LAW CENTRE (NI) RESPONSE TO:

THE DRAFT MENTAL CAPACITY BILL

August 2014

EXECUTIVE SUMMARY

1. The Law Centre believes that the Mental Capacity Bill is progressive in human-rights terms and is compliant with the European Convention of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Appropriate safeguards are proposed to be put in place that extend the protection of the rights of those who do not have the capacity to consent to their deprivation of liberty which bring Northern Ireland in line with its obligations under Article 5(1) of the European Convention. The gateway to compulsory interventions is disability and illness neutral, with a statutory duty added to maximise an individual's decision-making capacity. Substitute decisions are made as a last resort, in line with the UNCRPD. The Bill removes the stigmatising concept of a need for a piece of legislation designed for treatment of the "mentally disordered", replacing this with a focus on whether or not the individual has the capacity to make the relevant decision for him/herself.

2. The Law Centre believes the principles underpinning the legislation are vitally important and we particularly welcome the added emphasis on the need for support to be provided. We do however feel that the Bamford principle of "justice" could be better reflected by making it an offense to discriminate against someone who has been subject to interventions under the Bill. We also believe that the best interests step outlined in clause 6 would benefit from the addition of a reference to D taking into account "P's current will and preferences" in order to reduce concern about the Bill's compliance with the UNCRPD.

3. The Law Centre welcomes the statutory recognition given to advance decisions to remove treatment; however we believe that more detail should be given within the Bill over what constitutes a valid advance decisions, rather than leaving it to the common law to determine.

4. The Law Centre believes that the definition for treatment with serious consequences should be changed to any treatment that meets the criteria to be considered a serious intervention. Having two separate, but broadly identical definitions is confusing and unnecessary.

5. The Law Centre welcomes the proposals for deprivations of liberty as being more workable and in keeping with the ethos of the legalisation than those in England and Wales. We welcome that the provision of treatment with serious consequences for someone who is deprived of his/her liberty requires a separate authorisation process than the detention. We do, however, recommend that consideration be given to the inclusion of a definition of deprivation of liberty within the Bill that is in keeping with that expressed by Baroness Hale in the P v Cheshire West Supreme Court judgement, namely that a person is deprived of his/her liberty if they are "under continuous

supervision and control and are not free to leave" and that this can occur in any location, not just a hospital or care home.

6. The Law Centre welcomes the abolition of guardianship. However we believe that the power to mandate someone to attend training, education or employment as part of the terms of a community residence requirement should be removed.

7. The Law Centre welcomes that individuals will have the right to a review of their detention under the short-term (schedule 2 authorised) period which will not impact on their ability to do the same if the detention is extended under schedule 1. The Law Centre, however, believes that there should be an obligation on HSC trusts to refer any schedule 1 authorised measure to the Tribunal, if has not already been done so within one year as opposed to two within the Bill.

8. The Law Centre does not feel it can make substantive comment on the proposal for HSC trust panels as almost all of the detail around their membership and operation has been left to future subordinate legislation. If they are to remain within the final proposals, we believe that they must be multi-disciplinary, have relevant expertise and contain independent representation from people with service-user or carer experience. If not, then the HSC trust panels will be at best, a very limited safeguard.

9. The Law Centre welcomes the ability in certain circumstances of a person lacking capacity to appoint their nominated person and, in the event of none being appointed, that the default nominated person is the primary carer.

10. The Law Centre welcomes the inclusion of a statutory obligation to provide access to independent advocacy in certain situations as potentially a significant safeguard in the Bill. We believe, however, that they should be commissioned independently of the HSC trusts by the Health and Social Care Board; should be able to call for second medical opinions to be obtained regarding the provision of treatment to P; and should have a clear role which may include challenging a decision that P lacks capacity. We also caution against D being the gatekeeper for P's access to an independent advocate.

11. The Law Centre supports the creation of the Public Guardian. We welcome that those with lasting powers of attorney and court-appointed deputies are bound by Part 1 of the Bill.

12. The Law Centre believes that the research provisions need rethought. We welcome that the principles of the Bill apply to interventions and decisions with regard to "intrusive research", however we feel that a number of the provisions are not compatible with the principles themselves. We do not believe that research should be permitted which is not deemed to be in P's best interests.

13. The Law Centre believes that a deprivation of liberty in hospital must always be authorised through schedule 2 before a schedule 1 authorisation is sought for each admission.

14. The Law Centre believes that every schedule 1, 2 and 3 authorisation should be made by an approved social worker, or at least an individual who is social work trained.

15. The Law Centre believes that meeting the prevention of serious harm conditions should be a precondition of every schedule 1 authorisation for provision to P of treatment with serious consequences (whether the nominated person object, P resists or P is already subject to another measure under the Bill).

16. The Law Centre expresses concern about the extension of risk criterion in the Bill to include risk of serious psychological harm to P. We believe that it could be argued that failure to provide psychotropic medication could almost always be argued to risk serious psychological harm to P and that this could potentially lead to a significant increase in compulsory medication given in treatment of mental health conditions against P's wishes.

17. The Law Centre is disappointed that specific legislative proposals to reform the law relating to the emerging capacity of those under the age of 16 has not been achieved. We believe that retention of the Mental Health (Northern Ireland) Order 1986 for under 16s is the retention of a discriminatory piece of legislation. Although we are not yet convinced that the needs of children under 16 would be best served by their inclusion in the Mental Capacity Bill on the same basis as adults, we believe that comprehensive and evidence based law reform is needed on the issue of emerging capacity. The Department must therefore progress this work as a matter of urgency. Any transitional arrangements must provide, at the very least, the same level of safeguards for those under 16 and for those over 16 who are subject to the same intervention.

18. The Law Centre welcomes that the Department of Justice proposals intend to bring a capacity-based approach to any decision regarding compulsory treatment within the criminal justice system. We believe that anyone subject to compulsory treatment within this setting must also have access to the same safeguards as someone in a civil setting. It is regrettable that there will not be time to carry out a full public consultation on the draft legislative proposals in order for the Bill to complete its passage through this mandate of the NI Assembly. We therefore request that both the Health and Justice Mental Capacity Bill reference groups get a period of time on which to scrutinise and provide feedback on the draft proposals.

INTRODUCTION

About the Law Centre

The Law Centre is a public interest law non-governmental organisation. We work to promote social justice and provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. It provides a specialist legal service (advice, representation, training, information and policy comment) in a number of areas of law, including community care and mental health law as well as social security, immigration and employment. Law Centre services are provided to member agencies across Northern Ireland.

The Law Centre is a member of the Mental Health and Learning Disability Alliance, which is committed to and lobbies for the development of rights-based capacity legislation in Northern Ireland. We chair the DHSSPS Mental Capacity Bill Reference Group and are members of the DoJ Mental Capacity Bill Reference Group.

The Mental Capacity Bill

This consultation response represents the current thinking of the Law Centre with respect to the matters being consulted upon. Our positions continue to develop and refine through our research and engagement with stakeholders.

The publication of the draft Mental Capacity Bill for public consultation is a key milestone in a seven-year process since the Bamford Review of Mental Health and Learning Disability made its radical proposal for a single legislative framework, fusing what would be considered traditional mental health legislation with capacity legislation.

Traditional mental health legislation has evolved since the 1800s but at its core has always been the ethos of public protection. Mental capacity legislation, in contrast, is a more modern concept, which has developed initially through case law in recognition that the presence of a mental impairment did not always mean that individuals could not make certain, or even all, relevant decisions for themselves. Capacity legislation, therefore, has focused on protecting the rights of those affected by a lack of mental capacity; whereas mental health legislation has focused on protecting others from those considered to have a 'mental disorder'.

The Bamford Review determined that if people who were deemed to have a mental disorder continued to be treated by the law in such a way, it would only serve to reinforce the stigma that they were people who were to be feared and could justifiably be treated differently from the rest of the population. Instead, it proposed to take the more rights-based approach of use of lack of capacity as the single-gateway for any substitute decisions

(including compulsory treatment), whilst achieving a balance with respect to protection from harm.

DHSSPS has since embarked upon attempting to realise the Bamford vision; a type of law that has never been achieved before. Initially after proposing a "twin track" approach for two, principle-based pieces of mental health and mental capacity legislation, the Department, after sustained lobbying from professional and voluntary sector organisations, agreed to develop a genuine "single bill".

Developing a unique piece of legislation has brought many challenges and has taken a longer period of time than it would have done had the Department taken a more conservative approach and essentially replicated what most other jurisdictions have done. Coupled with this has been the realisation from Department of Justice of the merit of developing proposals for those with capacity issues within the criminal justice system as part of the same legislative framework.

The Bill, of course, is only one part of the picture of reform. Appropriate resources must be allocated to enable its effective implementation. Extensive training for a wide range of professionals will need to be provided, as well as for carers, service users and attorneys.

A significant amount of information within the Bill is left to future regulations. There will have to be an extensive public consultation around these. This also applies the Code of Practice which should be published in draft and consulted upon in time for the final document to be ready in advance of the go-live date for the Bill in 2017.

The Law Centre also believes that we must learn lessons from the poor implementation of the England and Wales Mental Capacity Act 2005. As such we believe that an independent oversight body should be created to ensure that the principles within the Bill are embedded in practice in Northern Ireland from the beginning of its implementation. This was a key recommendation by the House of Lords Select Committee on the Mental Capacity Act 2005 with the aim of improving practice in England and Wales.

The Law Centre thinks that the Bill should contain a provision for review of the legislation 5 years after its implementation.

Our consultation response provides a clause-by-clause analysis of the draft Bill. We have also provided comment on the policy proposals for the criminal justice system and for those under the age of sixteen.

We commend the approach taken by both Departments and their commitment to the realisation of the Bamford vision. Northern Ireland has a unique opportunity to reform mental health legislation in a fundamental and progressive way from a human rights perspective. While we naturally believe that aspects of the Bill can be improved upon, the Law Centre is highly supportive of the proposed framework and is hopeful that the Bill can

complete its passage through the Assembly within this mandate. It is important that adequate resources to be allocated to the ongoing work on the Bill to ensure its timely passage through the Assembly and in due course its full and effective implementation.

Whist recognising the highly technical and skilled nature of legislative drafting, we have at times suggested actual wording for inclusion in the Bill to be clearer about the changes that we think need to be made. The Law Centre would be happy to discuss our proposals further.

PART 1 - PRINCIPLES

General comments

The Bamford Review[1] of Mental Health and Learning Disability recommended a legislative framework which rested on a set of principles which it characterised as 'guiding principles underpinning legislative reform' (at 1.12 & 4.1). The Report stressed that 'legislative solutions must respect the key principles proposed by the Review (in Chapter 1), Autonomy, Justice, Benefit and Least Harm.' (at 4.8). These principles were articulated by the Review as follows:

i. Autonomy – respecting the person's capacity to decide and act on his own and his right not to be subject to restraint by others.
ii. Justice – applying the law fairly and equally
iii. Benefit – promoting the health, welfare and safety of the person, whilst having regard to the safety of others.
iv. Least harm – acting in a way that minimises the likelihood of harm to the person.[2]

The Review recognised that 'Principles underpinning legislation will only have effect if they are translated into clear provisions' (at 1.12). Part 1 of the draft Bill does in general provide such translation of the principles into clear provisions. However, the Law Centre is concerned that insufficient effect is given to the incorporation of the 'justice' principle in an appropriate manner. Whilst the overall approach of capacity-based legislation (which includes mental health) is progressive in terms of non-discrimination, the Bill also effectively creates a new potential ground for discrimination in practice: namely, 'having been found to lack capacity'. The proposals do not offer any remedy for discrimination on this ground and the disability discrimination legislation would not currently be adequate to cover all potential cases. This gap in terms of protection from discrimination could be addressed by insertion of a clause within disability discrimination legislation to state that the definition of a person with a disability includes 'any person who has been subject to interventions under the Mental Capacity Act'. This approach of supplementing the definition of a person with a disability by reference to particular cases or conditions has already been used to protect from discrimination on the basis of situations such as severe disfigurement, progressive conditions, cancer, HIV and multiple sclerosis.

Clause 1 - Principles

The presumption of capacity in clause 1 (1) is the correct basis for all that follows.

[1] 'A Comprehensive Legal Framework for Mental Health and Learning Disability', (2007). Available at: http://www.dhsspsni.gov.uk/index/bamford/published-reports/cl-framework.htm

[2] These four principles are the much debated and widely used principles of biomedical ethics. As essentially ethical principles, they have impacted on medical law, but they are not necessarily appropriate for transposition directly into legislation as they stand. See Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics*, 7th edition, (Oxford University Press, 2013)

We welcome the clarity provided in clause 1 (2) that the principles contained in clauses 1 (3) to 1 (5) apply to a determination of lack of capacity 'for any purpose of this Act'.

Clause 1 (3) is appropriate and important to ensure that people are not inappropriately found to lack capacity and thus unnecessarily and inappropriately come under the provisions of the Bill.

Clause 1 (4) is appropriate to rule out misunderstandings of capacity as being based on the outcome of a decision, rather than on the functioning of the decision-making process. However, we are concerned that the concept of an 'unwise decision' is vague. Consideration should be given to an alternative formulation which more clearly gives effect to its intent: namely, that people have a right to make decisions which others believe are clearly not in their best interests.

Clause 1 (5) could be significantly strengthened by a clarifying change to 'a condition, *disorder or disability* of the person'. This would then match clause 2 (3).

