”

“The woman from VOYPIC”.

“VOYPIC – they fight for you.”

“Social worker and youth-workers are no good, they just go along with the Doctors.”

“Parents could speak on your behalf.”

“My Youth worker from Include Youth would be the best person.”

(iii) *What aspects of their care they want to have a say in and how an advocate could help*

The young people were clear about what things an advocate could help them with.

“An advocate could have represented my views and helped me to express myself.”

“When I got sick I was scared and had no control. I would like things to have been explained to me so that I understood what was happening to me.”

“Finding out what is happening day to day like meetings, future plans, medication and reasons I was in there. Explain things.”

“Actually listened too instead of you have to do this and do that. Would have liked things like agreeing pass out and things.”

“I wanted to know why I was in, this wasn’t explained to me.”

“They could act as a go-between.”

Include Youth would like to see as broad a statutory right to advocacy as possible and extended to under 18s in the community. The young person should be able to choose their advocate.

Access to an independent advocate is critical to ensuring young people have a voice in processes and decision making in which they can frequently feel disempowered and lacking control. This service should be available to all children and young people who need it both in the community and in hospital settings.

We believe it is important that children and young people, regardless of age, are able to have an independent advocate of their choice. The draft clauses relevant to this seem to suggest that any advocate will either be in the direct employment of a Health and Social Care trust or will be contracted into the service by the Trust. We think that this will limit the choice of advocates considerably and could mean young people are not able to have someone with whom they have built up a relationship and trust as their advocate.

Disregard Provision

We asked the young people how they would feel about having to declare that they were detained for mental health reasons.

“Sometimes I worry sometimes I don’t. It’s up to them whether they consider it or not. It depends on the employer.”

“Yeah I would be mortified.”

“Not really, there are a lot worse things.”

“Feel that they might discriminate against me because of it.”

“I’m not allowed in Canada or America because I was detained.”

“It’s not fair as you can’t help your mental health and shouldn’t be punished because of it.”

“I would worry it could affect you getting a job.”

“Employers would judge you.”

“No I will never get a job.”

The extension of the disregard provision to include periods of detention should apply to all children under 18 and retrospectively to anyone detained for treatment as a child. We welcome the proposal to amend the Mental Health (NI) Order in this regard as we know that having to declare periods of detention for treatment of mental illness for various reasons, such as driving, insurance, to employers etc. can have a negative impact on a young person’s life.

Nearest Relative Provisions

These provisions should be amended to ensure rights compliance for under 16s. We would support applications being brought by under 16s to displace an unsuitable Nearest Relative being brought to the Mental Health Tribunal, as this would be faster and more in keeping with similar provisions for over 16s in the Mental Capacity Bill. As already discussed, we believe it is important that young people have the right to choose an appropriate person who is not in the current statutory list as their Nearest Relative. We would also welcome an exploration of the possibility of a looked after young person being able to displace the Trust as their Nearest Relative in favour of another suitable person of their choosing.

Duty on hospital managers in respect of age appropriate accommodation

We support the need to ensure that any person under 18, either a detained or voluntary in-patient who has a mental illness, is placed in a suitable environment which has regard to their age. We welcome the decrease in numbers of young people from a care background being admitted to adult mental health facilities⁴ but there is still more work to be done in this area. We would like to see further clarity around the definition of 'age appropriate' accommodation and would like a firm statement of statutory duty to be included to ensure that no young person is detained on an adult psychiatric ward. We would also welcome children and young people being provided with a mechanism to challenge instances where they are not placed in appropriate accommodation.

Education Provision

We note the Department's intention to consider access to education provision.⁵ We would welcome further detail on this. It is critical that children and young people with mental health difficulties or a learning disability up to at least the age of 18 have full access to educational services, as recommended by Bamford.⁶

We are aware that the Children's Law Centre have raised several other amendments to the Mental Health (NI) Order with the DHSSPS and we would support the additional amendments they have raised.⁷

⁴ Figures obtained by Detail TV on untoward events reported to Health and Social Care Boards from Trusts reveal 14 young people were admitted to adult mental health facility between 1 April 2013 – 31 March 2014. This is a sharp decrease from 77 in 2011/2012.

⁵ Para 3:11 vi, page 41

⁶ Bamford Report, Human Rights and Equality of Opportunity, 2006, page 21

⁷ Children's Law Centre, August 2014, Briefing Paper on Mental Capacity Bill (NI) – Implications for Children and Young People, page 18 and 19.

We are also concerned that the considerable length of time needed to review the Children (NI) Order will mean that the Mental Health (NI) Order will remain in place for under 16 year olds for some time to come, clearly a situation which was never envisaged by Bamford. We are not convinced that a review of the Children (NI) Order 1995, while much needed, is the place to deal with the complex mental health needs and rights of this vulnerable group.

While we acknowledge the intention to undertake a 'separate project' looking at the emerging capacity of ALL children under the age of 16⁸, this work will not address the exclusion of children who lack capacity as a result of mental illness or learning disability from the Mental Capacity Bill.

