



General Scheme of the Mental Health (Amendment) Bill 2021

**Observations by the
Ombudsman for Children's Office**

December 2021

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1. Introduction

The Ombudsman for Children's Office has previously expressed serious concerns about the statutory framework provided for under the Mental Health Act 2001 (2001 Act) in respect of children as well as about delays in progressing corresponding legislative reforms in this area.¹ Accordingly, the OCO welcomes the publication of the General Scheme of the Mental Health (Amendment) Bill 2021 (2021 General Scheme)². This General Scheme is currently undergoing pre-legislative scrutiny by the Oireachtas Sub-Committee on Mental Health.³

The OCO is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002, as amended (2002 Act). The OCO has two overall statutory functions:

- to promote the rights and welfare of children up to 18 years of age
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and hospitals that have, or may have, adversely affected a child.

The OCO's observations on the 2021 General Scheme focus on Part 8, which concerns the admission of children to approved inpatient facilities. We have prepared these observations pursuant to Section 7(4) of the 2002 Act, which provides for the Ombudsman for Children to advise on any matter concerning the rights and welfare of children, including proposals for legislation.

Prior to publication of the 2021 General Scheme, the OCO was asked by the Department of Health (DoH) on two occasions to provide our observations on draft Heads of Part 8. We provided written observations to the DoH in December 2020 and again in April 2021.

We have prepared our current observations on the 2021 General Scheme having regard to:

- the OCO's statutory function to promote the rights and welfare of children
- our work on matters relating to children's mental health, including our direct engagement with children receiving inpatient care and treatment for their mental health⁴
- our engagement with the DoH on previous draft Heads of Part 8 in advance of the publication of the 2021 General Scheme
- relevant international standards to which Ireland is a ratifying State Party, in particular the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Rights of Persons with Disabilities (CRPD).⁵

¹ Ombudsman for Children's Office, ['Take My Hand': Young People's Experiences of Mental Health Services](#) (2018), p.27; Ombudsman for Children's Office, [Submission to the UN Committee on the Rights of the Child on the List of Issues Prior to Reporting for the fourth periodic examination of Ireland](#) (2020), p.3 and p.21; Ombudsman for Children's Office, [Submission to the 39th session of the Universal Period Review Working Group](#), (2021), p.6.

² Department of Health, ['Ministers Donnelly and Butler welcome government approval of the heads of bill to amend the Mental Health Act'](#), (2021), 13 July 2021.

³ Houses of the Oireachtas, ['Joint Sub-Committee on Mental Health debate: General Scheme of the Mental Health \(Amendment\) Bill 2021: Department of Health'](#), (2021), 02 November 2021.

⁴ Ombudsman for Children's Office, ['Take My Hand': Young People's Experiences of Mental Health Services](#) (2018).

⁵ United Nations, [UN Convention on the Rights of the Child](#) (1989) and United Nations, [UN Convention on the Rights of Persons with Disabilities](#) (2006).

In preparing the observations set out below, the OCO has also been mindful:

- of views expressed by a range of stakeholders about provisions under the 2001 Act concerning children that require reform
- that the DoH's work to prepare the 2021 General Scheme has been informed by recommendations made by the Expert Group on the Review of the Mental Health Act 2001 (Expert Group)⁶ and that the DoH sought the views of several other stakeholders when it was preparing the Heads, namely the Mental Health Commission (MHC), the Health Service Executive (HSE), the College of Psychiatrists of Ireland and the Department of Justice.⁷
- that the DoH and the Department of Children, Disability, Equality, Integration and Youth (DCEDIY) have been working in collaboration on various aspects of Part 8.⁸

Following its most recent examination of Ireland's implementation of its obligations to children under the CRC, the UN Committee on the Rights of the Child (Committee) recommended in 2016 that Ireland "[e]nact legislation that explicitly and comprehensively provides for children's consent to and refusal of medical treatment, and ensure that the legislation is in line with the objectives of the Convention and encompass clear recognition of the evolving capacities of children".⁹ The Committee's expectation that the State will amend the 2001 Act in this regard is evident in the List of Issues Prior to Reporting (LOIPR), which the Committee published in respect of Ireland in November 2020.¹⁰

The Committee has identified legislation as a key measure to implement children's rights.¹¹ From the OCO's perspective, the 2021 General Scheme presents a significant opportunity to legislate for a child rights-based approach to decision-making in respect of children who may require inpatient care and treatment for their mental health. It is crucial, therefore, that the provisions made are fit for purpose in this regard.