We have no further comment to make on clause 1 (6) at this point.

Clause 1 (7) is appropriate. It has been suggested that 'benefit' should replace 'best interests'. It is worth noting that the Bamford Review did not suggest that the principle of 'benefit' be transposed directly into the legislation and that it made use of the concept of 'best interests' in articulating the meaning of the principle of 'benefit' (at 5.1, p. 38). There is great value in retaining the current concept of best interests as it differs from benefit. There are many situations where multiple options would all be of benefit to P, but only one option can be in P's best interests. 'Benefit' would not serve as a criterion to choose between options where all of those options provide benefit to P.

Amongst the opening principles of the England and Wales Mental Capacity Act 2005, there is a principle of 'least restrictive option' (section 1 (6)). The matching principle of the Mental Capacity Bill is placed at clause 6 (10). We think that this principle would be better placed after clause 1 (7) alongside the other principles. We are also concerned that the obligation to 'have regard' is not sufficiently protective of P's rights. We think the intent of the principle could possibly be strengthened by a formulation such as:

> Any act or decision to be done in P's best interests *must* be the least restrictive of P's rights and freedom of action compatible with the purpose of that act or decision.

Clause 2 – Meaning of "lacks capacity"

The general heading in italics just before clause 2 should be 'Establishing whether a person *lacks* capacity'.

Article 5 of the European Convention on Human Rights (ECHR) permits deprivation of liberty on the basis of 'unsound mind' and this phrase has been interpreted in the case law of the European Court of Human Rights to require the presence of a 'mental disorder'.

Clause 2 (1) depends on the concept of 'an impairment of, or disturbance in the functioning of, the mind or brain' and not on the presence of a 'mental disorder'. This carries throughout the Bill, including to the provisions relating to deprivation of liberty. It could be argued that without reference to the presence of a 'mental disorder' the Bill proposals may not be compliant with article 5 (1) of the ECHR as it has been interpreted by the Court. However, the notion of mental disorder is not one which lies in the Convention itself and only seems to have emerged in case law in 1979. The Court itself recognises that the meaning of 'unsound mind' is not fixed, but rightfully evolves:

> 37. The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.[3]

Part of the context for the correct interpretation today of the meaning of 'unsound mind' in article 5 includes the coming into force of the UN Convention on the Rights of Persons with Disabilities. This UN human rights treaty is clear in holding that 'the existence of a disability shall in no case justify a deprivation of liberty' (art. 14 (1)). Given the acceptance of this human rights obligation by the majority of Council of Europe states, it is arguable that the European Court of Human Rights would accept 'impairment of, or a disturbance in, the functioning of the mind or brain' such that the person is 'unable to make a decision' (and given the safeguards present in the Bill) as an alternative which falls within the meaning of 'unsound mind'. The Law Centre is thus not convinced of the view that the Mental Capacity Bill must include a requirement for a 'mental disorder' for any lawful deprivation of liberty in order for it to comply with the European Convention on Human Rights.

However, the above interpretative approach is potentially undermined by the retention of the concept of 'mental disorder' with the proposals. Mental disorder is defined in clause 159 (1) as 'any disorder or disability of the mind' and is used in clause 146 (1) (b) and in clause 26 (1) of schedule 6. The use of the concept does not appear to relate to the criteria for lawful deprivation of liberty. Nevertheless, it is our view that it would be better if the concept of 'mental disorder' were to be dropped from the Bill entirely to avoid any potential confusion or potential legal challenge on this basis.

Clause 2 (3) is welcome in clarifying that insofar as the provisions of the Act apply, they apply to everyone, including to people with disabilities on an equal basis with others as required by article 12 (2) of the United Nations Convention on the Rights of Persons with Disabilities.

[3] Winterwerp v The Netherlands, Application no. 6301/73, 24 October 1979.

Clause 3 – Meaning of 'unable to make a decision'

Clause 3 (1) (c) seems to set a broader basis for lack of capacity than that of the England and Wales Mental Capacity Act 2005 in that it contains three parts ('appreciate the relevance of that information' and 'use' and 'weigh'), in principle any of which P could fail to meet. Our understanding is that what is of value in the notion of 'appreciation' is basically an articulation of the content of 'use **or** weigh' [emphasis added] as found in section 3 (1) (c) of the England and Wales Mental Capacity Act 2005. We therefore propose that clause 3 (1) (c) of the draft be amended to: 'is not able to use or weigh the relevant information as part of the process of making the decision'. This would then better match the Mental Capacity Act 2005. The draft seems to require that P could lack capacity if s/he is not able to do even one of three things: 'appreciate', 'use' or 'weigh'. The Mental Capacity Act 2005 recognises no lack of capacity unless P is not able to do both of two things: 'use' or 'weigh'.

As currently drafted clause 3 (1) (c) refers to where P is 'not able to appreciate the relevance of that information'. Clause 3 (1) (c) should make use of the concept of 'the information relevant to the decision'. The inability should relate to using or weighing 'the information relevant to the decision'. If P is not able to understand the relevance of the information, that is an inability captured by clause 3 (1) (a).

It is important that the meaning of unable to make a decision focuses on where P is not able to 'use or weigh the relevant information'. If P does not understand the relevance of particular information, that is covered by clause 3 (1) (a).

A further sub-clause should also then be added to clause 3 as follows:

> In subsection (1) "not able to use or weigh the relevant information" includes not being able to appreciate the relevant information.

In clause 3 (4) the word 'circumstances' is vague. Left on its own it could be read to relate more to the external situation P is in, rather than to the particular needs of P as a unique individual. Consideration should be given to supplementing it with other formulations. For example: 'circumstances and particular communication needs', 'circumstances and communication means', or 'circumstances and individual methods of communicating'.

Clause 4 – Supporting person to make a decision

Clause 4 makes clear the requirements of clause 1 (3) and clause 5 deals with compliance with clause 1 (1). Consideration should therefore be given to placing clause 4 and clause 5 after what is currently clause 1 as both of these clauses relate directly to clause 1.

The Law Centre welcomes clause 4 in implementing at least partially the requirement of article 12 (3) of the UN Convention on the Rights of Persons with Disabilities for support for decision-making. This is a significant improvement upon the England and Wales Mental Capacity Act 2005, which includes the same basic principle as clause 1 (3) but at no stage elaborates further as to the steps that are expected to be carried out to fulfil it.

In Clause 4 (2) (a) 'circumstances' should be amended as suggested above for clause 3 (4).

Clause 5 – Compliance with section 1 (1)

The Law Centre has no further comment to make on this clause at this stage.

Clause 6 – Best interests

Clause 6 (2) (b) could be significantly strengthened by a clarifying change to 'a condition, *disorder or disability* of the person'. This would then match clauses 2 (3) and 1 (5) were they also to be so amended.

Clause 6 (5) should be 'encourage, help and support'. This is to better match clauses 1 (3) and 4 (1) and thereby to more clearly conform to the requirements of article 12 (3) of the UN Convention on the Rights of Persons with Disabilities.

For the avoidance of doubt as to compliance with the UN Convention on the Rights of Persons with Disabilities, clause 6 (6) could usefully be supplemented with a formulation along the lines of: 'P's current will and preferences'. This should not be a replacement for clause 6 (6) (a) on 'wishes and feelings' because 'wants', 'preferences', 'wishes', and 'feelings' are not identical and could all be separately relevant to a determination of P's best interests. Without a clear requirement to consider what P currently wants, in its current immediate expression, their opinion risks being largely set aside at the outset of the best interests determination.

Clause 6 (8) (c) might be better placed at the end of the list in which it is an item.

Clause 6 (9) should be amended and moved forward to clause 1 as discussed above.

Clause 6 (10) risks being misread as being about 'harm to other persons' in that the phrase 'with resulting harm to P' only comes at the end of the clause. The clause is about prevention of harm to P and this could perhaps be made clearer by an alternative formulation. For example: '… have regard to whether failure to do the act is likely to result in harm to P from harm caused by P to other persons'.

Clause 7 – Compliance with section 1 (7)

The Law Centre has no further comment to make on the clause at the current time.

PART 2 – LACK OF CAPACITY: PROTECTION FROM LIABILITY, AND SAFEGUARDS

CHAPTER 1 – PROTECTION FROM LIABILITY, AND GENERAL SAFEGUARDS

Clause 8 – Protection from liability for acts in best interests of person lacking capacity

The Law Centre recognises that there are two main ways in which this part of the Bill could have been written: it could have given certain people powers to intervene in P's life (for example, the Mental Health (NI) Order 1986); or it could put in place certain procedures that have to be followed in order to protect the person intervening in P's life from liability.

The Bill has been written according to the latter approach and we are supportive of this. This approach better reflects the seriousness and intrusiveness of removing an individual's decision making capacity. It lays out a very clear set of steps that must be followed by D if D is intervening in P's life, and makes it particularly clear that if D fails to follow these steps, then s/he will ultimately not have protection from civil or criminal liability available through the Mental Capacity Bill. We hope that this approach which places clear responsibility on D to ensure that their actions are lawful will drive cultural change and help to ensure the fullest possible implementation of the Bill.

Clause 9 – General limitations on section 8

The Law Centre welcomes the clarification provided in clause 9 (1) that makes it clear that any act carried out in accordance with clause 8 does not protect D from carrying out what would otherwise be considered to be a negligent act.

In relation to sub-clause (2), there is no further explanation within the Bill that clarifies what the correct procedure is, in the case of carrying out psychosurgery (or any treatment that sub-clause (5) may apply to) on P, if clause 8 does not apply in this regard. The assumption is that an act of this magnitude would require approval from the court but greater clarity is required.

Clause 9 (3) essentially clarifies that D may not intervene if the act comes under the authority of an LPA or deputy. This does not, however, absolve the need for an attorney or deputy to act according to the principles outlined in Part 1 of the Bill.

Clause 10 – Advance decisions: effect on section 8

The Law Centre is pleased that advance decisions have been given statutory recognition within the Bill. We are also pleased that the legislative intent is that effective advance decisions to refuse treatment will be equally applicable to decisions regarding treatment for mental health conditions as for physical health conditions.

However, the definition of a valid advance decision is left to be determined by the common law. We are concerned that for both P and D this does not provide the clarity about what is needed for an advance decision to be deemed effective. This could potentially lead to conflict between health and social care staff, patients and families in very difficult circumstances. Given the opportunity we currently have to legislate, it is much more prudent for the Northern Ireland Assembly to provide the legislative framework for advance decisions, rather than leaving such an important piece of policy for the courts to determine.

The Law Centre believes that this clause should be replaced by clauses that resemble those in sections 24 to 26 of the Mental Capacity (2005) Act but which are consistent with the "single-bill" ethos. This would give patients greater confidence that their advance decision is

effective and give medical practitioners greater confidence to respect clearly valid advance decisions without the need to go to court to clarify them.

Clause 11 – Act of restraint: conditions that must be met

The Law Centre believes that restraint to P in sub-clause 4 (a) should be limited to when failure to do the act would create a risk of physical harm to P, not to 'harm' which could include psychological or emotional harm. We are not convinced that circumstances could arise where physical constraint would be necessary to prevent psychological/emotional harm.

Sub-clauses (5) and (6) provide a welcome differentiation between an act of restraint and an act which is a deprivation of liberty. This should reduce the likelihood of confusion between the two for D and what conditions must be met in order to be legally carrying out the act and will assumedly be further elaborated on within the code of practice.

It is important to note that if the act of restraint is ongoing such that it causes P serious distress, then it must be considered to be a 'serious intervention' as defined by clause 63 and attract the resulting safeguards detailed in clauses 12 and 13 and if P resists, clause 36.

CHAPTER 2 – ADDITIONAL SAFEGUARDS FOR SERIOUS INTERVENTIONS

Clause 12 – Formal Assessment of Capacity

The formal assessment of capacity is an important safeguard, which is much stronger and clearer than any equivalent provision in the Mental Capacity Act 2005 where a formal capacity assessment is only required when it is proposed to deprive someone of their liberty.[4] The statement of incapacity provides a tangible piece of evidence to ensure that D has carried out all the required steps in Part 1 of the Bill and confirms that the serious intervention is carried out based on an identified lack of capacity on the part of P.

It is important that the formal assessment of capacity is decision-specific. The same assessment should not be relied upon for decisions regarding different acts. Clause 12 (1) (b) refers to the capacity assessment being carried out in the context of an act, however an additional sub-clause to further clarify this point would protect against such a misuse of formal capacity assessments.

It is difficult to comment on sub-clause 12(3) without knowing who the Department refers to as being "suitably qualified". The Law Centre would be concerned if future regulations were to define this within, for example the psychiatric profession. This is influenced by experience of current practice whereby it can take a considerable period of time before a capacity assessment is carried by a consultant psychogeriatrician. We believe that accredited training should be provided in order to enable as wide a range of health and

[4] Schedule A1, Mental Capacity Act 2005

social care professionals as possible to carry out formal capacity assessments based on clearly established possession of the requisite skills and understanding of the requirements of the law.

In general, we believe that where possible D should be the formal assessor of capacity to ensure clear lines of accountability and liability in implementing this safeguard. Thus, the phrase "who may be D if D is suitably qualified" should be amended to read "who should be D, if D is suitably qualified". Whilst it is also attractive that there should be independence in the formal capacity assessment, if this outweighs the above considerations then the draft should reflect this by stating that the formal assessment of capacity should not be carried out by D.