Detaining under 16 year olds

The proposals as they stand could have significant implications for under 16's and make it more likely that they could be formerly detained. The changes under the Mental Capacity Bill will mean that a person cannot be detained for assessment or treatment unless it has been shown that they have a lack of capacity. As the provisions will not apply to under 16s, we could have a situation where under 16s are more easily detained than their adult counterparts, as their lack of capacity will not have to be demonstrated. We are aware that there is no requirement to establish a lack of capacity before applying the test for formal detention under the current provisions of the Mental Health (NI) Order.

Protection and Safeguards for under 16s

There are a number of statutory safeguards which the new legislation will introduce which under the current proposals will not be available to under 16s. We are particularly concerned about the lack of application of the following safeguards for under 16s:

- A statutory right to access advocacy services,
- Protection under the creation of a new offence of ill treatment or neglect for those who lack capacity,
- Deprivation of liberty safeguards such as scrutiny and the need to monitor or justify the deprivation of liberty in the event that a child who lacks capacity to consent to care in a hospital or care home is deprived of their liberty in their

⁸ Para 3.9, page 38

best interests. As, in this instance, they would be voluntary patients, not formally detained and having complied, there would be no easy way to challenge their deprivation of liberty.

The consultation document refers to the plan to make amendments to the Mental Health (NI) Order which may introduce statutory safeguards for those children under 16 who are *formally detained* in a hospital setting, but no such protection will be afforded to those who are *voluntary* in patients. Voluntary patients are in need of protection also.

We are also concerned about the lack of safeguards for under 16s with mental health problems who are receiving care and treatment in a community setting and for those with a learning disability. The exclusion of those with a personality disorder is also concerning.

Deprivation of Liberty Safeguards within the Bill for over 16s

We are concerned that the focus of the safeguards with regard to deprivation of liberty appears to be focused more on providing the person who wishes to deprive another person of their liberty with protection rather than ensuring that no-one is unlawfully deprived of their liberty.

Children and Young People in the Criminal Justice System

We welcome the fact that the Justice Minister agreed with Bamford and the wider stakeholder group that whatever was developed for the general population in terms of mental capacity legislation should also be applied to people within the criminal justice system. We note that the Department of Justice does not intend to have specific criminal justice proposals within the Draft Mental Capacity Bill but rather will amend existing legislation.

We welcome the intention of the Department of Justice to adopt a capacity based approach to care, treatment and personal welfare but are disappointed that this approach will be limited to over 16s.

As we have already stated we are concerned that the Department of Justice has not provided consultees with draft amendment clauses at this late stage in the development of the legislation. Without being provided with details on what changes will be made to existing pieces of criminal justice legislation and what amendments will be made to Mental Health (NI Order) we are at a disadvantage in terms of

submitting our considered opinion. We would assume that the Department of Justice will carry out a further consultation when the draft clauses are published and that this consultation will include children and young people.

We are obviously keen to know more about how any changes will impact on the youth justice system and how it will impact on 'day to day' decisions, delivery of services and decision making.

Exclusion of under 16's

We would take issue with the plans to exclude under 16s from the scope of the justice provisions of the Mental Capacity Bill. This is a particularly contradictory stance given the fact that the current minimum age of criminal responsibility is 10. So the Department regards under 16s as not having the capacity to make decisions with regard to their care and treatment but paradoxically believes that 10 year olds have the capacity to commit a crime and are mature enough to be held criminally responsible.

Children with mental health needs tend to be over-represented in the youth justice system. A survey carried out by the Youth Justice Agency in 2006 found that 59% showed some sign of a mental health problem.⁹ The youth justice review team specifically referred to the over representation of 'special groups' within the justice system. 'Special groups' included looked after children, children with mental health needs, children with special educational needs and learning disabilities.

Children under 16 who are in the juvenile justice system represent a complex set of needs, mental health needs and learning disability being just several of many issues they have to deal with.¹⁰ Of the 30 children in residence in the JJC in 2007:

- 20 had a diagnosed mental health disorder
- 17 had a history of self harming
- 8 had at least 1 suicide attempt on record

A CJINI inspection revealed that of the children detained¹¹:

⁹ A Review of the Youth Justice System in Northern Ireland, September 2011, page 86

¹⁰ CJINI, 2010, Not a Marginal Issue: Mental Health and the Criminal Justice System, page 50

¹¹ CJINI, July 2012, Early Youth Interventions: An inspection of the contribution the criminal justice agencies in NI make to preventing children and young people from entering the criminal justice system, pages 9-11

- One third were looked after
- 82% from single parent family
- 34% experienced domestic violence at home
- 38% statement of learning needs
- 14% learning disability
- 80% issues related to school exclusion or absconding from school
- 92% misuse of drugs and alcohol
- 32% self harmed

Almost all had experienced some form of trauma in their lives, including:

- Suicide of family member (s) or friend (s)
- History of sexual, physical or emotional abuse
- Parental substance abuse
- Parental mental health difficulties
- Victim of bullying at school or in community
- Victim of paramilitary threat

Suicide and self - harm are a regular feature for many of the young people we come in contact with at Include Youth.