As the OCO has indicated on previous occasions,¹² we support the proposal to include a dedicated part (Part 8) focused on provisions affecting children under 18 years of age. Having reviewed the Heads of Part 8 of the 2021 General Scheme, we are concerned, however, that a number of the proposals do not have appropriate regard to children's rights and evolving capacities, and do not provide adequately for a child-centred, rights-based approach regarding children's admission to, and treatment in, approved inpatient facilities. Accordingly, the purpose of the observations set out

⁶ Department of Health et al, [Report of the Expert Group on the Review of the Mental Health Act 2001](#) (2015).

⁷ Department of Health, '[Ministers Donnelly and Butler welcome government approval of the heads of bill to amend the Mental Health Act](#)' (2021), 13 July 2021.

⁸ Houses of the Oireachtas, '[Joint Sub-Committee on Mental Health debate: General Scheme of the Mental Health \(Amendment\) Bill 2021: Department of Health](#)' (2021), 02 November 2021.

⁹ UN Committee on the Rights of the Child, [Concluding observations on the combined third and fourth periodic reports of Ireland](#) (2016), CRC/C/IRL/CO/3-4, para. 54(a).

¹⁰ UN Committee on the Rights of the Child, [List of issues prior to submission of the combined fifth and sixth reports of Ireland](#) (2020), CRC/C/IRL/QPR/5-6, para. 25(a).

¹¹ UN Committee on the Rights of the Child, [General Comment No. 5 \(2003\), General Measures of Implementation of the Convention on the Rights of the Child](#).

¹² Ombudsman for Children's Office, '[Take My Hand](#)': Young People's Experiences of Mental Health Services (2018), p.27; Ombudsman for Children's Office, [Submission to the Oireachtas Joint Committee on Health on the Mental Health \(Amendment\) Bill 2016](#) (2019).

below is to highlight a number of issues that we believe are among the issues that require further consideration in the interests of ensuring that the provisions made in respect of children recognise children's status as subjects of rights and uphold children's rights.

2. Guiding principles to apply in respect of children

Head 104, Section 84 sets out guiding principles that will apply in respect of children. Further to information provided to the OCO by the DoH, the OCO understands and welcomes that these guiding principles are intended to guide all decisions made in respect of the admission, care and treatment of children under Part 8 and, as such, that these proposed principles will guide the decisions made by mental health care professionals and the courts under Part 8.

The OCO also welcomes the provision made under the guiding principles for the best interests of the child to be treated as the primary consideration (Head 104, Section 84(1)(a)), which is in keeping with a recommendation that we made to the DoH in our observations on draft Heads of Part 8. We suggest that consideration should be given to making appropriate provision for the factors that need to inform an assessment and determination of what is in the best interests of the child, taking into account relevant international human rights standards (Article 3 of the CRC and Article 7(3) of the CRPD). In this regard, it is worth recalling that there is precedent for making such provision in Ireland's domestic law.¹³

While the proposed guiding principles under Head 104 have the potential to promote a more child-centred approach to decisions affecting children under 18 years, the OCO is of the view that the current provisions need to be strengthened. We believe that further attention needs to be given to the relationship between the proposed guiding principles set out under Head 104 and to how the provisions made in respect of these principles can guide their appropriate application in practice. In this regard, consideration should be given to relevant rights-based guidance, including guidance from the UN Committee regarding the interpretation and implementation of Article 3 (best interests of the child), Article 12 (respect for the views of the child) and Article 24 (children's right to the highest attainable standard of health) of the CRC.¹⁴

Moreover, in the interests of legislative coherence and clarity, we encourage further attention to be given to the provisions made under Head 104, Section 84(1)(c) in relation to respect for the views of the child. Specifically:

- Our understanding is that the guiding principles are intended to guide all decisions made in respect of the admission, care and treatment of children under Part 8. In this regard, we note that, as at Section 84(1), the provisions made under Sections 84(1)(c)(i) and 84(1)(c)(ii) make no explicit reference to 'admission'. In the interests of legislative clarity, we suggest

¹³ See [Part V](#) of the Guardianship of Infants Act 1964, as amended, and [Section 19](#) of the Adoption Act 2010, as amended.