We are pleased that there is a requirement to detail the help or support that has been unsuccessfully given to P within the "statement of incapacity". This will help guard against the provision of support from being merely a tick-box exercise or, worse still, ignored. The Law Centre however suggests that 12 (4) (d) be amended to read: "specifying **the** help and support" rather than "specifying any help and support" in recognition that D is obligated to follow the steps detailed in clause 4. We also believe that that the phrase "in accordance with section 4 (2)" should be added to ensure that the steps outlined in this clause have actually been followed by D. Therefore the amended sub-clause would read: "Specifying the help or support that has been given to P in accordance with section 4 (2) without success, to enable P to make a decision in relation to the matter."

We have reservations about the wording in clause 12 (5) in terms of the determination of how long is "recently enough" to be considered for the capacity assessment to be reasonably relied upon. We believe that as much as possible, timescales should be as specific as possible to guard against inappropriate assumptions being made about P's capacity after a lapse of a considerable period of time. It is also important that P is not left with his/her life 'on hold' whilst waiting for a formal assessment of capacity for an extended period of time. To preserve a degree of flexibility as to what is 'reasonable', consideration should be given to setting a statutory maximum period beyond which a formal assessment of capacity can no longer be relied upon.

Consideration should be given to the creation of a matching section for the 'formal assessment of best interests'. This should require a 'statement of best interests' recording the best interests process which has been carried out in keeping with the requirements of the Bill. We feel that this is a vital additional safeguard, especially where P is subject to many best interests interventions. We think that it would an appropriate and proportionate safeguard for where a serious intervention is being considered on the basis that it is in P's best interests.

Clause 13 – Nominated person: need to have in place and consult

D is only required in this instance to engage with the nominated person once a determination has been made that P lacks capacity. Given the emphasis on support for decision-making in clause 1 (3) and clause 4, it would be appropriate for D to ensure that the nominated person conditions are in place when a formal capacity assessment is required. This would give the nominated person an additional role within the supported-decision making process rather than simply to be consulted upon in D's determination of what would be in P's best interests.

CHAPTER 3 – SECOND OPINION

Clause 14 - Second opinion needed for certain treatment

The Law Centre recommends that a more fixed timescale be placed on clause 14 (4). Given the seriousness of the medical treatments for which a second opinion will be sought, it is important to guard against inappropriate assumptions being made about the relevance of a second opinion that was carried out in the past. We believe that a second opinion must be received no longer than 48 hours before the proposed act is done.

Clause 15 – Second opinion needed for continuation of medication

The Law Centre believes it is appropriate for the administration of medication that has serious consequences to P to require additional medical scrutiny. As in our response to clause 14, we believe that the reference to "recently enough" in clause 15(5)(a) should be replaced with a requirement for a second opinion to be received no longer than 48 hours before the proposed act is done.

Three months is a considerable period of time for an individual to be receiving a medication that is considered to have serious consequences for him/her. The Law Centre believes that the relevant period referred to in clause 15(2)(b) should be 28 days and require additional authorisations for every 6 month period after that. On current reading it appears that no further authorisation is required after provision of the medication has been extended beyond three months. As such, further periods of authorisation would provide a much greater safeguard to P.

Clause 16 – Second opinion: further provision

There is no reference to the second opinion appointed doctor having any liability with regards to clause 8 of the draft Bill. This is presumably because ultimate decision-making responsibility remains with D. However in determining what is in P's best interests, there is nothing in the Bill that ensures that the second opinion appointed doctor must follow the steps outlined in clause 6. The Law Centre believes that further clarity should be provided that confirms that the second opinion appointed doctor must comply with clause 6 in the determination of what is in P's best interests.

We welcome the procedure for instruction of a medical practitioner for the purpose of providing a second opinion as outlined in this clause. HSC trust policy has only recently changed to reflect the legislative position on this in England and Wales so it is important that the independent instruction of a second opinion is also put on a statutory footing here.

CHAPTER 4 – AUTHORISATION NEEDED FOR CERTAIN INTERVENTIONS

Compulsory provision of treatment with serious consequences

Clause 17 – Treatment with serious consequences: objection from nominated person

The Law Centre believes that it is important the nominated person retains an important safeguarding role for P and supports the need for additional authorisation to be required if s/he objects to the provision of treatment with serious consequences being given to P.

Clause 18 – Meaning of "treatment with serious consequences"

The definition of "treatment with serious consequences" in clause 18 (1) is identical to that of the definition of a "serious intervention" in clause 63 (1) which is also a 'treatment'. It can therefore be assumed that any treatment that meets the criteria for serious intervention is also considered to be a treatment with serious consequences. The Law Centre believes that the Department should give consideration to making this clearer in order to avoid confusion between the two definitions. The meaning of treatment with serious consequences should be any treatment that is a serious intervention as detailed in clause 63 (1).

The Law Centre believes that as part of clause 18 (3), an additional sub-clause should be added which states that, in the context of 18 (3) (a) and 18 (3) (b) occurring, if it is possible to do so, D should embark upon the authorisation process in order to continue provision of the treatment. For example, if P was receiving what would ordinarily be considered a routine course of medication that unexpectedly caused P serious distress, then every effort should be made by D to put the appropriate safeguards for a "serious intervention" (formal capacity assessment and nominated person) and "treatment with serious consequences" in place. Clause 18 (3) appears to be written in mind of a treatment that is immediate in nature (e.g. an injection) rather than a treatment that is continuous.

Clause 19 – Meaning of "prevention of serious harm conditions" in relation to treatment

The Law Centre is concerned about the objective measurement of the phrase "serious harm to P" in sub-paragraph (1) (a). In contrast to the Mental Health (Northern Ireland) Order 1986, risk to P can be interpreted as relating to psychological harm as well as physical harm.[5] We are concerned that this could lead to a significant increase in compulsory treatment and detention on the basis that not providing psychotropic medication to someone who is mentally ill and lacks capacity could almost always be justified on the basis

[5] Article 4, MHO

that failure to provide the treatment would result in a risk of serious psychological harm to P. We believe that the Department should give further consideration to the implications of this.

With regard to the interpretation of "serious physical harm to others" we refer to our response to clause 58.

Clause 20 – Resistance etc by P to provision of certain treatment

The Law Centre believes that the prevention of serious harm conditions must be met in order to receive authorisation for the provision of treatment with serious consequences in the event of P resisting or if it is done while P is subject to another schedule 1 measure. We do not believe that treatment with serious consequences should ever be provided to P if failure to provide it would not create a "risk of serious harm to P or a risk of serious physical harm to others". We therefore believe it is inconsistent for the prevention of serious harm conditions to not be required to be met in these circumstances.

Clause 21 – Meaning of "subject to an additional measure"

The Law Centre believes that the requirement for authorisation of the provision of compulsory serious treatment while P is subject to another authorised measure is a welcome development. This should provide for greater thought and scrutiny given towards the provision of such treatments and the justification for their use whether P is deprived of his/her liberty in a hospital or care home or is under a compulsory intervention in the community.

Deprivation of Liberty

Clause 22 – Deprivation of liberty: general

The Law Centre welcomes the concept of a single gateway process for a deprivation of liberty whether in the context of admission to hospital due to a physical or mental health condition or to a placement in a care setting. This removes the legislative distinction associated with having special procedures for those requiring mental health treatment and not for others. It also extends the safeguards available for people who currently lack the capacity to consent to their admission to hospital or placement in a care setting, but for whom there has been no formal procedure in place to assess whether or not the act was in their best interests, and no formal review procedures available in practice. We believe that the process as outlined in the Bill is better than the deprivation of liberty safeguards that were added to the Mental Capacity Act 2005 through the Mental Health Act 2007 which have been widely criticised.[6]

[6] Select Committee of the Mental Capacity Act 2005, House of Lords (2014) (Paragraphs 253 – 300)

Northern Ireland has been operating in a legislative vacuum with regards to the *Bournewood* scenario of the incapacitous but compliant patient or resident. The European Court of Human Rights has been clear that not having formal procedures in place to safeguard the rights of those considered to lack the capacity to consent to the deprivation of their liberty violates Article 5(1) of the European Convention on Human Rights. States therefore have an obligation to "to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society"[7].

A deprivation of liberty is defined in clause 160 (1) as being "within the meaning of Article 5 (1) of the Human Rights Convention". The Supreme Court has recently ruled that the key determination of whether or not a deprivation of liberty has taken place relates to the nature and degree of supervision and control and whether or not the individual is free to leave, irrespective of the location that it occurs in[8]. This ruling has had profound implications in England and Wales, widening the scope from deprivations of liberty occurring specifically in hospitals and care homes, to occurring in locations that they had previously not been considered to occur in such as supported living units and foster care placements.

The context of the *P v Cheshire West* ruling and the potential for an alternative European Court of Human Rights interpretation of what constitutes a deprivation of liberty provides a challenging context for the drafting of the Mental Capacity Bill. If it appeared likely that the *Cheshire West* interpretation was to remain the definitive judicial definition of a deprivation of liberty then it would be advisable to fix it in the statute in order to provide clarity on what scenarios should be considered as such. The flipside to this is that if the Cheshire West judgement was to be superseded in the future, then it leaves the Northern Irish legislation out of touch and potentially non compliant with the European Convention.

The Law Centre believes that the Department should nevertheless give consideration to incorporation of a definition of what constitutes a deprivation of liberty in line with Baroness Hale's definition at paragraph 49 of her Cheshire West judgement. Namely, that a person is deprived of their liberty when they are:

> "under continuous supervision and control and are not free to leave."

We believe that deprivations of liberty can occur in any location and their regulation by the Bill should not be confined to those that occur in a hospital or a care home only. It would appear perverse if an individual who lacked capacity and received a high level of control, supervision and restriction of movement in a supported living unit was denied access to the same safeguards as someone who experienced a similar situation but lived in a care home.

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[7] Stanev v Bulgaria (2012) 55 EHRR 696

[8] P v Cheshire West and Chester Council and another (Respondents); P and Q v Surrey County Council [2014] UKSC 19

Clause 23 – Deprivation of liberty: authorisation etc

With regards to the prevention of serious harm condition, the Law Centre refers to its response to clauses 19 and 58.

Clause 24 – Taking person to a hospital etc for deprivation of liberty

The Law Centre is has no further comment to make on this clause at this time.

Clause 25 – Permission for absence from hospital or care home

The Law Centre is has no further comment to make on this clause at this time.

Clause 26 – Limit on conditions that may be imposed on permission for absence

The Law Centre is has no further comment to make on this clause at this time.

Clause 27 – Disregard of certain detention

The Law Centre welcomes the retention of the disregard provision from the Mental Health (Northern Ireland Order) 1986.

Requirements to attend for treatment with serious consequences

Clause 28 – Requirements to attend for certain treatment: authorisation etc

The Law Centre welcomes the abolition of the concept of guardianship. The guardianship model is out-dated, stigmatising and overly paternalistic.

The "attendance requirement" has been drafted to be an intervention which can facilitate the administration of compulsory treatment with serious consequences in the community, without the need for P to be a hospital in-patient. It is also important to note that the provision of any treatment to an individual subject to an attendance requirement will likely be subject to an additional authorisation, as detailed in clause 21.

The Law Centre is content with the concept of the attendance requirement and the receipt of treatment condition as currently drafted.

Clause 29 – Duty to revoke where criteria no longer met

The Law Centre welcomes the clarity provided in this clause. However we are concerned that there is no equivalent clause in the sections of the draft Bill relating to deprivation of liberty and receipt of treatment with serious consequences.

Community residence requirements

Clause 30 – Community residence requirements: authorisation etc

The Law Centre is broadly content with the concept of the community residence requirement, but maintains some reservations as detailed in our response to clause 31.

The prevention of harm condition is set rather low at, "the failure to do the act would result in a risk of harm to P". We would be concerned that this intervention could be used inappropriately as a result.

Clause 31 – Meaning of "community residence requirement"

The Law Centre is content that a community residence requirement will require P to live at a particular place, to receive treatment, and that there could be an associated requirement to allow a healthcare professional access to P while P is subject to the requirement.

The Law Centre is concerned about sub-clause (2) (b) allowing a community residence requirement to require P's attendance at places for training, education or occupation. This is paternalistic and has been brought directly over from the Mental Health (Northern Ireland) Order 1986. Decisions regarding employment, training and education are highly personal and should not be mandatory. If P were to break the requirement to attend work, for example, then what would the resulting consequence be for P? The implicit threat of depriving P of liberty as a result of not complying with such a requirement would be unethical and unduly punitive. The focus around these issues should be one of support to P to allow P to do so on his/her terms rather than one of compulsion.

Clause 32 – Duty to revoke requirement where criteria no longer met

The Law Centre has no further comment to make on this clause at this time.

Clause 33 – Duties in relation to people subject to community residence requirements

The Law Centre has no further comment to make on this clause at this time.

Clause 34 – Community residence requirements: further provision

The Law Centre welcome the content of clause 34 as we have had direct experience of HSC trusts inappropriately placing restrictions of movement on individuals subject to guardianship orders which have constituted a deprivation of liberty.[9]

The *P v Cheshire West* judgement, however, reinforces the need for clear safeguards for individuals who live outside of a traditional hospital or care home setting but who are subject to compulsion that goes beyond that of a community residence requirement.

CHAPTER 5 – INDEPENDENT ADVOCATE NEEDED FOR CERTAIN INTERVENTIONS

Clause 35 – Independent advocate: need to have in place and consult

[9] JMCA v Belfast Health and Social Care Trust [2014] NICA 37

We welcome the requirement to have in place an independent advocate for P as this is potentially one of the most effective of the safeguards which the Bill provides.