In 2010 there were 78 cases of self harm in JJC – including two attempted hangings, one overdose and nine cases of deep cutting.

A CJINI 2011 announced inspection claimed that:

“Many of the children who entered the JJC were in poor physical and mental health as they had limited access to and uptake of healthcare services in their own community. The healthcare interventions and health promotion provided within the JJC were vital for these children.”¹²

Many young people coming into custody have experienced trauma and mental ill health. They are extremely vulnerable young people and it is essential that that are given the necessary protection possible. The current plans will actually deny certain protection and safeguards.

¹² CJINI, November 2011, Announced inspection of Woodlands Juvenile Justice Centre, para 7:3

For example, under the current proposals a person who has capacity can consent or refuse treatment but under 16s will not have their consent or refusal of treatment respected. Under 16s who are detained in custody will not have their decisions in relation to their care or treatment respected in the same way as those who are over 16. We also note that a new suite of healthcare based disposals will be made available to the courts including a new community residence order or protection order, but it is unclear if these will be made available to under 16s. We are concerned that these healthcare based disposals will not be available for under 16s.

We are also concerned how a capacity based approach will operate under the vast range of disposals which require consent from the child such as police diversion and discretion, youth engagement clinics etc. We would seek further clarity on how children under 16, who may have a mental health condition or a learning disability, will be supported if they are asked to consent to various courses of action within the youth justice system.

We would welcome further clarification on what support will be given to children over 16 in terms of how they will be able to abide to various conditions under some disposals. We know that children have to agree to a number of conditions as part of a youth conference plan, some which are highly relevant to their health and welfare eg. agreement to treatment for mental health conditions. It will be interesting to know if a child's capacity will be assessed before they agree to abide by these conditions.

We would also welcome further details on whether an assessment of the capacity of a young person to abide to bail conditions will form part of the decision making process with applying bail conditions.

We also are concerned that while the term 'mental disorder' will be removed from the criminal justice system in relation to persons aged 16 and over it will be continued to be used for under 16s. Bamford specifically recommended that this term should no longer be used.

We do not believe we have been provided with enough detail on what the alternative plans are to deal with under 16s.

Working under a dual legislative system, one for under 16s and another for 16 and 17 year olds will present considerable challenges for all those working in the juvenile justice system, including staff in PSNI, PBNI, the Youth Justice Agency, the Juvenile

Justice Centre and the Northern Ireland Courts and Tribunal Service. The JJC detains under 16 year olds and over 16 year olds and it is unclear how staff will operate under a dual system.

We would question how PSNI Officers will be able to ascertain what system they are to operate under, non capacity based or capacity based, if they are not able to identify the age of the young person they are dealing with.

Places of Safety

We note the intention for the PSNI to retain the power to remove a person from a public place to a place of safety and that the current list of places of safety will remain unchanged. We also note that once the age of the person is established, any further examination must then comply with the conditions set out in the Draft Mental Capacity Bill. However, we remain concerned that under 16s will not be afforded the new protections and safeguards.

Include Youth do not regard police stations or the JJC as suitable places of safety for children and young people with mental health illness.

We would like to see a reduction in the time for detention in the place of safety from 48 hours to 24 hours in line with Article 37b of the UNCRC.

Transfer of Prisoners

Under the proposals the DoJ will retain its power of transfer and return of prisoners, aged 16 and over resident in the JJC, for in-patient treatment or examination. We would seek clarification on what will happen in the case of under 16s.

Resource Implications

It is clear that there will be significant delivery challenges and resource implications as a result of this legislation. We would note the considerable staff training that will be involved for those staff who have little awareness of mental illness. We would expect there to be a need for greater investment in diagnosis and assessment as a child or young person passes through the youth justice system. The increased role of advocates will clearly require substantial training. The new community disposals will also undoubtedly require increased resources. In January 2013 the Department of

Justice said that it would be 'preparing a full analysis of resources required to implement any new legislation'.¹³

Conclusions

Include Youth welcome the opportunity to have been involved in the consultation process on the draft Mental Capacity Bill and are keen to offer any assistance we can to the Department of Justice and the Department of Health and Social Services in the future development of the legislation. This is a ground breaking piece of legislation which will extend safeguards and protections to many people. However, we are deeply concerned that a large group of children will be denied these protections simply because of their age. We hope that the Departments will find the quotes from the young people we spoke to informative and see them as indicative of the vital contribution that children and young people have to make to this discussion. The young people have eloquently described the reasons why it is important that under 16 year olds must be included in this legislation. Their experiences and views should not be ignored and we hope that the Departments will respect the opinions expressed within this consultation response. Include Youth and the young people who contributed to this consultation wish to be kept informed of progress and to hear how the issues raised in this response will be addressed.

¹³ DoJ, Consultation on proposals to extend mental capacity legislation to the criminal justice system in NI: Report on responses and way forward, January 2013, page 19