¹⁴ UN Committee on the Rights of the Child, General Comment No.12 (2009) [on the right of the child to be heard](#); General Comment No. 14 (2013) [on the right of the child to have his or her best interests taken as a primary consideration \(art.3, para.1\)](#); and General Comment No. 15 (2013) [on the right of the child to the enjoyment of the highest attainable standard of health \(art. 24 \)](#).

that the inclusion of explicit references to 'admission' under these provisions merits consideration.

- Section 84(1)(c)(i) refers to 'care and treatment' of the child while Section 84(1)(c)(ii) refers to 'diagnosis and treatment' of the child. It is unclear why a different form of words is being used in respect of children aged 16 and over and children aged under 16. Furthermore, we note that Section 84(1) refers to 'care or treatment' of a child. It is worth considering whether the same form of words should be applied consistently in this regard – for example, and taking into account the previous point, 'admission, care and treatment'.
- Section 84(1)(c)(ii) provides for a child under the age of 16 who is capable of forming their own views to be consulted and to have due weight given to their views. However, Part 8 of the General Scheme appears to be silent on the matter of who will assess and determine whether a child under 16 is capable of forming their own views, and how this will be done. Part 8 also appears to be silent in relation to what measures will be taken to ensure that due weight is given to the child's views, including with regard to their proposed admission. In this regard, the OCO notes that references made to children's entitlement to engage an advocate appear to be limited to circumstances following their admission to an approved inpatient facility.
- Section 84(1)(c)(ii) provides for a child under the age of 16 who is capable of forming their own views to be consulted 'where practicable'. The OCO is of the view that 'where practicable' should be deleted.
- Further attention needs to be given to how the provision made under Section 84(1)(c)(ii) as regards giving 'due weight' to the views, will and preferences of a child under 16 interacts with the attendant provision made in relation to having 'regard also to' the views, will and preferences of the child's parent(s) or person(s) acting in loco parentis.

In addition to further examining the current provisions made in relation to the guiding principles, we also encourage consideration to be given to adding to these principles. The OCO previously made the following observations to the DoH in the context of advising on draft Heads of the Bill:

- The CRC contains four general principles, which are to be understood as vital to the implementation of children's other rights under the CRC. While two of these principles (best interests of the child and respect for the views of the child) are partially reflected under Head 104 of the General Scheme, no provision is made in respect of the two other general principles, namely, children's right to non-discrimination (Article 2, CRC) and children's right to life, survival and development (Article 6, CRC). The OCO is of the view that attention might usefully be given to how these two additional core children's rights principles might be incorporated into the list of guiding principles under Head 104.
- Having regard to Article 37(b) of the CRC, and taking into account that the proposed principles will inform decision-making about the involuntary admission of children, the OCO suggests that consideration should be given to making a provision under the guiding principles at Head 104 that admission will be a measure of last resort and for the shortest appropriate period of time.
- Timely decision-making is a key component of a child-centred approach to actions and decisions affecting children due to the negative impact that delay can have on children and their enjoyment of their right to the highest attainable standard of health (Article 24, CRC).

Accordingly, the OCO suggests that appropriate provision could be made under Head 104 and/or under relevant Heads such that there is a requirement for all decisions and actions impacting on children to be prioritised and taken in the shortest period of time possible.

The OCO notes that, further to our engagement, the DoH did make provision in previous draft Heads of the Bill in respect of children's right to non-discrimination, children's right to life, survival and development, and ensuring that decisions and actions concerning the care and treatment of the child are carried out in a timely manner. We also note that these provisions did not carry over into Head 104 of the 2021 General Scheme.

3. Consent

The OCO welcomes the attention given under the 2021 General Scheme to strengthening provisions for children's right to be heard in decisions regarding their admission to, and treatment in, approved inpatient facilities. The OCO also welcomes the provisions made for children aged 16 years and older to be able to consent to their admission (Head 106, Section 86), including the presumption that any child aged 16 years or older has capacity to consent to or refuse admission to an approved inpatient facility (Head 106, Section 86(1)). These provisions are in keeping with recommendations we made in our observations to the DoH in respect of earlier draft Heads of the Bill.

