IRISH FOSTER CARE ASSOCIATION SUBMISSION TO THE DEPARTMENT OF HEALTH PUBLIC CONSULTATION ON DRAFT LEGISLATION TO UPDATE THE MENTAL HEALTH ACT 2001

9th April 2021

IFCA welcomes this opportunity to contribute to the review of the Mental Health Act, 2001.

Contents of the Submission:

About IFCA:

The Irish Foster Care Association is the national organisation that supports foster families and the wider fostering community. We advance and promote best practice in foster care through support, learning and advocacy. Membership is broad based and includes foster and relative carers, social workers, child care workers, academics and others with an interest in or who are involved in foster care.

The Irish Foster Care Association's Services include:

1)National Helpline Service offers independent and professional support to the foster care community. The aim of the service is to offer the best and most appropriate support during challenging times by providing clarity and guidance for all those involved in foster care. The service is confidential, responsive and personal and open to everyone involved in foster care.

2) Advocacy Service: At IFCA we understand that carers may need support to carry out their foster caring role. We believe that situations such as allegations, communication breakdowns and placement disruptions require additional support, guidance and sensitivity. We have a team of Advocacy Workers around the country who provide support to foster carers in these situations.

3) Learning and Development: The Irish Foster Care Association offers opportunities for learning and development to foster carers and fostering practitioners with the aim of building the knowledge and skills required to meet the needs of children in care with confidence. We offer training and learning events tailored for the fostering community. The Irish Foster Care Association Annual National Conference brings together all those with an interest in foster care, including general and relative foster carers, care leavers, health and social care practitioners, academics, students, teachers, policy makers, those with an interest in foster care.

4) Policy: In IFCA, we are uniquely placed to see the impact of policies on children in care, their carers and on the fostering community in general. Through our National Helpline and National Advocacy services we obtain feedback from foster carers and children in foster care as to how policies impact upon them.

Context of this Submission:

"The purpose of modern mental health legislation is to ensure that the rights of a vulnerable section of our population are protected and that people with a mental illness who require treatment may have access to this treatment in an appropriate environment. Individuals who suffer from mental illness can still face stigma, discrimination and marginalisation in all societies with a likelihood that their human rights can be violated. Legislation has an important role to play in promoting positive mental health and preventing mental disorders. A mental health legal framework can address critical issues such as the provision of high quality care, the regulation of and safeguards for compulsory admission in addition to the protection of human rights". (Page 6, Report of the Expert Group, 2014)

The Irish Foster Care Association agrees with the recommendations of the Expert Group on the Review of Mental Health Act 2001 which published its report in December 2014 and calls for the all recommendations to be included in the revised Act and followed through on and implemented without delay.

The Mental Health Act 2001 was signed into law in July 2001, five years before the publication of A Vision for Change and it was only fully implemented in 2006, the same year as publication of A Vision for Change. Accordingly, the current Act does not reflect the significant changes in thinking about the delivery of mental health services that have taken place in the last ten years, such as the shift to community-based services, the adoption of a recovery approach in every aspect of service delivery and the involvement of service users as partners in their own care and in the development of the service.

Changes in the law relating to mental health are needed to fulfill the vision set out in Ireland's mental health policy, Sharing the Vision, and to bring about compliance with several key human rights instruments, including the European Convention on Human Rights , the United Nations Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child .

Revised mental health legislation needs to reflect current and emerging trends in human rights standards, and trauma-oriented, person-centred care. This is essential if the revised Mental Health Act is to be fit for purpose and an enduring piece of legislation that protects, affirms, and vindicates the rights and obligations of all partners and stakeholders in the treatment and care of those experiencing mental health difficulties in Ireland, including most importantly the service users and their families, their carers, friends, service providers and clinical and support staff.

Focus of this Submission:

This submission will consider key aspects of the Mental Health Act 2001 and the Expert Group Report 2014 as they relate to and impact upon the health and wellbeing of children and their parents or foster carers and on the quality of their relationships and on the capacity of parents/carers to attend to and meet the needs of their children or foster children.

Inclusion of Guiding Principles

IFCA believes that the inclusion of guiding principles of self-determination, autonomy, dignity, bodily integrity, least restrictive care and best attainable mental health in the legislation will consolidate and further promote the move that has taken place in the intervening years from professional dominance towards a person-centred, partnership approach to service delivery.

It is important that the limited principles in the 2001 Act are replaced with a more human rights-based list of guiding principles which would reflect the importance of the person's right to autonomy. The right of people to make their own choices and the principle of a presumption of capacity as set out in the Assisted Decision Making (Capacity) Act 2015 with the provision of support if necessary, must be respected.

Key in this regard is the principle of respect for a person's own understanding of their condition and mental health in the context of their own life experience. It forms the basis of the therapeutic and supportive connections that can help a person begin to make sense of themselves and their experiences, to feel understood and accepted and to help in creating a sense of felt safety that is essential if recovery is to be possible.

We believe that mental health must be given equal priority to physical health to ensure a holistic approach is taken to address each person's overall health needs.

We agree that there needs to be a balancing of these guiding principles in contexts where there is threat to the safety or life of the person or to other people with whom they may come in contact. We agree with the Expert Group recommendations in that regard.