Clause 36 – Interventions to which section 35 applies

In the view of the Law Centre the interventions to which section 35 applies are too narrowly framed. Clause 36 (1) (e) should read 'a serious intervention as defined by section 63', not 'a serious compulsory intervention'. The safeguard of independent advocacy support should be in place for all serious interventions, not just those which are resisted or objected to.

CHAPTER 6 – EXTENSION OF PERIOD OF AUTHORISATION

Period of authorisation

Clause 37 – Period of authorisation

The Law Centre is has no further comment to make on this clause at this time.

Extensions of period of authorisation

Clause 38 – First extension of period of authorisation

The Law Centre welcomes the requirement for the first authorisation report to be made within the period one month before any schedule 1 authorisation is due to end. Currently under the Mental Health (Northern Ireland) Order 1986, for guardianship it is within two months.[10]

Regarding the provision made in sub-clause (4), the Law centre refers to its response to schedule 3 of the Bill.

Clause 39 – Subsequent extensions

The Law Centre believes that the report authorising the extension should be carried out within one month of the end of the first six month period of extension, and could then be carried out within two months of the end of the subsequent one year extension periods.

This safeguard of clause 39 (2) is weaker than in the Mental Health Order for renewal at one year. The Order states that one of the two people must come from another hospital and must not have previously made a report in this current admission (article 13). The clause should be amended to require at least an equivalent level of independence as that required by the Mental Health Order.

Supplementary provisions about extension

Clause 40 – "Authorised measures" and criteria for continuation

[10] Article ?, Mental Health (Northern Ireland) Order 1986

The Law Centre has no further comment to make on this clause at the current time.

Clause 41 – Meaning of "responsible person"

The Law Centre has no objection to who is defined as "the responsible person", however we are unclear as to who will make the application if the responsible person does not believe the criteria is met. We refer to our response to Schedule 3.

Clause 42 – Extension reports: further provision

The Law Centre has no further comment to make on this clause at the current time.

Clause 43 – Effect of extension on authorisation where authorised measures unused etc

The Law Centre is has no further comment to make on this clause at the current time.

CHAPTER 7 RIGHTS OF REVIEW

Clause 44 – Renaming of Mental Health Review Tribunal

The Law Centre supports the renaming of the Mental Health Review Tribunal as the Review Tribunal.

The Law Centre welcomes that legal aid for representation at Mental Health Review Tribunals is no longer means tested and that eligibility is solely dependent upon the merits test being met.[11] The Law Centre believes that this should continue to be the case for representation at the proposed Review Tribunal and would welcome clarification from the Department of Justice that this is their intention.

Clause 45 – Rights to apply to Tribunal

The Law Centre welcomes that each authorisation can be reviewed within the initial period. This is a particular improvement on the Mental Health Order which only allows for one review during the period for short-term assessment in hospital and the following six months detention for treatment.[12] P will now have the right to appeal a schedule 2 deprivation of liberty in hospital to the Review Tribunal and if that appeal is unsuccessful, then P will not lose the right to appeal a subsequent Schedule 1 deprivation of liberty in hospital once it has been authorised, and indeed any subsequent period of extension.

Clause 46 – Applications: visiting and examination

The Law Centre has no further comment to make on this clause at this time.

Clause 47 – Power of certain persons to refer case to Tribunal

[11] LSC Circular 08/14, Annex 9 found at http://www.dojni.gov.uk/index/legalservices/northern-ireland-legal-services-commission-legal-profession/lsc-08-14-annex-9-mental-health-review-tribunal-scheme

[12] Article71, Mental Health (Northern Ireland) Order 1986

The Law Centre has no further comment to make on this clause at this time.

Clause 48 – Duty of HSC trust to refer case to Tribunal

The Law Centre believes that the HSC trust should refer P's case to the Tribunal if the Tribunal has not considered the case within one year, rather than the two years as stated in Clause 48 (1) (b) for those aged 18 or over. It is important than there is genuine independent scrutiny on a regular basis of the cases of those who are subject to extension of schedule 1 interventions, particularly given the relative ease of authorising extension periods as detailed in clauses 38 and 39.

Clause 49 – Powers of Tribunal in relation to authorisation under Schedule 1

The Law Centre has no further comment to make on this clause at this time.

Clause 50 – Powers of Tribunal in relation to authorisation under Schedule 2

The Law Centre has no further comment to make on this clause at this time.

Clause 51 – Applications relating to detention: additional powers of Tribunal

The Law Centre believes that clause 51 (2) is in direct conflict with Article 5 (1) of the European Convention on Human Rights. It has been established in the High Court that in the case of the Tribunal ordering mandatory discharge from detention, the Tribunal cannot direct the discharge to occur at a later date.[13]

Clause 52 – Procedure

The Law Centre has no further comment to make on this clause at this time.

CHAPTER 8 – SUPPLEMENTARY

Medical Reports

Clause 53 – Medical practitioners who may make certain medical reports

The Law Centre cannot comment in any meaningful way on this clause until detail is provided through public consultation on the associated regulations.

Clause 54 – Medical reports: involvement of nominated person

The Law Centre has no further comment to make on this clause at this time.

Clause 55 – Medical reports: involvement of independent advocate

The Law Centre has no further comment to make on this clause at this time.

[13] *X's Application (No.2)* [2009] NIQB 2

Clause 56 – Sections 54 and 55: meaning of emergency

The Law Centre has no further comment to make on this clause at this time.

Clause 57 – Panels constituted to decide applications: general provision

The Law Centre does not feel it can make a substantive comment on the Department's proposals for HSC trust panels needed to be in place for schedule 1 and schedule 3 authorisations. Other than that the panel must have three members, the detail regarding the make-up and operation of the panels in this clause is left almost entirely to future regulations.

We believe that there is merit in a body which scrutinises schedule 1 applications at the point of authorisation. This is particularly relevant for individuals who perhaps lack the capacity to instruct a review. Particularly when the intervention requires what is envisaged to be a long-term deprivation of liberty in a care home setting, it is important to have a robust authorisation process that prevents further disruption in the person's life when an inappropriate authorisation is only picked up by a Review Tribunal months, or even years after the person has moved into the care home. There must be robust safeguards at the point of decision, not just through review of that decision.

We are concerned that if the HSC trust panel is based too closely on the Hospital Managers' Review process in England and Wales, then it will be at best, a very limited safeguard particularly where the panel does not contain sufficient expertise on which to challenge medical professionals' opinions.

The Expert Committee Review of the Mental Health Act 1983 (1999) recommended the abolition of the managers' power to discharge in favour of the creation of a genuinely independent decision making body.[14] The Law Centre does not believe that the creation of a body which, to all intent and purposes would require a similar resourcing level to that of the Review Tribunal would be justified in Northern Ireland. Nor do we believe that it is appropriate for the Review Tribunal to take on an authorisation role in the manner in which it has in Scotland.[15]

However, if the HSC trust panels are to remain within the Bill, then the Law Centre is of the opinion that the members must have high levels of expertise, be multi-disciplinary, must not be bound by resource considerations and must have an element of independence from the health and social care system if they are to be a genuine safeguard. Consideration should be given to medical practitioner, legal, social work and lay member representation, bolstered by someone with service-user experience and/or someone with experience as a carer. We believe that a HSC Trust panel model reflective of the above could perhaps provide a genuine safeguard and make a positive contribution to P's in certain circumstances.

[14] Review of the Mental Health Act (1999), Department of Health etc page 56 and page 79.
[15] Require reference to relevant part of Mental Health (Care and Treatment) Act (2003)

However, at this point given the lack of detail we remain to be convinced of their value as an effective safeguard at all and the resources might be better deployed in other ways to protect the rights and interests of P.

Limits on matters that may be taken into account in determining certain risks

Clause 58 – Risk of serious physical harm to others

The Law Centre believes that clause 58 (2) (a) and clause 58 (2) (b) should be amended to reflect that past violent behaviour or past behaviour such as to place others in fear of serious physical harm must be linked to the lack of capacity. This would require a clear association between the lack of capacity and the need for interventions related to the protection of others. Where P has behaved violently or aggressively in the past, but this is not related to P's impaired mental capacity, such behaviour should not be able to be relied on as evidence of a risk of serious harm to others for panel authorisation. Further, where a lack of capacity is related to an acquired 'impairment of, or disturbance in the functioning of, the mind or brain' (such as an acquired brain injury), then any behaviour of the type specified in clause 58 (2) (a) & (b) which predates the lack of capacity should be explicitly excluded from consideration.

Other supplementary provision

Clause 59 – Provision of information

The Law Centre believes that clause 59 should be redrafted with as much of the content that is intended to be contained within future regulations as possible. Even with the anticipated information provided by the regulations, this clause will be very difficult to interpret.

The Law Centre believes that the clause should be clear within the primary legislation about the need for information to be provided to P and the nominated person on the basis P is being made subject to an intervention under schedules 1, 2, or 3, what safeguards are available to P and what the right of appeal is. Specific information should be provided when the intervention, or extension to the intervention, is in the process of being sought as well as when P has just been made subject to an authorised intervention.

Clause 60 – Documents appearing to be duly made

The Law Centre cannot interpret the meaning of this clause in isolation of the information referred to within which is to be provided through future regulations.

Clause 61 – Failure by person other than D to take certain steps

The Law Centre welcomes this clause as giving real teeth behind the support principle. Essentially it confirms that a person other than D, or in certain circumstances D's employer, is exposed to liability if the support principle is not adhered to.

In the interest of clarity, the Law Centre believes that clause 61 (4) should cross reference the "supportive steps" with those in clause 4.

We do not believe that there are any situations for which clause 61 (5) (a) would be appropriate given the support principle of clause 1 (3). Support for a person's capacity cannot be deferred to a later time as that would mean that any lawful determination of a lack of capacity would also have to be deferred. It is not at all clear to us what this provision aims to achieve nor what circumstances it is seen to be necessary for.

Clause 62 – Part 2 not applicable where other authority for act

The Law Centre as no further comment to make on this clause at the current time.

CHAPTER 9 – DEFINITIONS FOR PURPOSES OF PART 2

Meaning of serious intervention

Clause 63 – "Serious intervention"

The Law Centre welcomes the fact that it is not just the nature of the intervention that can make it serious, but it is also the impact that the intervention has, even idiosyncratically, on P. We believe that this clause would benefit from the extra clarity provided by the addition of a sub-clause stating that any intervention that would ordinarily be considered routine must be considered a serious intervention if P's reaction to it meets the description in sub-clauses (1) (b), (1) (c) or (1) (d).

On clause 63 (4), the Law Centre refers to our response to clause 18 (3) and the need for the appropriate safeguards to be put in place if it is possible to do so if an intervention unexpectedly becomes a serious intervention.

Clause 64 – Acts that are "part of" serious interventions

The Law Centre has no further comment to make on this clause at this time.

Meaning of "emergency"

Clause 65 – Meaning of "emergency" in relation to safeguard provisions

The Law Centre agrees with the need for a procedure for intervening in P's life in an emergency situation. We are broadly content with how this clause is written but we feel that it is important for the clause to reiterate that D, when making an emergency intervention, must reasonably believe that P lacks capacity and that s/he must have a reasonable belief that s/he is acting in P's best interests, even if D is unable to ensure that other safeguards that apply in a non-emergency situation are in place.

Clause 66 – Definitions etc for purposes of section 65

The Law Centre has no further comment to make on this clause at this time.

Clause 67 – Failure by persons other than D to take steps to ensure safeguard met

The Law Centre has no further comment to make on this clause at this time.

Other definitions for purposes of Part 2

Clause 68 – Meaning of "resisted by P", "requirement", etc

The Law Centre has no further comment to make on this clause at this time.

Clause 69 – References to treatment "likely" to be treatment with serious consequences

The Law Centre is has no further comment to make on this clause at this time.

PART 3 – NOMINATED PERSON

Clause 70 – Nominated person

The Law Centre has no further comment to make on this clause at the current time.

Appointment by person of his or her nominated person

Clause 71 – Appointment of nominated person

The Law Centre welcomes the proposal to give P the power to declare who his/her nominated person is, so long as P has the capacity to do so. This is in contrast to the Mental Health (Northern Ireland) Order 1986, which instead bestowed similar powers on the "nearest relative". This follows the recommendation of the Bamford Review[16] and is similar to the role of the "named person" in Scotland.[17]

The ability for an individual to choose who should be his/her nominated person is important in order to better respect the autonomy of the person. Ultimately, the preference should almost always be to respect P's ability to determine whom s/he most trusts to take on that role. For many reasons, it may be inappropriate for the nearest relative to be the nominated person.

The traditional concept of the nearest relative has sat uneasily with Article 8 of the European Convention on Human Rights and after being taken to the European Court, the UK Government acknowledged that it needed to legislate to allow for an individual to have the

[16] *A Comprehensive Legislative Framework,* Bamford Revew (at paragraph 6.35)
[17] Part 17, Chapter 1; Mental Health (Care and Treatment) (Scotland) Act 2003

right to displace their nearest relative.[18] The right to displace a nearest relative has only recently been introduced through the courts in Northern Ireland.[19] It is therefore logical to assume that the right the actively chose a nominated person is much more in keeping with the ethos of the European Convention of Human Rights.

Clause 72 – Revocation of nominated person

The Law Centre has no further comment to make on this clause at the current time.

