



# **Consultation on the Child Care Act 1991**

**Mental Health Commission**

**02 October 2020**

## **Introduction**

The Mental Health Commission (MHC) welcomes the opportunity to provide input into the high-level stakeholder consultation by the Department of Children and Youth Affairs' (the "DCYA) on its initial proposals to amend the Child Care Act 1991. The issues raised in the consultation document are of relevance to the MHC given its functions under the Mental Health Acts 2001-2018 (2001 Act) and the MHC's Strategic Plan for 2019-2022.

The MHC is an independent statutory body established in April 2002 under the provisions of the 2001 Act. The principal functions of the MHC are to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres. The remit of the MHC was extended by way of the Assisted Decision Making Capacity Act 2015. The 2015 Act provides for the establishment of the Decision Support Service (the "DSS") within the MHC. The DSS will support decision-making by and for adults with capacity difficulties and will regulate individuals who are providing support to people with capacity difficulties.

## Background

Section 25 of the 2001 Act specifically sets out the position in relation to the involuntary admission of children to approved centres.<sup>1</sup>

The MHC closely monitors the admission of children and young people<sup>2</sup> (under the age of 18) (collectively referred to as children in this document) to approved centres. The total number of admissions of children to approved centres in 2019 was 497. This compares with a total of 408 admissions in 2018 and 439 in 2017.<sup>3</sup>

The MHC has been very clear in its views that children should not be admitted to adult units save in exceptional circumstances. The reason for the majority of admissions to adult units are due to an immediate risk to the child or others because of the lack of a bed in a specialist CAMHS unit.

There are only CAMHS units in **three counties** for the entire country. One of these units does not take out-of-hours admission.<sup>4</sup> The result is that children in crisis are left with the unacceptable 'choice' between: an emergency department in a general hospital or children's hospital or an adult approved centre.<sup>5</sup>

In 2019, there were 54 child admissions to 15 adult units this compares with 84 admissions to 18 adult units in 2018. This is in keeping with a trend where child admissions to adult units have fallen year-on-year for the past 10 years. While the MHC welcomes this trend, the question does arise as to where these children are being treated. It is very important that a child's first introduction to mental health care should not be through a service or building that is not specifically equipped to support their needs.<sup>6</sup>

The MHC is currently in the process of providing input into the Heads of Bill to amend the Mental Health Act 2001 prepared by the Department of Health. An entirely new Part relating to children is being drafted to go into the 2001 Act. The MHC spent considerable time reviewing and considering this new Part and made a separate submission on this to the Department of Health in May 2020.

The MHC as the regulator of mental health services in Ireland is concerned about the lack of oversight it currently has in relation to section 25 applications. Therefore, the MHC recommended in its Submission to the DOH, that if an application is made to involuntarily detain a child that notice of the application should be given to the MHC, together with copies of all orders made, and that the MHC would be entitled to make representations where it considers appropriate. The involvement of the MHC might extend for example to the court asking the Inspector of Mental Health Services or one of her team to review the approved centre where it is proposed to detain the child and confirm if it is appropriate to do so.

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<sup>1</sup> Code of Practice Relating to Admission of Children under the Mental Health Act 2001  
<[https://www.mhcirl.ie/File/IRs/COP\\_Admission\\_2006.pdf](https://www.mhcirl.ie/File/IRs/COP_Admission_2006.pdf)>

<sup>2</sup> Children and young people (under the age of 18) shall collectively be referred to as children in this document.

<sup>3</sup> Mental Health Commission Annual Report 2019. <[https://www.mhcirl.ie/File/MHCAnnualReport\\_2019.pdf](https://www.mhcirl.ie/File/MHCAnnualReport_2019.pdf)>

<sup>4</sup> Merlin Park and Linn Dara do accept out of hours referrals.

<sup>5</sup> Mental Health Commission Annual Report 2019. <[https://www.mhcirl.ie/File/MHCAnnualReport\\_2019.pdf](https://www.mhcirl.ie/File/MHCAnnualReport_2019.pdf)>

<sup>6</sup> Mental Health Commission Annual Report 2017. <[https://www.mhcirl.ie/File/2017\\_AR\\_Incl\\_OIMS.pdf](https://www.mhcirl.ie/File/2017_AR_Incl_OIMS.pdf)>

The Mental Health Commission has committed to answering the following proposals that are relevant to the work of the Commission:

1. Guiding Principles
2. Interagency coordination and collaboration
3. Jurisdiction - operation of the courts and hearing of proceedings
4. Voice of the Child

## **1. Guiding Principles**

*The amended Child Care Act will contain explicit guiding principles. In all decisions under the Act the best interests of the child will be considered and their views will be ascertained and given due weight. Parental participation will be facilitated in all decisions concerning the care and protection of children as far as practicable and attempts will be made to safeguard the welfare of children within the family, including the wider family when appropriate. In cases of conflict between principles, the best interest will always be paramount.*

### **Response to the above proposal:**

As stated above the MHC, made Submissions in March and May 2020 to the Department of Health in relation to the Heads of Bill to amend the 2001 Act. In the Heads of Bill, a new section has been inserted on “guiding principles” to align with the Assisted Decision Making Capacity Act 2015 and the various European Conventions relating to Adults and Children (Convention on the Rights of the Child). The guiding principles in each of the adult and children sections differ. The guiding principles shall be a core part of the amended Act / Heads of Bill. However, it should be noted that further work requires to be done by the Department of Health in relation to the draft guiding principles for children.