The OCO is concerned, however, about some of the proposed provisions made, particularly the provisions regarding children under 16 years of age, as set out under Head 105, Section 85. The OCO acknowledges that the provisions made in respect of children under 16 years are in keeping with a recommendation of the Expert Group in 2015 that there should be no automatic presumption of capacity for children under the age of 16. The OCO has no immediate difficulty with the proposal that there should be no automatic presumption of capacity in respect of children under 16. Furthermore, we support the involvement of a child's parent(s) and guardian(s) in decision-making regarding the child's prospective admission to – and treatment in – an approved inpatient facility. However, having regard to Article 5 of the CRC and Articles 3(h), 7(3) and 12 of the CRPD, the OCO is concerned that the use of this age-based approach in respect of children under 16 does not have sufficient regard to the evolving capacities of children.

We favour the more nuanced approach previously proposed by the Law Reform Commission (LRC) in its 2011 report¹⁵ and encourage consideration to be given to the use of this approach, including under Heads 105, 109 and 111 of the 2021 General Scheme. In this regard, we suggest that provision could be made that a child under 16 years may give or refuse consent to their proposed admission, care and/or treatment in circumstances where it is established that the child has the maturity and understanding to appreciate the nature and consequences of the specific decision. In our view, such an approach would be more aligned with a child rights-based approach and with relevant provisions of the CRC and the CRPD.

¹⁵ Law Reform Commission, [Child and the Law: Medical Treatment \(2011\)](#), p.143.

4. 'Intermediate' and 'voluntary' persons

The OCO notes that the definition of 'intermediate person' under Head 3 of the 2021 General Scheme now includes children aged 16 or over: in the case of such children, an intermediate person "means a child who lacks capacity to consent to his or her admission and has been admitted with the consent of his or her parents, or either of them, or person or persons acting in loco parentis."

We welcome this provision of a third category of admission for children aged 16 and over who lack capacity, but who do not fulfil the criteria for involuntary detention (Head 107, Section 87). In this regard, we note that the DoH has stated that the Assisted Decision-Making (Capacity) Act 2015 (2015 Act) will apply for the purposes of conducting capacity assessments under the Act.¹⁶ However, the 2015 Act does not apply to children under the age of 18. While we note that Head 107, Section 87(17) provides that the MHC shall prepare and publish a code in relation to capacity assessments for children, it is unclear what form these assessments will take and whether, and to what extent, they will draw on the 2015 Act.

The proposed definition of 'voluntary person' in respect of children under 16 set out under Head 3 and the corresponding proposals in relation to voluntary admissions set out under Head 105, Section 85 are concerning. Specifically, the OCO has significant concerns about the proposed scope of 'voluntary' admissions in respect of children under 16, whereby the admission of a child under 16 will be deemed 'voluntary' on the basis of the consent of the child's parent(s) or person(s) acting in loco parentis. As the LRC has noted previously, for an admission to be 'voluntary' it must involve an element of voluntariness on the part of the person concerned.¹⁷ Accordingly, the idea that the admission of a child under 16 on the basis of parental consent constitutes a 'voluntary' admission appears to the OCO to be fundamentally flawed. Furthermore, we are of the view that it fails to give appropriate recognition to the child's status as a subject of rights and is at odds with the provisions of relevant international standards, including Articles 2 and 12 of the CRC and Articles 5 and 7 of the CRPD. The difficulty with this approach from a children's rights perspective is further amplified by subsequent provisions in the 2021 General Scheme, including:

- It is proposed that children under 16 admitted solely on the basis of parental consent would be permitted to leave an approved inpatient facility at any time only "with the agreement" of their parent(s), or either of them, or person(s) acting in loco parentis (Head 105, Section 85);
- In circumstances where a second consultant psychiatrist deems that a child under 16 admitted as a 'voluntary person' does not fulfil the criteria for detention, it is proposed that the child will be informed of their right to leave or, alternatively, to stay as a 'voluntary person' "with the consent" of their parent(s) or person(s) acting in loco parentis (Head 113, Section 93(2)(a)).