Clause 73 – Resignation

The Law Centre has no further comment to make on this clause at the current time.

Clause 74 – Default nominated person

The Law Centre believes that a sub-clause (1) (c) should be added that states: "and, P does not have the capacity to appoint a nominated person". We feel this is important in order to emphasis the decision-specific nature of capacity; just because P lacks the capacity to consent to a serious intervention does not necessarily mean that P lacks the capacity to appoint a nominated person. It is important that the Bill is written in a way that helps ensure that inappropriate assumptions about capacity are not made.

The Law Centre is content with the default nominated person list. The recognition of P's carer as the primary default nominated person is an important statutory recognition of the role of carers.

Clause 75 – Exceptions to and interpretation of section 74

The Law Centre has no further comment to make at this stage.

Clause 76 – Meaning of "carer"

The Law Centre is broadly supportive of the criteria for carer. However, it may be appropriate for the Department to consider how subsection (2) relates to a potential default nominated person who is employed by P as a personal assistant through a direct payment. This may be an exceptional circumstance that needs written into this clause.

Clause 77 – Declaration that particular person not to be nominated person

The Law Centre has no further comment to make at this stage.

Clause 78 – Formalities for documents under Part 3

The Law Centre is content with this clause and has no further comment to make.

[18] FC v UK (1999) 37344/97; JT v UK (2000) 26494/95
[19] HM v NHSCT (2013)

Powers of the Tribunal

Clause 79 – Application to Tribunal for appointment of nominated person

The Law Centre is content with the power to appoint a nominated person being moved to the Review Tribunal from the County Court.

The Law Centre also has no objection to the "qualifying person" being expanded to a range of roles beyond that of the approved social worker.

Clause 80 – Tribunal's power to appoint nominated person

The Law Centre believes that a timescale should be added to this clause for which the Review Tribunal is obliged to consider the application within. As the nominated person has an important role to play within serious interventions it is crucial that there is an appropriate nominated person in place as soon as possible.

Clause 81 – Tribunal's power to disqualify persons from being default nominated person

The Law Centre is content with this clause and has no further comment to make.

Clause 82 – Revocation of Tribunal's appointment where P regains capacity

The Law Centre believes that if P regains the capacity to make decisions regarding his/her nominated person, that the Tribunal's appointment should be automatically revoked on the basis of a medical report that states that P has regained the capacity to do so. It is unfair for P to have to go through the stress of having to actively make an application to the Tribunal.

PART 4 – INDEPENDENT ADVOCATES

The use of the term 'independent advocates' is potentially misleading as there will continue to be 'independent advocates' who are not carrying out the statutory role in the Bill. We would suggest changing this to 'Independent mental capacity advocates' throughout.

Clause 83 – Independent Advocates

The Law Centre believes that, while the instruction of an independent advocate should be carried out by the relevant HSC trust, the commissioning of independent advocacy services should be done at a regional level through the HSC Board. As independent advocates may at times have to challenge HSC trust decisions, it is vitally important that they remain genuinely independent from the HSC trusts. The DHSSPS guidance 'Developing advocacy

services: a policy guide for commissioners' (May, 2012)[20] provides the following as 'Commissioning Principle 2 – Independence':

> Advocacy services are commissioned that are structurally independent from all statutory organisations and preferably from service providers. (at 7.9)

In our view, commissioning of independent mental capacity advocacy services by the trust, within which the advocates will do their work, is not in keeping with this commissioning principle. Financial independence from HSC trusts is essential to ensure that the independent mental capacity advocacy provided is a genuine safeguard and has the fullest possible trust and confidence of those people who rely upon it.

Clause 83 (3) accepts a weak form of independence for an advocate in stating that 'a person to whom a proposed act relates should, so far as practicable, be represented by a person who is independent of any person who will be responsible for the act'. Given how essential independence is to the effective operation of advocacy provision as a safeguard, the 'so far as practicable' should be removed. Advocacy services can be commissioned in a way that would ensure such independence.

Clause 84 – Functions of independent advocates: provision of support, etc

Clause 84 (3) mirrors the provisions of section 36 of the Mental Capacity Act 2005, but omits the provision at section 36 (2) (e) which enables regulations to be made to require an advocate to take steps for the purpose of 'obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained'. We think that this could usefully be included in the Bill.

Clause 84 (4) is welcome insofar as it makes clear that regulations will be able to provide that in certain circumstances 'an independent advocate may challenge, or provide assistance for the purposes of challenging, any relevant decision'. However, we feel that the Bill itself should explicitly state that an independent advocate may challenge, or provide assistance to P for the purposes of challenging, the decision that P lacks capacity with respect to the matter for which that independent advocate has been instructed.

As drafted, clause 84 (5) (b) could lead to refusals to accept independent advocacy support because it would involve P surrendering decision-making power over access to P's confidential personal information. Clause 84 (5) (b) should be limited to: (1) circumstances in which P also lacks capacity to a make decision about access to such records; and (2) circumstances in which records are in whole or in part withheld from P on a lawful basis. Where P has the relevant capacity, the independent advocate should be accessing records on the basis of the consent of P. Clause 86 (6) should be amended to reflect this.

[20] Available at: http://www.dhsspsni.gov.uk/Developing-Advocacy-Services-A-guide-for-Commissioners-May-2012.pdf

Procedure for ensuring that an independent advocate is instructed

Clause 85 - Request for an independent advocate to be instructed

The Law Centre has no further comment to make on this clause at the current time.

Clause 86 – Steps to be taken before independent advocate may be requested

We are concerned about how clause 85 (3), clause 86 (3) and clause 87 (1) would operate jointly in practice. If the 'healthcare professional' who is requesting an advocate is also D, then that leaves open potentially significant conflicts of interest. It would not be difficult for the healthcare professional to inadvertently present the information about advocacy in such as manner as to make it unattractive to P. D should not be a gatekeeper for access to independent advocacy support for P with respect to the decision or intervention D is proposing.

One possibility would be for an independent advocate to confirm with P whether s/he wishes an independent advocate to be instructed. However, this would create a problem in that clause 35 requires that D ensure that the 'independent advocate conditions' are met in order for clause 8 (2) on protection of liability to apply. We therefore propose the addition of provisions akin to those dealing with the formal assessment of capacity in clause 12 which permit D to rely on a formal assessment of capacity which D has not carried out him/herself. Additional provisions could require that the independent advocate ascertain the decision of P on refusal of advocacy support and provide a formal report to D of P's "statement of refusal" should the relevant declaration under clause 91 be made. Such provisions would: (1) ensure the independence of P's decision-making with respect to accessing independent advocacy support; and (2) would still enable D to access the requisite protection from liability.

Clause 87 – Right to declare that no independent advocate to be instructed

The Law Centre has no further comment to make on this clause at the current time.

Clause 88 - Instruction of independent advocate

The Law Centre has no further comment to make on this clause at the current time.

Clause 89 – Right of person to discontinue involvement of independent advocate

The Law Centre has no further comment to make on this clause at the current time.

Clause 90 – Continuing duty of trust in relation to independent advocate

The Law Centre has no further comment to make on this clause at the current time.

Formalities

Clause 91 – Formalities for declarations under Part 4

The Law Centre has no further comment to make on this clause at the current time.

Power to adjust role of advocate

Clause 92 – Power to adjust role of independent advocate

The Law Centre has no further comment to make on this clause at the current time.

PART 5 - LASTING POWERS OF ATTORNEY

Clause 93 – Lasting powers of attorney

The Law Centre supports the introduction of lasting powers of attorney in Northern Ireland. The House of Lords Select Committee's post legislative scrutiny report of the Mental Capacity (England and Wales) Act 2005 highlighted few problems with the concept of, and the legislative basis behind, the lasting powers of attorney. It focused instead on the difficulties associated with the out-workings of the legislation, particularly in terms of public and professional awareness.[21] While it is important that the Department considers these issues for implementation of the Bill, we do not believe that these issues can be addressed within the scope of the legislation.

If used correctly, a lasting power of attorney can be a useful tool to ensure that the wishes and feelings of P are better reflected within the decision-making process at times that s/he lack capacity. We welcome the extension of powers of attorney to cover care, treatment and personal welfare issues. This will help give donors a greater influence over these issues at times when they lack capacity.

We also welcome the requirement for attorneys to abide by the principles of the Bill. It is important that attorneys follow the correct procedure to determine a lack of capacity and to come to a best interests judgement.

Clause 94 – Restrictions on scope of lasting power of attorney

The Law Centre agrees that for decisions relating to a donor's care, treatment and personal welfare, the attorney should only be authorised to make those decisions that the donor lacks the capacity to do. These decisions are so personal that, unlike for property and affairs decisions, a donor should not be able to defer decision-making responsibility to someone else while they retain capacity.

[21] Select Committee of the Mental Capacity Act 2005, House of Lords (2014) (Paragraphs 179 – 192)

We have no objection to sub-clause (2) that the default position is that the attorney does not have the power to authorise the giving or refusing of life-sustaining treatment unless there is expressed permission from the donor to allow this.

We are supportive of attorneys not being given the power to deprive a donor of his/her liberty in any circumstance or restrain the donor (except in exceptional circumstances). We do believe, however, that the Department should consider whether it needs to be made clearer whether an attorney should be able to object to a proposal to deprive the donor of his/her liberty.

Clause 95 – Relationship between advance decisions and lasting powers of attorney

The Law Centre has no further comment to make on this clause at this time.

Clause 96 – Scope of lasting powers of attorney: gifts

The Law Centre has no further comment to make on this clause at this time.

Clause 97 – Appointment of attorneys: general

The Law Centre has no further comment to make on this clause at this time.

Clause 98 – Appointment of replacement attorneys

The Law Centre has no further comment to make on this clause at this time.

Clause 99 – Way in which replacement attorneys are to act

The Law Centre has no further comment to make on this clause at this time.

Clause 100 – Revocation etc of lasting power of attorney

The Law Centre has no further comment to make on this clause at this time.

Clause 101 – Protection of attorney and others if no power created or power revoked

The Law Centre has no further comment to make on this clause at this time.

Clause 102 – Protection from liability: reliance on authority of attorney

The Law Centre has no further comment to make on this clause at this time.

Clause 103 – Powers of court as to lasting powers of attorney

The Law Centre has no further comment to make on this clause at this time.

Clause 104 – Powers of court as to operation of lasting powers of attorney

The Law Centre has no further comment to make on this clause at this time.

Enduring powers of attorney

Clause 105 – Enduring powers of attorney

The Law Centre has no further comment to make on this clause at this time.

PART 6 – HIGH COURT POWERS: DECISIONS AND DEPUTIES

Decisions and deputies

Clause 106 – Court's power to make declarations

The Law Centre agrees with the Department's opinion that Northern Ireland is too small to justify the creation of a separate Court of Protection and is content for those powers to be retained within the High Court. We are therefore content with the Court's powers to make declarations as detailed in this clause.

The Law Centre believes that consideration should be given by the Department of Justice as to whether the current legal aid criteria are sufficient to cover cases for which clauses 106 and 107 apply. It is essential that legal aid be available for P to access the High Court.

Clause 107 – Court's powers to make decisions and appoint deputies: general

The Law Centre welcomes the requirement for the powers of the court to be subject to the principles of the Bill as detailed in sub-clause (3).

We also welcome the clarity provided in sub-clause (4) that the court should essentially take the least restrictive measure when it comes to considering whether or not to appoint a deputy and if so, what powers to confer on that deputy.

Clause 108 – Section 107 powers: care, treatment and personal welfare

The Law Centre has no further comment to make on this clause at this time.

Clause 109 - Section 107 powers: property and affairs

The Law Centre has no further comment to make on this clause at this time.

Clause 110 – Appointment of deputies

The Law Centre believes that an additional sub-clause should be added which states that when the court is considering the appropriateness of an individual to be a deputy, regard should be given to that individual's relationship to P, the individual's ability to carry out the role and any expression of how comfortable P feels with having that individual as a deputy.

Clause 111 – Restrictions on deputies

Clause 111 provides welcome clarity over the retention of decision-making authority by the court over certain decisions related to P.

We again, welcome the clarity provided that deputies are subject to the principles of the Bill.

The Law Centre also agrees with the same limitations over decisions related to deprivation of liberty and restraint being imposed on a deputy as to an attorney in clause 94.

Clause 112 – Protection from liability: reliance on authority of deputy

The Law Centre has no further comment to make on this clause at this time.

Ancillary powers of the court

Clause 113 - Interim orders and directions

The Law Centre has no further comment to make on this clause at this time.

Clause 114 – Power to call for reports

The Law Centre has no further comment to make on this clause at this time.

Practice and procedure

Clause 115 – Applications to the court

The Law Centre believes that the nominated person should be added to the list of those detailed in sub-clause (1) of who do not need permission to apply to the court.

Clause 116 – Rules of court

The Law Centre believes that an additional clause should be added that relates to maximising the ability of P to contribute to the proceedings.

PART 7 – PUBLIC GUARDIAN AND COURT VISITORS

Public Guardian

Clause 117 – The Public Guardian

The Law Centre supports the creation of the Public Guardian. Given the power held by attorneys and deputies over potentially very vulnerable people's lives, it is important that there is a central body which keeps a record of those that are in operation and provides oversight to ensure that they are operating appropriately and within the law.

Clause 118 – Functions of the Public Guardian

The Law Centre has no further comment to make on this clause at the present time.

