mhc
coimisiun meabhair - shláinte
mental health commission

Mental Health Commission Submission to the Joint Committee on Justice, Home Affairs and Migration: General Scheme of the Guardianship of Infants (Amendment) Bill 2025

6 June 2025

1. Introduction

The MHC welcomes the opportunity provided by the Joint Committee on Justice, Home Affairs and Migration to comment on the General Scheme of the Guardian of Infants (Amendment) Bill 2025. It is noted that the purpose of this proposed Bill is to provide for the situation where the guardian or parent of a child is convicted of murder or manslaughter, or of a serious offence resulting in the incapacitation of another parent of the child. While the MHC has limited comments in relation to the Bill, those comments are of importance.

The Mental Health Commission (MHC) is an independent statutory body established under the provisions of the Mental Health Acts 2001 -2018 (2001 Act). Section 33(1) of the 2001 Act sets out the principal functions of the MHC, which 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 involuntarily detained in approved centres under the 2001 Act.

Pursuant to the Assisted Decision Making (Capacity) Act 2015 as amended (2015 Act), the MHC's remit was extended to include the establishment and commencement of the Decision Support Service. The Decision Support Service supports decision-making by and for adults with capacity difficulties and regulates individuals who are providing a range of supports to people with capacity difficulties.

2. General Comment

The MHC recommends that the Act and Bill aligns itself with other national policies (HSE and Tulsa) on capacity and consent and legislation to include the forthcoming Mental Health Bill, which separately deals with children under 16 and those 16/17 years old, given the different considerations for these age groups.

HEAD 2

Under this head, it is proposed to amend section 6 of the Guardianship of Infants Act 1964, which sets out the rights of parents to guardianship, to require the Child and Family Agency to apply to court for an order to either remove the convicted guardian or parent 'from office' and appoint another guardian or to confirm the status of the convicted parent or guardian.

Comments:

1. Expanded definition of a child

Head 2 (19)) states that child shall include a person who

(c) 'by reason of physical or mental incapacity it is not reasonably possible for the person to maintain himself or herself fully'.

The MHC has concerns in relation to the definition for the following reasons -

1. Section 2 of the Guardianship of Infants Act 1964 defines a child as "a person who has not attained full age'. The Bill seeks to extend the definition to a person of any age (over 18) by reference to their ability to look after themselves.

2. There is no definition provided on a person's reasonable ability 'to maintain himself or herself'.

3. There is no clear rationale provided for this fundamental change to the proposed definition of a child.

4. The definition is not aligned with other legislation (see Appendix) where a child is defined as a person under the age of 18 (and who is not married) to include the definition of child in the current Mental Health Acts, the Mental Health Bill as published in July 2024 and the Assisted Decision-Making (Capacity) Act 2015 (as amended) (the 2015 Act).

5. Of significant concern is the reference to mental or physical capacity. This does not align with recent legislation. The MHC does not believe that the reference to "mental and physical capacity" is appropriate and should simply refer to capacity. As you are aware, the Convention on the Rights of the Child (Art 12) should be considered in relation to issues relating to children, and that convention refers to maturity and capacity. The Mental Bill refers to capacity, and the National Policies (HSE and TULSA) refers to capacity.

6. Furthermore, the 2015 Act does not use the phrase 'mental or physical capacity' but instead refers to capacity. The 2015 Act adopts a functional definition of capacity under section 3. The guiding principles of section 8 of the 2015 Act, including the presumption of capacity for adults and the requirement to give effect as far as practicable to past and present will and preferences, as opposed to 'best interests'

should also be considered. The principles relating to capacity in the 2015 Act are being adopted in the Mental Health Bill.

7. Furthermore, the expanded definition of a child at 2(19) (c) appears to be based on the assumption that a 'parent concerned' already holds 'an office' in respect of an adult child who lacks capacity, from which the parent concerned may have to be removed by way of an application to court. This is incorrect. If it was the case that the guardianship rights of a parent or guardian in respect of a child who lacks capacity continue into that child's adult life, then there would be no necessity for applications by parents under Part 5 of the 2015 Act to be appointed as decision-making representatives (at least in respect of personal welfare decisions as defined). To this extent, the expanded definition of a child proposes to address a situation that does not arise.

8. It is also important to note that the grounds for automatic disqualification of a DMR is set in section 40 (4) of the 2015 Act - https://revisedacts.lawreform.ie/eli/2015/act/64/section/40/revised/en/html These are similar to the grounds for ineligibility and disqualification of the other supporters in Parts 3,4, 7 and 8 of the 2015 Act. These grounds include conviction for an offence against a relevant person or a relevant person's child but not a relevant person's parent or of murder / manslaughter, albeit there is a requirement that the decision supporter must be deemed to be a suitable person for the role. To remove a 'parent concerned' from acting as a DMR for an adult child who lacks capacity, an application would have to be made to the Circuit Court.

It is a matter for the relevant Departments to consider whether

a) the grounds for ineligibility/ disqualification in the 2015 Act should be expanded to achieve the objectives of these Heads of Bill, and/or
b) whether a state agency should be required to make the necessary applications in relation to parent concerned who is a 'decision supporter' for an adult child under the 2015 Act.

APPENDIX – Definition of a child

1. **UN Convention on the Rights of the Child, Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

2. **Child Care Act 1991, Section 2**

"child" means a person under the age of 18 years other than a person who is or has been married;

3. **Children Act 2001, Section 3**

"child" means a person under the age of 18 years;

4. **Child First Act 2015, Section 2**

"child" has the same meaning it has in section 2 of the Child Care Act 1991;

5. **Childcare Support Act 2018, Section 1**

"child" means a person under the age of 18 years;

6. **Adoption Act 2010, Section 3**

"child" means a person under the age of 18 years;

7. **Child and Family Agency Act 2013, Section 2**

"child" means a person under the age of 18 years other than a person who is or has been married;

8. **Education (Welfare) Act 2000, Section 2**

"child" means a person resident in the State who has reached the age of 6 years and who—

(a) has not reached the age of 16 years, or

(b) has not completed 3 years of post-primary education, whichever occurs later, but shall not include a person who has reached the age of 18 years;

9. **Protections for Persons Reporting Child Abuse Act 1998, Section 1**

"child" means a person who has not attained 18 years of age;

10. **Ombudsman for Children Act 2002, Section 2**

"child" means a person under the age of 18 years and "children" shall be construed accordingly;

11. **Mental Health Act 2001, Section 2**

"child" means a person under the age of 18 years other than a person who is or has been married;

12. **Assisted Decision-Making (Capacity) Act 2015 (as amended), Section 2**

"child" includes a step-child;