The OCO notes that a number of stakeholders who have previously recommended provision for a category of 'informal' or 'intermediate' persons for children admitted on the basis of parental

¹⁶ Department of Health, [Update on reform of the Mental Health Act: Report of the Public Consultation Process](#) (2021), p.20.

¹⁷ Law Reform Commission, [Children and the Law: Medical Treatment](#) (2011), p.119.

consent did not propose that this category should be limited to children aged 16 and over.¹⁸ The OCO is of the view that serious consideration needs to be given to applying the category of intermediate person to children under 16 who are admitted on the basis of parental consent.

As regards admissions that are voluntary in the true sense of the term ‘voluntary’, and in light of stakeholders’ concerns about limited safeguards available to children under the 2001 Act following their voluntary admission, the OCO welcomes that certain additional safeguards are proposed under the 2021 General Scheme in respect of children who are ‘voluntary persons’. These include the safeguards outlined under Head 111, Section 91, which concerns the provision of information to children admitted to an approved inpatient facility, and the provision made under Head 112 that every child admitted must have an individual care plan.

5. Admission to adult facilities

The practice of admitting children to adult inpatient facilities is a matter of longstanding and grave concern to the OCO, and we are firmly of the view that the necessary resources must be put in place as a matter of priority to bring this practice to an end.¹⁹ In this regard, the OCO notes that the MHC’s 2020 annual report records that 27 children were admitted to 9 adult facilities in 2020.²⁰ In less than five of these cases, the children concerned were 15 years of age and there were no cases of children under 15 being admitted to adult facilities. Furthermore, of the 39 involuntary admissions orders made by the District Court in respect of children in 2020, two orders involved admission of a child to an adult facility.²¹

The OCO welcomes that the proposed guiding principles set out under Head 104 include the principle that children should be cared for and treated in an age-appropriate environment (Head 104, Section 84(1)(d)). That this provision is accompanied by the clause ‘in so far as practicable’, and that the Heads permit the admission of children to adult inpatient facilities, are a symptom of a systemic failure on the part of the State over many years to establish and maintain sufficient appropriate child and adolescent mental health services and supports.

Allowing that there does not appear to be any immediate prospect that the admission of children to adult inpatient facilities will cease on a permanent basis, the OCO welcomes the provision made under Head 128, Section 108(3) that the MHC must make rules on the admission of a child to an adult approved facility and that any decisions to admit children to such facilities must be in line with these rules as well as the guiding principles set out under Section 84.

In relation to the establishment of these rules, we are of the view that due regard needs to be given to relevant international standards and guidance, including guidance under the CRC and the CRPD as

¹⁸ G. Shannon, [Fourth Report of the Special Rapporteur on Child Protection](#) (2010), p.67; Law Reform Commission, [Children and the Law: Medical Treatment](#) (2011), p.145f. See also, National Disability Authority, [Submission to the Review of the Mental Health Act 2001](#) (2011).

¹⁹ Ombudsman for Children’s Office, [Submission to the UN Committee on the Rights of the Child on the List of Issues Prior to Reporting for the fourth periodic examination of Ireland](#) (2020), p.21.

²⁰ Mental Health Commission, [annual report 2020](#) (2021) p.30

²¹ Mental Health Commission, [annual report 2020](#) (2021) p.30

well as to Section 2.5 of the MHC's Code of Practice relating to the Admission of Children under the Mental Health Act 2001.²² Additionally, it needs to be clear that both the purpose and effect of such rules are neither to vindicate the practice nor to exacerbate the already protracted delay in implementing the necessary measures to bring the practice to an end. Rather, such provision needs to be directed towards ensuring that the rights and welfare of children who may need to be admitted to an approved adult facility in the absence of an appropriate alternative are safeguarded. Furthermore, these rules and associated legislative provisions concerning the admission of children to adult facilities need to be subject to repeal once the necessary supports and services are in place.