Clause 119 – Duty to notify the Public Guardian

The Law Centre has no further comment to make on this clause at the present time.

Clause 120 – Notifications under section 119: procedure and effect

The Law Centre has no further comment to make on this clause at the present time.

Court Visitors

121 – Court Visitors

The Law Centre has no further comment to make on this clause at the present time.

PART 8 - RESEARCH

Part 8 of the Bill appears to reproduce sections 30 to 34 of the Mental Capacity Act 2005. We are concerned that these clauses are not coherent with the overall approach of the Bill for the reasons outlined below.

The Law Centre welcomes that clause 1 (2) means that the principles contained in clauses 1 (3), 1 (4) and 1 (5) apply to interventions and decisions with respect to 'intrusive research'. We also welcome that clause 1 (6) means that the best interests principle in clause 1 (7) also applies; that is, P is never to be a research subject unless it is in his/her best interests to be so.

Clause 122 – Research

The Law Centre has no further comment to make on this clause at the current time.

Clause 123 – Requirements for approval

Clause 123 (4) (a) makes sense in that it is possible for it to be in P's best interests to participate in research because of a proportionate potential benefit to P from doing so.

Clause 123 (4) (b) does not cohere, and may actually conflict with the general principle at 1 (7) of the Bill that 'the act or decision must be done, or made, in the best interests of the person who lacks capacity'. It is unclear how it could be in P's best interests to participate in research where there is no potential benefit to P in doing so. Even given the additional requirements of clause 123 (5) which restrict research which can be carried out under 123 (4) (b), the latter clause still seems to permit research which is not of benefit to P. If research of this type were to be permitted, it would be on the basis that being a research

participant to provide benefit to others can be in P's best interests. Clause 123 (4) (b) seems to us to introduce a public interest to trump what is P's best interests.

There is unquestionably a substantial public interest in research being carried out into 'impairing conditions' as described in clause 123 (7). However, there is no reason for people who lack capacity to be used as a means to the end of serving that public interest on the basis of setting aside what are otherwise seen as core protections for this vulnerable group. If the public interest in the research taking place is so substantial that the law should permit people lacking capacity to be research participants without it being in their best interests; then the law should also permit people with capacity to be research participants to serve similar public interests.[22] We are concerned that this clause is discriminatory in permitting interventions with respect to people who lack capacity which would not be permitted for people who have capacity. We are also concerned that it sets aside the core protection of the Bill which requires that interventions and decisions must be in the best interests of P.

Clause 124 – Consulting nominated persons, carers etc

To avoid confusion as to roles within the Bill, it would be helpful if the role carried out by the 'person' R must consult with in this clause had a role name.

Clause 124 should be clear throughout that when 'research' involves 'treatment' of any kind, then the general safeguards appropriate to the nature of the treatment must also be in place.

Much of clause 124 (4) seems redundant. It either conflicts with or reproduces the kinds of steps which would have to be taken in determining whether it was in the best interests of P to take part in the research.

With respect to clause 124 (7), we have reservations about individuals being able to carry out multiple formal roles in the Bill. It would be better for the clause to exclude people in such roles than to explicitly include them.

Clause 125 – Additional safeguards

The Law Centre refers to its response to clause 10 relating to advance decisions.

While we recognise the origin of clause 125 (4) in the relevant international standards[23], its significance within the Bill for the actual and effective protection of P's rights and interests

[22] An example of this approach would be the public interest based proposals for enhanced access to service user identifiable information without consent for research purposes contained in 'Consultation on a proposal to introduce primary legislation for the use of health and social care service user information for secondary purposes in controlled circumstances', (DHSSPS, July, 2014). Available at: http://www.dhsspsni.gov.uk/patientinfo070714.pdf.

[23] Such as article 2 of the Council of Europe Convention on Human Rights and Biomedicine and article 3 of its Optional Protocol on Biomedical Research.

is not clear. Indeed, as argued above, Part 8 appears precisely to be constructed so as to permit the interests of society to outweigh those of P.

PART 9 – TRANSFER BETWEEN JURISTICTIONS

Clause 127 – Removal of detained person from Northern Ireland to England or Wales

The Law Centre has no further comment to make on this clause at this time.

Clause 128 - Removal of detained person from Northern Ireland to Scotland

The Law Centre has no further comment to make on this clause at this time.

Clause 129 – Persons removed from England or Wales to Northern Ireland

The Law Centre believes that anyone who is removed from hospital from England or Wales under this provision to Northern Ireland must immediately be entitled to a right of review of that detention and to be made aware of his/her rights. Future regulations may need to provide further detail on this. Clarification is needed over at what point the person will be assessed against the Northern Irish legislative criteria for deprivation of liberty. An individual should spend the least amount of time possible detained in Northern Ireland on the basis of another jurisdiction's legislation.

Clause 130 – Persons removed from Scotland to Northern Ireland

The Law Centre refers to our response to clause 129.

Clause 131 – Removal from Northern Ireland: power to make further provision

Given Northern Ireland's land border with the Republic of Ireland, it is important that clear guidance is developed in co-operation with the Irish authorities and reflected in the regulations. Transfers across this border are likely to be more common than those taking place with other jurisdictions within the United Kingdom.

Clause 132 – Person transferred to Northern Ireland: power to make further provision

The Law Centre refers to its response to clause 131.

PART 10 – OFFENCES

Clause 133 – Ill-treatment or neglect

The summary conviction for the matching offence, section 44 (3) of the Mental Capacity Act (2005) is 12 months imprisonment. The Law Centre believes that this clause should be amended to match this.

Clause 134 – Forgery, false statements etc

The Law Centre has no further comment to make on this clause at the current time.

Clause 135 – Unlawful detention of persons lacking capacity

The Law Centre believes that clause 135 (2) should be amended to clarify that such 'unlawful detention' includes detention in supported living units or private homes, not just hospitals or care homes.

Clause 136 – Assisting persons to absent themselves without permission

The Law Centre believes that clause 136 should be amended to clarify that the offence includes assistance to absent from supported living units or private homes, not just hospitals or care homes.

Clause 137 – Assisting persons to breach residence requirement

The Law Centre has no further comment to make on this clause at the current time.

Clause 138 – Obstruction

The Law Centre has no further comment to make on this clause at the current time.

Clause 139 – Offences by bodies corporate

The Law Centre has no further comment to make on this clause at the current time.

PART 11 – MISCELLANEOUS

Clause 140 – Power to make regulations about dealing with money and valuables

The Law Centre has no further comment to make on this clause at this time.

Clause 141 – Contravention of regulations under section 140

The Law Centre has no further comment to make on this clause at this time.

Clause 142 – Expenditure

The Law Centre has no further comment to make on this clause at this time.

Clause 143 – Payment for necessary good and services

The Law Centre has no further comment to make on this clause at this time.

Miscellaneous functions of HSC trusts

Clause 144 – Appointment of approved social workers

The Law Centre is supportive of the duty for each HSC trust to appoint a sufficient number of social workers being put on to a statutory footing in this clause.

Clause 145 – Miscellaneous functions of HSC trusts

The Law Centre has no further comment to make on this clause at this time.

In-patients under 18: duties of hospital managers

Clause 146 - In-patients under 18: duties of hospital managers

The Law Centre believes that the reference in this clause to mental disorder should be removed and we refer to our response to clause 2 for justification for this. We believe that the provision for those falling under sub-clause (1) (b) should be added to the amended Mental Health Order in its temporary application for those under sixteen, or to the Children's Order. Those who are under 18 should always be treated in an age-appropriate environment. This does not need to be specific to those who have "mental disorder".

We also believe that sub-paragraph (2) should be amended to read: "The managing authority of the hospital must ensure that (subject to the person's needs) the person is placed in an age-appropriate environment." It is crucial that young people receive their treatment in a hospital environment which is conducive to recovery.

Direct payments in place of provision of care services

Clause 147 - Direct payments in place of provision of care services

The Law Centre welcomes the proposed amendment to the Carers and Direct Payments Act (Northern Ireland) 2002 through this clause. The impact of the judgement by Lord Justice Girvan in PF and JF's Application had a devastating effect on a number of carers who received direct payments on behalf of individuals who lacked the capacity to procure the required services for them.[24] This clause, providing there is sufficient oversight of its operation, has the potential to have a hugely positive impact on the lives of people who lack capacity, but who will benefit from having more control over how their care is provided alongside their attorney/other appropriate person.

International protection of adults

Clause 148 - International protection of adults

The Law Centre welcomes effect being given to the Convention on the International Protection of Adults.

[24] 2 [2011] NIQB 20

Matters excluded from the Act

Clause 149 – Family relationships etc

The Law Centre welcomes the clarification that no decision can be made on behalf of a person on the matters outlined in this clause.

Clause 150 – Voting rights

The Law Centre refers to its response to clause 149.

Declaratory provision

Clause 151 – Relationship of Act with law relating to murder etc

The Law Centre welcomes this clause as an important clarification that nothing in the Bill affects the law relating to encouraging or assisting suicide.

PART 12 - SUPPLEMENTARY

Clause 152 – Codes of practice

The Law Centre considers it essential that the Code of Practice be issued in time for it to be available for the training before and then during the initial phase of implementation of the Bill.

The Law Centre has no further comment to make on the detail of this clause at this time.

Clause 153 – Effect of code

The Law Centre has no further comment to make on this clause at this time.

Warrants

Clause 154 – Warrants

The Law Centre has no further comment to make on this clause at this time.

Other supplementary provision

Clause 155 – Duties in relation to nominated person: supplementary

The Law Centre has no further comment to make on this clause at this time.

Clause 156 – Power to make further provision

The Law Centre has no further comment to make on this clause at this time.

Clause 157 – Regulations and orders

The Law Centre has no further comment to make on this clause at this time.

Definitions

Clause 158 – Persons "connected with" a person

The Law Centre has no further comment to make on this clause at this time.

Clause 159 – Meaning of "mental disorder"

The Law Centre refers to its response to clause 2.

Clause 160 – Definitions for purposes of the Act

The Law Centre has no further comment to make on this clause at this time.

Final provisions

Clause 161 – Short title

The Law Centre has no further comment to make on this clause at this time.

Clause 162 – Commencement

The Law Centre has no further comment to make on this clause at this time.

SCHEDULE 1 – AUTHORISATION BY PANEL OF CERTAIN SERIOUS INTERVENTIONS

PART 1 – PRELIMINARY

Paragraph 1

The Law Centre has no comment to make on this paragraph at this time

PART 2 – APPLICATIONS FOR AUTHORISATION

Paragraph 2 - Applications for authorisation

The Law Centre is concerned that paragraph 2 (5), despite stating that it is preferable for a deprivation of liberty in hospital to be initially authorised through schedule 2, falls short of making it a requirement that every hospital admission for someone who lacks capacity should be authorised through schedule 2 first.

One of the positive aspects of the Mental Health (Northern Ireland Order) 1986 is that every detention for compulsory mental health treatment can only be authorised under Article 4 (admission for assessment). In order to be detained under Article 12 on a long-term (6 months) basis, the patient must always have gone through the Article 4 period of assessment (14 days).

While recognising the different nature of detention in the Mental Capacity Bill, we believe that maintaining a similar approach has the following advantages:

- By embodying the period of assessment it guards against inappropriate assumptions being made about P's condition
- P is not required to reveal any schedule 2 deprivation of liberty in circumstances other than judicial proceedings as detailed in clause 27. This is not currently the case for any schedule 1 deprivation of liberty
- P is entitled to a right of review in each schedule 2 and schedule 1 period of deprivation of liberty
- A judgement call has to be made by the 14 day and 28 day stage of a schedule 2 detention as to whether or not further detention is appropriate. There is greater potential for P to be detained for a longer period than necessary under a schedule 1 deprivation of liberty.
- There is no meaningful difference in terms of the treatment that P can receive under a schedule 2 or schedule 1 authorisation: if the treatment has serious consequences, additional authorisation must be sought for it to be provided under both measures.

- It removes the ambiguity for those making an application who may be unsure as to whether it may be appropriate in a situation to bypass making a schedule 2 authorisation and instead go straight to a schedule 1.

Taking this into account, the Law Centre believes that paragraph 2(5) should be re-written to read: "An application may not be made under this schedule for authorisation of the detention of P in a hospital where P has not already been detained under schedule 2 (short-term detention for examination etc)."

The Law Centre is also concerned about the potential for someone who is under 16, to have an application made regarding a schedule 1 measure that would be carried out after they have turned 16 as detailed in paragraph 2 (7). Given that the Bill is only applicable to those 16 and over, we believe that it is inappropriate to assess the capacity of someone who is under 16 with the view of predicting what their capacity will be in the future. We believe that another interim process must be used that enables an assessment of capacity to be carried out as soon as the person turns 16 and an appropriate application to be made at that point.

Paragraph 3 - Relevant Treatment

The Law Centre refers to its response to clauses 17, 18 and 20.

Paragraph 4 - Who may make application

The Law Centre is concerned about the description in sub-paragraph (2) (b) and the appropriateness of such an individual to make an application. Before we can fully comment on this, we will of course have to see the future regulations but this appears to be broadly similar to the application process for a deprivation of liberty in the Mental Capacity (England & Wales) Act 2005 where the managing authority of the hospital or care home make the application.[25]

The problem in trying to take this approach and place it within the Mental Capacity Bill is the potential lack of coherence with the "single-bill" approach. The inevitable assumption that can be made is that an approved social worker will make applications related to compulsory mental health treatment related interventions, and the person designated by the managing authority will make applications for deprivations of liberty in a hospital for physical health treatment and deprivations of liberty in a care home. When, by virtue of having single criteria for all forms of deprivations of liberty, we have different tiers of individuals with the required training to make applications, it undermines the principle that a deprivation of liberty is as important an intervention, no matter where it is located. We therefore believe that, ideally, an approved social worker should be making the application for all schedule 1 authorisations.