The MHC recommends that there be guiding principles into which the concept of best interests and welfare requirements be incorporated. The MHC would be concerned about having competing concepts as referred to in your proposal above. This issue forms part of the MHC’s submission to the Department of Health. The MHC would query the legal basis for such competing concepts in the one piece of legislation and that is not having regard to the practical difficulties, which it would pose for service users and services providers.

Furthermore, the legal basis for including wider family involvement needs to be considered and clearly addressed in terms of data privacy and patient confidentiality.

The MHC recommends that the DYCA and the Department of Health liaise with each other in relation to the drafting of agreed guiding principles, which would apply across both sets of legislation, for the benefit of services users and services providers. The MHC would welcome an opportunity to discuss this further with the DCYA and the Department of Health.

The MHC has advised that that the guiding principles must be readily understood by all persons using and working in the mental health service. The MHC has proposed that Guides be issued to assist all those using the mental health services prior to the commencement of the revised Mental Health Act. The Guides shall be drafted with the input of children, service users, advocacy groups and other groups who represent minorities.

## **2. Interagency coordination and collaboration**

*CYPSCs will assess the needs of children in their local area on a regular basis to inform planning and co-ordination of services inclusive of both universal and targeted measures relevant to the 1991 Act. Utilising relevant sub-groups, they will liaise with specific delivery and co-ordination structures to monitor the local co-ordination and delivery of multi-agency support to vulnerable children. They will provide a report on their assessment to the national oversight body e.g. Children First IDG. The national body will also liaise with Departments and key agencies in collating information on relevant services. It will also provide a forum for discussing services that promote the welfare of vulnerable children under the Act and co-operation among them. The information and discussion will inform the report on the review of services under the revised Section 8 that will be published annually. Furthermore, Ministerial guidance will support the implementation of the statutory duty concerning inter-agency co-operation and the compilation of the Section 8 reports (e.g. list of priority groups). Further independent reviews of co-operation among relevant services may also be commissioned by the Minister.*

### **Response the above proposal:**

The MHC is a strong advocate of inter-agency co-operation and collaboration. In that regard, the MHC earlier this year sought a meeting with the DCYA and the Department of Health to discuss a number of issues relating to the Heads of Bill to amend the 2001 Act relating to children.

State agencies should not be operating in silos, particularly where they are dealing with the health and well-being of children.

The MHC works collaboratively with a number of state agencies. A few examples of this are -

1. HIQA - National Safeguarding Standards
2. Court Services – Wards of Courts
3. HSE – Training / Establishment of the Decision Support Service
4. National Disability Service – Establishment of the Decision Support Service

The MHC has also established a Stakeholder Initiative whereby stakeholders come and meet the Commission, to date this has included –

1. Mental Health Reform
2. SpunOut
3. Cairde
4. Individual persons who have been involuntarily detained

We are due to meet –

5. The Irish Hospice Foundation
6. Bodywhys
7. Pavee Point

In terms of the DCYA's proposal –

1. The Department is considering replacing Child Care Advisory Committees with Children and Young People Services Committees (CYPSCs<sup>7</sup>) in the legislation.

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<sup>7</sup> See <https://www.cypsc.ie/> for further information

2. All the relevant services are represented on CYPSCs and they are strategically well-positioned to link together more specific co-ordination mechanisms (e.g. Child and Family Support Networks, Children First Tusla-AGS or Tusla-HSE structures).

MHC – Notes the above two proposals.

3. It is also proposed that a national strategic oversight group should also be incorporated in the legislation. The Department's preference would be to utilise an existing national structure such as the Children First Inter-Departmental Group or a Better Outcomes, Brighter Futures structures on which all Departments and key agencies are represented, rather than to create a new national governance structure.

MHC – The MHC would welcome such a Group and the opportunity to contribute to such a Group given the increase in the need for and focus on mental health services for children. It is important that there be one agreed Vision for children.

4. Within this overall context, consideration is being given to including a statutory duty on all relevant services to work together in the planning and delivery of services which promote the welfare and well-being of vulnerable children under the Act. Details of what such a duty would entail and the list of relevant agencies and services involved would be most appropriately specified in Ministerial guidance rather than in the legislation itself.

MHC – An express duty in legislation would be welcomed. If this is not possible, it could perhaps be incorporated into the 2016 Code of Practice for the Governance of State Agencies and the Corporate Governance Standard for Civil Service.