6. Powers of An Garda Síochána

The OCO is aware that the powers of An Garda Síochána provided for under Head 110, Section 90 as regards taking a child believed to fulfil criteria for involuntary detention into custody are modelled after Section 12 of the Mental Health Act 2001. The OCO welcomes the proposal to provide legislative clarity following the Expert Group's observations in this regard.²³ The OCO further welcomes and supports the provision made under Section 90(6) that, when exercising powers under Head 110, a member or members of An Garda Síochána may, when possible and as appropriate, engage with trained personnel with experience of working with children, including child protective services.

In addition, the OCO understands that the provisions made under Section 90(1) in relation to a member or members of An Garda Síochána having 'reasonable grounds' for believing that a child fulfils the criteria for involuntary detention are in accordance with the criteria for detention set out under Section 88(1) of the 2021 General Scheme. However, in the interests of clarity, we suggest that further consideration should be given to setting out explicitly under Head 110 what 'reasonable grounds' are.

From the OCO's perspective, the provisions made under this Head need to ensure that the powers of An Garda Síochána in this regard are only exercised in exceptional circumstances, where it is absolutely necessary and appropriate, and where there is no alternative.

7. Advocacy

The OCO is among a range of stakeholders at national level that have highlighted the need for children and young people with mental health difficulties to have access to independent, specialised advocacy services.²⁴ This view is shared by the UN Committee on the Rights of the Child. Among the

²² Mental Health Commission, [Code of Practice relating to Admission of Children under the Mental Health Act 2001](#) (2006), p.12f.

²³ Department of Health et al, [Report of the Expert Group on the Review of the Mental Health Act 2001](#) (2015), p.72.

²⁴ G. Shannon, [Fourth Report of the Special Rapporteur on Child Protection](#) (2010), p. 68; Law Reform Commission, [Children and the Law: Medical Treatment](#) (2011), p.145; Department of Health et al, [Report of the Expert Group on the Review of the Mental Health Act 2001](#) (2015), p.74; Children's Rights Alliance, [Making Rights Real for Children: A Children's Rights Audit of Irish Law](#) (2015), p.95 and p.99; Department of Health and National Youth Mental Health Taskforce, [National Youth Mental Health Taskforce Report 2017](#) (2017), p.8; Mental Health Reform, [Briefing Note on Reform of the](#)

Committee’s recommendations to Ireland in 2016 was that the State should “consider establishing a mental health advocacy and information service that is specifically for children and accordingly accessible and child-friendly”.²⁵ In its LOIPR for Ireland published in November 2020, the Committee returned to this recommendation through its request for information on measures the State has taken to establish such a service.²⁶

The OCO welcomes the provisions made under Head 111, Sections 91(1)(f) and 92(2)(h) of the 2021 General Scheme for children admitted as voluntary, intermediate or involuntary persons to be entitled to engage an advocate, either by themselves or with their parent(s) or person(s) acting in loco parentis. This is aligned with recommendations we made in our previous observations to the DoH on earlier draft Heads of this Bill.

In this regard, the OCO is of the view that appropriate advocacy services need to be made available to all children who wish to avail of them, irrespective of means, and that children should be supported to access such services.

8. Appointment of legal representative and guardian *ad litem*

The OCO welcomes the provision under Head 117, Section 97(1) that, in every case brought to the court under Part 8, a legal representative must be appointed to the child. We further welcome the confirmation provided to us by the DoH that the appointment of a legal representative to the child under Part 8 means that the child will be made party to the proceedings.

Furthermore, the OCO notes that provision is made under Section 97(3) for the court to also appoint a guardian *ad litem* (GAL) for the child to whom the case refers, unless it is not in the best interests of the child to do so. Taking into account the vulnerability of children affected by these proceedings, as well as the complexity and serious implications of such proceedings, the OCO is of the view that there must be a presumption in favour of appointing a GAL in such proceedings.

[Mental Health Act, 2001](#) (2021), updated February 2021; Department of Health, [Update on reform of the Mental Health Act: Report of the Public Consultation Process](#) (2021).

²⁵ UN Committee on the Rights of the Child, [Concluding observations on the combined third and fourth periodic reports of Ireland](#) (2016), CRC/C/IRL/CO/3-4, para. 54(c).

²⁶ UN Committee on the Rights of the Child, [List of issues prior to submission of the combined fifth and sixth reports of Ireland \(2020\)](#), CRC/C/IRL/QPR/5-6, para. 26(c).