[25] Schedule A1, Mental Capacity (England & Wales) Act 2005

Paragraph 5 – Contents of application

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 6 – Medical report

For the avoidance of doubt, the Law Centre believes that the medical practitioner referred to in sub-paragraph (1)(a) should be appointed by the RQIA.

Paragraph 7 – Care plan

The Law Centre has no further comment to make on this paragraph at this time.

PART 3 - CRITERIA WHICH MUST BE SATISFIED

Paragraph 8 – Criteria for treatment

The Law Centre believes that what is currently sub-clause (c) should become (c) (i), be followed by "; or (ii) the proposal to provide treatment is done while P is subject to an additional measure within the meaning given by section 21; or (iii) the proposal to provide treatment is resisted by P."

The Law Centre believes that the prevention of serious harm conditions should be part of the criteria if P is already subject to an additional measure such as a deprivation of liberty and/or P resists it. If a schedule 1 authorisation is already needed in this instance, in accordance with clause 20, then it stands to reason that the safeguard should ensure that the proposed compulsory treatment with serious consequences should only be provided on the basis that failure to provide it would result in an unacceptable risk of harm to P or others. If a treatment with serious consequences did not meet the prevention of serious harm conditions, then the question would need to be asked why the treatment was being considered at all.

The Law Centre is concerned about the objective measurement of the phrase "serious harm to P" in sub-paragraph (2)(a). In contrast to the Mental Health (Northern Ireland) Order 1986, risk to P can be interpreted as relating to psychological harm as well as physical harm.[26] We are concerned that this could lead to a significant increase in compulsory treatment and detention on the basis that not providing psychotropic medication to someone who is mentally ill and lacks capacity could almost always be justified on the basis that failure to provide the treatment would result in a risk of serious psychological harm to P. We believe that the Department should give further consideration to the implications of this.

With regard to the interpretation of "serious physical harm to others" we refer to our response to clause 58.

[26] Article 4, Mental Health (Northern Ireland) Order 1986

Paragraph 9 – Criteria for detention amounting to deprivation of liberty

The Law Centre believes that the lack of capacity and best interests criteria should be moved from sub-paragraphs (d) and (e) and be moved to (a) and (b).

We believe that capacity criterion that is currently in sub-paragraph (d) is incorrect. It states: 'P lacks capacity in relation to whether he or she should be detained'. However, being detained is not something which requires consent. The decision as to whether or not P should be detained in a hospital or care home is never going to be a decision that P can make for him/herself. This should instead be rewritten to, "P lacks the capacity in relation to whether he or she should be admitted to/accommodated in a hospital or a care home".

With regards to our response to sub-paragraphs (b) and (c), we refer to our response to schedule 1, paragraph 8 and clause 58.

Paragraph 10 – Criteria for requirement to attend for treatment

The Law Centre believes that the criteria should be reordered so that the sub-paragraphs related to lack of capacity and best interests are moved from (b) and (c) to (a) and (b).

In the criteria for the attendance requirement, the provision of the treatment with serious consequences must receive additional authorisation, including meeting the prevention of serious harm conditions.

Paragraph 11 – Criteria for community residence requirement

Again, the Law Centre believes that the capacity and best interests sub-paragraphs should be moved from (c) and (e) to (a) and (b).

The Law Centre notes that the risk criterion is very low in this instance. We would express concern that this intervention could therefore be over-used and that it should be preferential that P lives in the community with the least compulsion possible.

Paragraph 12 – Measures proposed to be carried out only if particular circumstances arise

The Law Centre is concerned about the potential misuse of this paragraph as a coercive tool against P. For example if a measure were to be framed such that: if P were to carry out an act resulting in certain 'circumstances', then then there is an authorisation in place that allows P to be immediately subject to a compulsory measure. Additional safeguards could in principle be put in place for where the circumstances do not simply 'arise', but actually result from a decision or action of P, whether one with capacity or lacking in capacity. However, it is difficult to envisage how they would operate.

We are also concerned about the large element of predicting the future in this clause. Best interests decision-making should be of P's best interests in the particular circumstances that

actually exists, not necessarily vaguely conceived circumstances that may come into existence.

In conclusion, we believe that this paragraph should be removed. Too often, mental health patients are compliant in their treatment plans on the basis of their reasonable concern of being detained if they express dissatisfaction with it. If someone does not meet the criteria for a compulsory intervention then they should not live under the shadow of the potential to be so subject, if certain circumstances, like not taking certain medication arise. If someone, for example stops taking medication, then a new assessment of whether the criteria for a compulsory intervention are met should occur at that material time.

PART 4 – DECISION ON APPLICATION

Paragraph 13 – Panel to consider application

With regards to the "prescribed information" the Law Centre refers to its response to clause 59 and with regards to the make-up of HSC trust panels, we refer to our response to clause 57.

Paragraph 14 – Decision on application

The Law Centre is concerned about the provision made in sub-paragraph (2) for a HSC trust panel to authorise an intervention that has not been applied for if it feels that the criteria for that intervention are met. We do not see how the panel could have all the necessary information that would enable it to make such a decision if the application did not directly relate to that intervention. This sub-paragraph appears to permit authorisation with deviation from what is otherwise recognised in the Bill as good process. Further, the provision is not coherent in that it would likely permit authorisation without the necessary information specified under paragraph 5 (d) and (e).

Paragraph 15 – Specifying detention

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 16 – Specifying requirement to attend for treatment

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 17 – Specifying community residence requirement

With regards to sub-paragraph (5), the Law Centre refers to its response to clause 31.

The Law Centre is concerned that a panel, according to sub-paragraph (4), can either itself specify where P is required to live, or give the trust the power to specify where P is required to live. We believe that where P is required to live should form a crucial part of the application and should always be directly authorised by the panel. If the trust feels that it

would be in P's best interests to live somewhere else, then another application should be made to authorise such an amendment to the residence requirement.

Paragraph 18 – Time limit for panel's decision, and duty to notify decision

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 19 – Interim authorisations

The Law Centre is concerned about the phrasing of sub-paragraphs (1)(a) and (1)(b). If a panel cannot decide whether the criteria for authorisation are met, then it should not be possible to enforce a compulsory intervention on P.

We are not opposed to the potential for interim authorisations. One option could be that if a majority of the panel believe that the criteria are met but that the decision is not unanimous, then an interim authorisation is granted which must be reconsidered within 28 days.

PART 5 – MATTERS COVERED BY AUTHORISATION, ETC

Paragraph 20 – Treatment: what is covered by authorisation

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 21 – Detention: what is covered by authorisation

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 22 – Effect of discharge from detention

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 23 – Power to vary or revoke requirements etc imposed under authorisation

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 24 – Effect of authorisation on previous authorisations

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 25

The Law Centre has no further comment to make on this paragraph at this time.

Paragraph 26 – Relationship with other conditions

The Law Centre has no further comment to make on this paragraph at this time.

Additional

The Law Centre believes that there should be a part in schedule 1 which outlines what events must lead to a termination of the authorisation, for example:

- At any time it becomes apparent that the criteria for authorisation are no longer met, particularly if P regains capacity at any point.
- The expiry of the authorised period of compulsory intervention without a report being carried out under clause 38, 39 or schedule 3 authorisation achieved.
- Not having the appropriate medical reports carried out at appropriate times

There should also be a duty placed to inform P, the nominated person and the independent advocate if P is to be discharged from a compulsory intervention.

SCHEDULE 2 – SHORT-TERM DETENTION IN HOSPITAL FOR EXAMINATION ETC: AUTHORISATION

Title

The Law Centre believes that the term detention is heavily laden and its use should be avoided as much as possible. We therefore suggest that the title of this intervention should be changed to the more precise: "Short-term deprivation of liberty in hospital for examination etc."

Paragraph 1 - Preliminary

The Law Centre has no further comment to make on this paragraph at the present time.

Authorisation of detention in hospital for examination etc

Paragraph 2 – Authorisation of detention in hospital for examination etc

The Law Centre believes that sub-paragraphs (4) (d) and (e) should be moved to become 4 (a) and (b) to emphasise that P must lack capacity and the intervention must be in P's best interests before the rest of the criteria for authorisation are addressed.

With regards to sub-paragraphs (b) and (c), we refer to our response to the "prevention of serious harm conditions" in paragraph 8 of schedule 1.

Paragraph 3 – Who may make a report under paragraph 2

The Law Centre is content with the removal of the nominated person as a person who can make such an application. We believe that this role should primarily be that of an appropriate healthcare professional.

With regards to sub-paragraph (2) we refer to our response to paragraph 4 of schedule 1.

Paragraph 4 – Medical report

The Law Centre is content for the appropriate medical practitioner to be independent of P and appointed by RQIA. For clarity, either paragraph 4 or clause 53 should state that the medical practitioner should not be an employee at the detaining hospital.

We also believe that it would be more appropriate for the reference to "2 days" in subsection (2) to be changed to "48 hours".

Paragraph 5 – Consultation required before report authorising detention is made

The Law Centre believes that the reference to "two days" should be changed to 48 hours.

Paragraph 6

The Law Centre believes that the purpose and nature of the consultation with the approved social worker in this context requires further explanation. The safeguard is negligible unless there is a clearly defined purpose to the person making the report consulting with another approved social worker.

We believe that the approved social worker in this instance must make a statement stating that in his/her opinion the criteria for short-term deprivation of liberty in a hospital are met. This would include consulting with P and the relevant people in P's life to determine whether the measure is in P's best interests.

Paragraph 7 – Information to be given where report authorising detention is made

"As soon as practicable" in this instance should be changed to a more definitive timescale. 24 hours should be appropriate for giving the prescribed information to the managing authority of the hospital. The Law Centre also believes that notification should also be given to the RQIA in this instance.

Paragraph 8 – Duration of authorisation: preliminary

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 9 – Expiry where failure to admit P within period required

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 10 – Expiry where failure to inform P of rights

The Law Centre refers to its response to clause 59. We also believe that the information regarding rights must be provided at a time and in a manner that is likely to maximise P's understanding of the information provided.

Paragraph 11 – Expiry where failure to examine and report on P on admission

The timescale for the examination of P on admission by a medical practitioner in sub-paragraph (3) has been changed from "immediately" in the Mental Health (NI) Order 1986 to as soon as it would be practicable to do so.[27] The term "immediately" should be retained in this instance. If arrangements are being made for P to be admitted to hospital under this schedule, this should be done so as to coincide with a medical practitioner being free to carry out the examination. In the context of this paragraph, it would be difficult to determine that an authorisation is terminated on the basis of a failure to examine and report on P's admission due to this not being carried out at a time "within which it would have been practicable" to do so.

Paragraph 12

[27] Article 9(1), Mental Health (Northern Ireland) Order 1986

The Law Centre believes that subparagraphs (2) (c) and (d) should be moved to (2) (a) and (b).

We also believe that the illness criterion in paragraph 2 (4) (a) of this schedule should be retained as part of this criteria and a reference to treatment added alongside "further care". It is important that there is always a therapeutic basis to a deprivation of liberty in a hospital.

Paragraph 13 – Expiry where no examination and report by suitable medical practitioner within required time

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 14 – Expiry where no further examination and report on P within 14 days

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 15 – Expiry 14 days after date of further report

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 16 - Discharge

The Law Centre believes that if P is to be discharged then there should be a duty for the nominated person and independent advocate to be informed.

Paragraph 17 – Unreasonable delay in taking certain steps

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 18 – Detention covered by authorisation

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 19 – Relationship with other conditions

The Law Centre has no further comment to make on this paragraph at the present time.

Paragraph 20 – Rectification of reports

The Law Centre believes that In the event of this occurring, P, the independent advocate and the nominated person must be informed of the amendment.

Paragraph 21

The Law Centre believes that In the event of this occurring, P, the independent advocate and the nominated person must be informed.

Additional

The Law Centre believes that an additional paragraph should be added that makes it clear that if at any point during the period of detention it appears that P has regained capacity to make the decision as to whether or not to remain in hospital, that this terminates the authorisation.

SCHEDULE 3 – EXTENSION BY PANEL OF PERIOD OF AUTHORISATION

Paragraph 1 - Preliminary

The Law Centre has no further comment on this paragraph at the current time

Paragraph 2 – Applications for extension

The Law Centre feels that it is unclear as to who in this situation submits the application. If, according to sub-paragraph (1) (d), the responsible person (i.e. the approved social worker or person of a prescribed position who is designated by the managing authority of a hospital or care home) does not feel the criteria are met, does a different person that meets the same description need to submit the application in schedule 3? It would appear strange if someone who didn't feel that the criteria for authorisation were met was submitting the application. We believe that this point would benefit from greater clarity.

Paragraph 3 – Who may make application

The Law Centre refers to its response to paragraph 4 of schedule 1.

Paragraph 4 – Contents of application

The Law Centre has no further comment on this paragraph at the current time.

Paragraph 5 – Medical report

The Law Centre has no further comment on this paragraph at the current time.

Paragraph 6 – Care plan

The Law Centre has no further comment on this paragraph at the current time.