### **3. Jurisdiction – operation of the courts and hearing of proceedings**

*The establishment of a dedicated Family Court Division will help to address the current difficulties in the court system around specialisation, judicial variance and resources. Child care cases will be heard separately, with specialised judges presiding over cases. The reform will also provide the opportunity to introduce concurrent jurisdiction between District and Circuit level courts so that complex cases can be transferred to the latter in a similar manner to neighbouring jurisdictions. New enabling provisions in combination with a detailed Practice Direction concerning case management (including the time frame) will facilitate effective case preparation and management and the use of ADR processes where appropriate. A nationwide case management system and ancillary services will support the implementation of those measures. The court will have enhanced oversight over the procurement of expert reports, and the appointment of expert witnesses (e.g standards required) will be regulated through a Practice Direction combined with the future development of panels of experts.*

#### **Response the above proposal:**

The MHC fully supports the proposal above for a dedicated Family Court with all of the relevant supports required. Currently, sensitive cases are being dealt with in general District / Circuit Lists which is not appropriate and can be both difficult and intimidating for both the parents and children involved in those cases.

Reference is made to the appointment of experts. The MHC would agree that that this needs to be clearer and more transparent. The Courts should have a section on its website in relation to the process for appointment, the experts' names and the terms and conditions on which they are engaged should be publically available. The MHC appreciates that some of these experts may come from outside of Ireland but this should not prevent them complying with the above process. The procurement process would be subject to the government guidelines and the Office of Government Procurement, who in the MHC's experience work very well with State Agencies to assist on issues relating to procurement.

The MHC recommends that the child and specifically 16/17 years olds would be more actively involved in the cases relating to them. A dedicated Family Court should more easily facilitate this involvement.

The MHC in its May 2020 Submission to the DOH, as referred to above, strongly recommended the participation of the child in all proceedings. During the current health crisis, the courts have started using video links to allow parties to participate in cases and to ensure that cases are heard. The MHC is of the opinion that these learnings should be taken and adopted as part of future practice. Video links from approved centres or the other facilities would be an excellent way of having a child participate in the proceedings while not having to attend court, which as stated can be intimidating for a child. Furthermore, most children are adept with using technology so that this will not be a barrier and in fact might be welcomed. All of this should ensure that the child is informed and their voice is heard.

The MHC strongly recommends that each child should be appointed a legal representative from the beginning of an involuntary detention process to its conclusion. The MHC is of the view that this is the best way to ensure that the voice of the child is heard. The MHC's current legal aid scheme deals only with adult involuntary patients. The MHC is proposing to extend its legal aid scheme to deal with the appointment of legal representatives for children. Such appointments would also provide continuity when a child turns 18 and is dealt with under the adult Parts of the 2001 Act.



Similarly, the MHC recommends that children in relation to the childcare legislation should all be appointed legal representatives. The MHC has previously made its position clear on this matter in correspondence to the Department of Health, which has been forwarded to the DCYA and in a joint meeting with the Department of Health / the DCYA and the MHC earlier this year. Legal representation should be appointed to the child not the Guardian ad Litem, save in exceptional circumstances.

#### **4. Voice of the child**

*Children will be made aware of their options to give their views in care proceedings. The future Family Court reform will support the creation of child and family friendly venues and increased use of videolink and online technology. Allowing a child to retain their GAL when becoming a party to proceedings will have removed an important barrier to making a child a party (S25). Training of and guidelines in combination with specialist judges and panels of lawyers will facilitate the greater use of S25 and judicial interviews. The potential to separate ancillary issues from threshold issues during proceedings may also lead to an increase in the number of children being made a party to the proceedings as this may facilitate their increased engagement and participation in respect of issues such as care planning and access. Hearsay evidence will be admitted without having to conduct separate hearings, with the judge determining how much weight he/she attaches to it.*

#### **Response to the above proposal:**

The MHC believes that there are a number of ways to ensure that the voice of a child is heard –

1. First and foremost, all those engaging with children should listen to what they have to say – their views and opinions.
2. The MHC notes the importance of the provision of information to children / their parents and the manner in which that information is communicated. It must be in a form which addresses all of the relevant issues for the child and is easily understood by all. This extends to translating information leaflets, using sign language and braille.
3. The MHC supports greater involvement of the advocacy services for children in schools, community services and residential facilities. These should be properly funded and resourced. The MHC acknowledges that there are advocacy services but they appear to be focused on specific sections such as persons with disabilities, when there is a wider cross-sectional societal need for such services.

Where there are court proceedings -

4. The MHC recommends that the voice of the child may be heard through the appointment of a legal representative from the beginning of any such proceedings to their conclusion. As noted above, the MHC's current legal aid scheme deals only with adult involuntary patients. The MHC has proposed the possibility of extending its legal aid scheme to deal with the appointment of legal representatives for children. Such appointments would also provide continuity when a child turns 18 and is dealt with under the adult Parts of the 2001 Act.
5. The MHC fully supports the appointment of a Guardian Ad Litem
6. The MHC, strongly recommends the participation of the child in all proceedings. During the current health crisis, the courts have started using video links to allow parties to participate in cases and to ensure that cases are heard. The MHC is of the opinion that these learnings should be taken and adopted as part of future practice. Video links from approved centres or the facilities would be an excellent way of having a child participate in the proceedings while not having to attend court, which as stated can be intimidating for a child.

The MHC recommends that the DYCA and the Department of Health need to distinguish the position as it relates to those under 16 and then those aged 16 years and older and how the issues for each are required to be addressed.