NIACRO response to Ad Hoc Joint Committee on the Mental Capacity Bill - Call for Evidence

Date: 07/07/2015

Thank you for the opportunity to respond to the Ad Hoc Joint Committee's Call for Evidence on the Mental Capacity Bill.

NIACRO is a voluntary organisation which has been working for more than 40 years to reduce crime and its impact on people and communities. NIACRO provides services for, and works with, children and young people, adults in the community, and people in prison and their families, whilst working to influence others and apply our resources effectively. We receive funding from, and work in partnership with, a range of statutory departments and agencies in Northern Ireland, including criminal justice, health, social services, housing and others. Our policy comments are based on our direct experience of delivering services and gathering feedback from those in or impacted by the criminal justice system.

Many of our service users are affected by mental health concerns, and we recognise that mental health is a serious concern throughout the criminal and youth justice systems. There are clear links between poor mental health and the risk of offending and re-offending: many people who offend have a history of mental health issues and have been affected by issues such as abuse, poverty, neglect and crisis, which have been contributory factors in their offending behaviour.

The Minister of Health, Social Services and Pubic Safety said in 2011 that "90% of prisoners have a diagnosable mental health problem, substance misuse problem, or both". We therefore welcome the single Mental Capacity Bill, as we indicated in the Department of Justice's (DOJ) initial consultation in 2012 and again in 2014.

The comments made in this brief response are informed by our work with people in, affected by or at risk of entering the criminal justice system, including some of the most vulnerable people who will be affected by this legislation. While we urge the Committee to consider carefully the responses submitted by other organisations who are more closely involved with this broader policy area, we would like to note a small number of points in relation to the following sections:

Part 1:

In its current format, the Bill will only apply to people aged 16 and over. It is suggested that the existing Mental Health Order 1986 – which the Bamford Review team deemed inadequate – will continue to be the relevant legislation for children and young people aged under 18, with separate legislation progressed for this age group in the next Assembly mandate.

We have serious concerns that an outdated Order already recognised as unsuitable will continue to be used for children and young people, who are arguably even more vulnerable.

Due to the low age of criminal responsibility in Northern Ireland, there are young people in the youth justice system aged 10 and up, yet the Bill will only apply to those aged over 16. Not only does this mean a disparity in the care and protection offered to people in the youth and criminal justice systems, it also suggests that the Juvenile Justice Centre (JJC) will need to adhere to two separate, perhaps conflicting, pieces of legislation in dealing with mental capacity and mental health concerns. This may become even more problematic in the cases of young people who turn 16 whilst in the JJC, which can accommodate young people aged 10-17 years old.

Mental health problems amongst young people in the youth justice system are well documented. The Youth Justice Review stated that children with mental health concerns are over represented in custody, with a 2006 survey by the Youth Justice Agency finding 59% of children under its supervision showed some sign of a mental health problem. In 2009, the CJINI inspection at the JJC found that of the 30 children residing there, 50% had a history of self-harm and 50% had a record of special needs, with serious implications for mental capacity:

> "We spoke to some young people with learning disabilities, who told us that most police struggled to understand their problems or how to respond to them. Parents too felt that criminal justice agencies had little understanding of their children's conditions, particularly their difficulty in comprehending the impact of their behaviour on others."
> *Youth Justice Review (2011), page 89*

This clearly indicates there are widespread concerns in relation to mental capacity for children and young people affected by the justice system. It is therefore unacceptable for vulnerable young people who are being caught up in the youth justice system – often acquiring permanent criminal records – to be subject to outdated and inadequate legislation under the 1986 Order until sometime in the next mandate.

Whilst we appreciate the intention to review the governing legislation in relation to children in the next mandate and we acknowledge that the purpose of this delay is to ensure it is done properly, we recommend the Committee considers whether an interim arrangement could allow for the clauses relating to criminal justice to be applied to all children and young people affected by the justice system until that time. This should include:

- the same protections in relation to unfitness to plead should be granted to defendants aged under 16; and
- while we would welcome an improvement of community and healthcare based disposals, the full suite of such disposals should be available to the youth courts to ensure children who have mental health and/or capacity issues who offend are diverted from custody where at all possible.

In addition, the previous consultation document indicated that the Bill cannot apply to under 16s as that would presume capacity and children of that age cannot be presumed to have capacity. However, this seems to be in direct

contrast with the current age of criminal responsibility, which is 10 years old. This is clearly incongruous, and we recommend that the DOJ reconsider the age of criminal responsibility, as recommended in the Youth Justice Review (Recommendation 29).

The comments above in relation to who this Bill applies to refer to the Bill in general terms. The below comments are brief points we wish to make on specific clauses.

Part 9:

Clause 139; (2): "The person is to be regarded … as having been arrested"

- We are concerned about the long term implications on a person being regarded "as having been arrested", potentially in the absence of a crime being committed. We recommend the Committee clarifies how this arrest will be disclosed on criminal record checks under police information and whether this will be held on the police database indefinitely, given the implications of arrest information on a person's ability to access employment and mainstream services.

Clause 140: Power of police to detain in hospital a person removed from a public place

- We recommend that when a person is detained in hospital, that hospital is required to provide a calm and appropriate environment for that person; detention in an Accident and Emergency Waiting Room, for example, may cause further distress to a person in need of being removed to a place of safety. In instances of distress, a more appropriate location could also reduce the potential risk of anti-social behaviour against other users of the Waiting Room and healthcare staff.

Clause 141: Power to detain in a police station a person removed from a public place

- We recommend that it is clearly outlined in the Bill that police stations should only be used as a place of safety as an absolute last resort, only used if there is genuinely no suitable alternative, and used for the shortest period of time possible.

Clause 147: Record of detention to be kept

- We recommend the further use of this individual personal record is clarified. We recommend that it is sealed and not disclosed to current/future employers, given the stigmatising impact of mental capacity issues and detention in police stations/hospitals. However, we welcome the provision outlined in Clause 154 that the total number of persons detained in both hospitals and police stations should be published in the Police annual reports.

Part 10

Clause 166, Section 165: Detention Conditions

- We welcome the provision to consider whether it would be appropriate to deal with the person in a way not involving detention. On that point, we reiterate the need to ensure continuous improvement of mental healthcare provision in the community to meet the needs of vulnerable people.

Clause 222: Right to apply to a Tribunal / Clause 241: Appeals

- Mental capacity can fluctuate and vary from person to person. The legislation must therefore have a robust, time bound and accountable appeals process which is accessible and clearly explained to qualifying persons.

We are disappointed that the Bill does not appear to reference the importance of a continuum of care between custody and the community. In our previous consultation responses, we also outlined the need for a single Mental Capacity Bill to form part of an effective resettlement process for people leaving custody and re-entering the community. Ensuring that people receive the same standard of care from the same agencies and, crucially, in a joined-up manner is critical to helping reduce the risk of offending in the first place; getting the appropriate support and disposal in instances where offending does take place; and enabling effective resettlement and reducing the risk of re-offending. We recommend that this continuum of care and resettlement element is fully incorporated into the Bill to contribute to the Executive's Programme for Government commitment to reduce offending.

I hope these comments are helpful. If you require further clarification or would like to informally discuss these points, please do not hesitate to contact me.