Paragraph 7 – Panel to consider application

The Law Centre refers to its response to paragraph 13 of schedule 1.

Paragraph 8 – Decision on application

The Law Centre has no further comment on this paragraph at the current time.

Paragraph 9 – Time limit for panel's decision, and duty to notify decision

The Law Centre refers to its response to paragraph 18 of schedule 1.

SCHEDULES 4 to 8: The Law Centre has no further comment to make on these schedules at the current time.

CHILDREN AND YOUNG PEOPLE

The Law Centre believes that children under 16 deserve substantial consideration of the issues of their mental capacity and decision-making rights. The formulation and delivery on clear law reform proposals on mental capacity for children under 16 remains an uncompleted delivery on the recommendations of the Bamford Review call for a comprehensive legislative framework[28] and of the priority in the Northern Ireland Executive Programme for Government 2011-15 on 'strengthening legal safeguards for people who lack capacity to take decisions for themselves'[29]. Both the Review call and Programme for Government commitment apply to children under 16.

The Law Centre is not yet convinced that the rights and best interests of children under 16 would be best served by their inclusion in the draft Mental Capacity Bill on the same basis as adults. The principle of presumption of capacity in clause 1 (1) cannot reasonably be applied to all children. In principle, it might be applicable to children younger than 16 as suggested by the Bamford Review[30], but as yet there is insufficient consensus on what might be an appropriate younger age to legislate on this. We would also have concerns about the use of the definitions of 'lack of capacity' and 'unable to make a decision' in clauses 2 and 4 for children under 16. Ultimately these clauses have their origin in case law with respect to adults who lack capacity and their meaning has been expanded upon in case law under the England and Wales Mental Capacity Act 2005 which does not apply to children under 16. Legislative provision for children under 16 should be developed with children under 16 specifically in mind. We do not think that appropriate legislation is most likely to be achieved by simply extending a law developed for adults. The Law Centre believes that a mental capacity law reform which applies to children under 16 would impact on the full range of specific legislation with respect to children of this age, including the Children Order 1995 which legislates in a substantial way for decisions to be made for children by those with parental responsibility. The Law Centre believes that such law reform must be approached in a comprehensive and evidence-based manner.

There are particularly complex issues in the area of the decision-making rights of children and young people with respect to healthcare, including mental health care.[31] The Law Centre therefore welcomes the proposed project to look at the emerging capacity of children in relation to health and welfare decisions and looks to an early start on this work by DHSSPS. Whilst the conclusion of such work depends in part on the final content of the Mental Capacity Bill when passed, the Law Centre believes that much work could still be done to progress this project in the interim and that additional dedicated resources should

[28] Available at: http://www.dhsspsni.gov.uk/legal-issue-comprehensive-framework.pdf
[29] Available at: http://www.northernireland.gov.uk/pfg-2011-2015-final-report.pdf
[30] 'A comprehensive legislative framework', para 5.49, p. 47.
[31] See for example the discussion in *Children and the Law: Medical Treatment*, (Dublin: Law Reform Commission, 2011). Available at: http://www.lawreform.ie/_fileupload/Reports/Children%20and%20the%20Law103%202011.pdf

be provided to ensure that there is no delay to the start of the proposed project. We see no good reason other than a Departmental decision not to commit resources as to why this project could not have already commenced.

The Law Centre wishes to stress that it is essential that amendments to the Mental Health Order as an interim measure respect the rights of children under 16 as laid out in the UN Convention on the Rights of the Child. This respect requires striking the right legal balance between (1) support for the rights of children to make decisions for themselves in keeping with their emerging capacity and (2) safeguards of their rights (including best interests). This balancing will require provision of lawful bases for the overriding of the decisions of children in particular circumstances which would not be appropriate for adults. There is much in the Bill that can be applied without problem to children under 16 who are subject to detention and compulsory treatment on a different basis. The Law Centre considers that any transitional legal arrangements relating to the capacity of children under 16 must provide at least the same level of safeguards as those provided to someone 16 or over subject to the same intervention. The amendments required to the Mental Health Order 1986 as an interim measure are thus substantial. The additional safeguards provided for children subject to the proposed transitional arrangements should include those provided to adults in the Mental Capacity Bill. As what is under consideration is detention for treatment, the safeguards must include:

- **Principles** –With the exception of the presumption of capacity in 1 (1), the other principles of the Mental Capacity Bill should apply. The 'best interests' principle of clause 1 (7) and clause 6 should be amended if necessary to ensure greater conformity with the UNCRC and the Children Order 1995, but a different principle entirely does not need to be drafted. The principle of support for decision-making in clause 1 (3) and clause 4 should apply as this will act to strengthen the voice of the child in decision-making with respect to him or her. It is also necessary as a general obligation of article 12 (3) of the UN Convention on the Rights of Persons with Disabilities. Article 12 (3) requires support for legal capacity which applies to children in an appropriate way. This requirement for support for legal capacity is not dependent on ultimate recognition of the capacity to make the decision at issue— this is also the approach taken in the Mental Capacity Bill. Support for the mental capacity of the child could in principle lead to a capacitous legal consent on the part of the child and thus avoid the need for a resort to compulsory powers or to an earlier end of their use.
- **Nominated person** – the nearest relative provisions of the Mental Health Order should be updated to match the nominated person provisions of the Mental Capacity Bill. The child under 16 should be able to initiate a challenge as to who is their nominated person.

- **Independent advocate** – all children subject to powers under the amended Mental Health Order should be provided with access to an appropriate independent advocate as a matter of course.
- **Trust authorisation panel** – Detention and compulsory treatment of under 16s should require authorisation by the Trust Panel. To ensure that the robustness of the authorisation process is the same for children under 16 as proposed under the Mental Capacity Bill, and to avoid the need to an additional 'joint' authorisation process, the authorisation of detention and of compulsory treatment of children under 16 should be two separate authorisations.
- **Rights of review** – rights of review by the Review Tribunal should match those contained in the Mental Capacity Bill. There should be a greater emphasis on automatic review for children under 16.
- **Restraint** – the use of restraint under an amended Mental Health Order should be subject to the same safeguards as proposed for its use under the Mental Capacity Bill.

Our proposal of the above as amendments for inclusion in the Mental Health Order is subject to our detailed comments on these provisions in the draft Bill.

We welcome the proposal to extend the disregard provision to include periods of detention for treatment and also welcome the strengthening of the safeguards around use of ECT. We welcome the creation of a duty on hospital managers in respect of age appropriate accommodation. Provisions are also necessary to ensure access to education for children under 16 subject to the amended Mental Health Order.

CRIMINAL JUSTICE POLICY

The Law Centre welcomes the approach taken by the Department of Justice in developing a capacity-based approach to healthcare decisions for those engaged with the criminal justice system. It is vital that this process moves in tandem with that of the core civil provisions and we remain hopeful that the proposals from the Department of Justice will be introduced as part of the Mental Capacity Bill when it enters the floor of the NI Assembly.

Taking a genuine capacity-based approach to the criminal justice system is no easy task, but we believe that the proposals contained within the consultation document form a good basis on which to develop the legislation. We believe that they are, in general in keeping with the ethos of the Bamford Review and radical in terms of their positive impact on human rights. As such, we are in full agreement with the three key positions as detailed in paragraph 4.11.

Legislative Model

The Law Centre strongly expresses a preference for as much of the legislative proposals to be contained within the main body of the Mental Capacity Bill as possible, rather than using it as a vehicle to amend existing criminal justice legislation. We believe that this sends a more positive message and is less stigmatising. For example, the use of place of safety powers should not be seen as a criminal justice measure, but a measure that is there for police to use to protect a vulnerable person who lacks capacity.

Interfaces

The Law Centre believes that the interface between the health and criminal justice systems should be as seamless as possible for those who require care and treatment and are subject to the criminal justice system. We believe that:

- The criteria used for compulsory interventions should be the same within both systems;
- The safeguards for those subject to compulsory interventions within both systems should be the same;
- That the healthcare setting in which treatment is delivered should, as much as possible, be the same;
- Decisions regarding treatment should be the primary responsibility of healthcare professionals; and
- No-one should receive compulsory treatment within the criminal justice system who wouldn't ordinarily be subject to such if their need for treatment had been discovered within a civil context.

Police and the Place of Safety

The Law Centre supports the retention of the police's power to remove a person from a public place to a place of safety and the proposal to amend this to embed a capacity based approach within it.

We are content with the proposal to construct this in an age-neutral way. Ultimately, given the scenarios that police officers find themselves using such a power, it is unrealistic to require them to make an accurate judgement call on age in difficult circumstances.

The Law Centre is reluctantly content that police stations are proposed to still be defined as places of safety and welcomes the provision that they should only be used if no other suitable place is available. It is well documented that police stations are not the appropriate place for people who are in mental distress to be taken to. We believe that the use of this power requires careful monitoring and that more work needs to be done to ensure that appropriate places of safety are available at all times. People who are subject to this power should be taken to a place of safety where appropriately trained medical professionals can make therapeutic interventions.

The implementation of the equivalent powers in England and Wales has been the focus of much attention by Parliament, health bodies and the police. Close attention should be provided at the outworking of this for improvement to be made in the Northern Irish context.

Courts

The Law Centre welcomes the use of a capacity-based approach to court decisions to remand for examination and treatment, to treatment-based disposals and to the determination that an individual is unfit to plead.

Remand

With regards to the use of remand powers, the Law Centre believes that examination should always precede a power for treatment. Indeed, for two medical practitioners to give evidence to the court that the criteria for making such a remand are met, they will have had to examine P. It is important that the legislation reflects this to ensure that appropriate examination periods are carried out.

Sentencing

The Law Centre supports the development of the In-patient direction order. Given the capacity-based approach, it will be no longer possible for it to be guaranteed that an individual would serve an entire in-patient order sentence in hospital and this appears to be an appropriate solution.

The Law Centre is content with the retention of the Restriction order.

We are also content with the replacement of the Guardianship order with the Community residence order. However we would, as in our response to clause 31, express our concern about the potential for P to be mandated to attend particular venues for training, education or occupation.

Unfitness to plead

The Law Centre is supportive of the adoption of the Law Commission's recommendation to update the test to determine unfitness to plead with one that better mirrors the capacity test in clause 2 of the Bill.

Given that the presumption of capacity to make decisions of a criminal matter is set at 10 years old in Northern Ireland, it is not inappropriate to use this test for unfitness to plead for those subject to a Youth Court. This would, of course, have to be amended if the age of criminal responsibility was raised.

In relation to the reference in paragraph 4.59 to the retention of "insanity cases", the Law Centre believes that any reference to "insanity" must be updated with more modern and less stigmatising language.

The 'Protection order' aims to manage circumstances which the Law Centre believes have the potential to arise. It may be highly unlikely that someone who meets the criteria to be determined unfit to plead would retain the capacity to make health and welfare decisions, but because of the decision-specific nature of capacity, it cannot be presumed to be the case that no such situation would arise in practice. The Law Centre believes that the Protection order may be the only possible disposal in such a rare circumstance arising. It will be essential for use of this order to be closely monitored and its impact on both P and those it aims to protect should be rigorously assessed. It is important that a Protection order can only be imposed for a limited period of time and that its use be subject to regular independent review.

The Law Centre has no further comment at this time on the proposals for the use of the in-patient order, the supervision and treatment order and the community residence order for those unfit to plead.

Transfer of prisoners

Embedding a capacity-based approach to the transfer of prisoners is arguably the most straightforward part of the criminal justice system to do so in. The Law Centre is so far content with the Department of Justice's proposals in this regard.

The Review Process

The Law Centre believes that any individual, who is engaged with the criminal justice system, lacks capacity and is subject to compulsory health or welfare interventions should be entitled to the same rights of review as someone in a civil setting. The right to refer a case to the Review Tribunal should mirror the equivalent in a civil setting, taking account of the differences regarding deprivation of liberty.

The Law Centre does not believe that it is appropriate for the Review Tribunal to have the power to replace an in-patient order with a protection order. Given the potential human rights implication of the protection order, the Law Centre believes that power should rest with the Courts.

Additional comments

Safeguards

Aside from the role of the Review Tribunal, the consultation document is silent on access to other safeguards available to P in a civil setting in certain circumstances, for example the appointment of a nominated person, the instruction of an independent advocate and the need to receive HSC Trust Panel authorisation. The Law Centre believes that these safeguards should be identical for those receiving compulsory treatment within the criminal justice system.

Support

The Law Centre believes that the support principle should be as embedded within the capacity approach in the criminal justice system as the civil system. This will not be without its challenges. Consideration has to be given to how an individual's decision-making capacity can be maximised by support as part of, for example, a decision of unfitness to plead or on court disposal.

Protection from liability

The draft civil provisions of the Bill are currently drafted in a way that puts the onus on "D" to take certain actions in order to protect him/her from liability, if D is proposing to make a decision on P's behalf. In contrast, the proposals bestowed on the police are ones of powers. Further consideration should be given to how these two approaches marry within the Bill.

EQUALITY IMPACT ASSESSMENTS

The Law centre is broadly content with the Equality Impact Assessments from both DHSSPS and DoJ. However, within the DHSSPS Assessment, we believe that the Bill will have a positive impact, particularly with regards to those with disabilities and older people, rather than having “no differential impact”. One potential negative impact for people with disabilities is that it could create a ground for discrimination on the basis of having been subject to the provisions of the Mental Capacity Act. We recommend a potential mitigation to this in the “General comments” section of our response to Part 1 of the Bill.