Capacity and Decision-Making

The Expert Report recommends the need for clarity regarding capacity and consent for treatment for young people aged between 16 and 18 years and acknowledges that for children under the age of 16 that their parent or person(s) 'in loco parentis' will make decisions about their care and treatment. It acknowledges the need to adhere to the principle of seeking to take into account the child's understanding and their views in an age-appropriate way in any decision-making about the child. It is acknowledged that children are rights holders within the UN Convention of the Rights of the child, as well as Article 42a as citizens of the Irish State.

This is significant for the treatment of children who are in alternative care as it is an important element of the Child Care Act 1991, the legislation underpinning the protection and care of children by the State.

The principles and provisions of Assisted Decision-Making (Capacity) Act 2015, which at that time were yet to be enacted, were also strongly referenced in the Expert Group Report.

While this Act has since been enacted many parts of it have not yet commenced. The Assisted Decision-Making Act 2015 is a very important piece of legislation for young vulnerable adults who have been in the care of the state, many of whom have been cared for in foster families during their childhood years. Indeed, many remain in the care of their foster families as vulnerable adults who may require specialist mental health services and treatment at specific times or throughout their adult lives as well as other services such as disability services.

As there is no legal provision for the care of these vulnerable adults by their foster carers, it is essential that the Mental Health Act 2001 is comprehensively reviewed in conjunction with the more recent Assisted Decision-Making legislation to ensure that these vulnerable adults are afforded as much effective support and protection as possible through the effective and appropriate inclusion of these key people in their lives in their care/treatment planning and delivery and discharge from inpatient services. For these vulnerable adults, with possible histories of early childhood trauma, learning and emotional regulation difficulties, social isolation and risk of homelessness, their foster carers may have been the only consistent source of care and protection in their lives, either the only place they can continue to reside beyond 18 years, or return to if life becomes unmanageable. It is for this reason that foster carers need to be involved in the planning and delivery of services to vulnerable adults.

The Assisted Decision-Making Act makes provision for a Decision-Making Assistance Agreement, a Co-Decision-Making Agreement, a Decision-making Representation Order and an Advanced Healthcare Directive by, and through, the HSE Decision Making Service. This service is in the early stages. The parts of the Mental Health Act 2001 which touch on issues associated with capacity, decision-making and consent, must take into account the structure and provision of this service and the legislation underpinning it.

Interdisciplinary Approach to Care and Treatment

IFCA believes that a holistic and interdisciplinary approach to care and treatment is essential if meaningful and lasting outcomes are to be achieved for people experiencing mental health difficulties. In the revision of the Mental Health Act there is an opportunity to achieve this through the establishment and consolidation in a number of areas, ie. in the roles of Authorised Officers and in the functioning of Mental Health Review Boards.

IFCA welcomes the recommendation of the Expert Group Report that there should be a more expanded and active role for Authorised Officers where involuntary admissions to an inpatient mental health facility is being considered. As Authorised Officers are proposed to include Community Mental Health Practitioners such as Psychiatric Nurses or other health practitioners with experience working in mental health contexts, this can lead to more appropriate and least restrictive treatment for individuals in community or other mental health settings and bring a greater focus on involuntary admission being a treatment of last resort. They recommend that the Authorised Officer must, after consultation with family/carers where possible and appropriate, make the decision on whether or not an application for involuntary admission of the person should be made. The Expert Group recommends that an Authorised Officer should be the person to sign all applications for involuntary admission to an approved inpatient facility (this also includes change of patient

status in an approved centre from voluntary to involuntary. This can have the effect of reducing the burden on families/carers in these difficult circumstances and reducing the involvement of Gardaí in the admission process.

IFCA acknowledges the importance of the role of the Mental Health Tribunals for person who are admitted to mental health treatment facilities on an involuntary basis and welcomes the recommendation to rename them 'Mental Health Review Boards'. While decisions about the nature and content of treatment remain within the remit of the multi-disciplinary mental health team, the Expert Group recommendation that Review Boards should have the authority to establish whether there is an individual care plan in place and if it is compliant with the law is essential. Review Boards should also establish that the views of the patient as well as those of the multi-disciplinary team were sought in the development of the care plan. It is appropriate and in keeping with a rights-based approach that the patient must always have a right to attend the Review Board and to be accompanied by an Advocate at the invitation of the patient exercising his/her right to such support. In addition to the Independent Psychiatric Consultant Report, the inclusion of a psychosocial report that has been carried out by a member of the multi-disciplinary team from the inpatient facility, is also essential.

This psychosocial report, concentrating on the non-medical aspects of the patient's circumstances, is a vital part of the care planning, review and discharge process. This should include information provided by parents, foster carers and families and child protection and fostering services as appropriate and with the consent of the patient. It is essential in contexts where parents of children may be seeking to return home after inpatient treatment and who may seek to have their children returned to their care following a period of alternative care of the child(ren) or may seek to have contact visits with their children following discharge from inpatient treatment, if there has been no contact while an inpatient. This is vital in situations where the children may have witnessed the parents' mental health episodes and associated behaviour and presentation or where a family member or sibling may have been physically harmed or killed by that parent arising from their mental ill health. It is essential for ensuring that a Recovery approach to the care and treatment of the person and their family is taken from the outset.

IFCA agrees that the revised legislation should provide for the oversight of the integrity of the process of Review Boards by the Mental Health Commission in line with best practice. This would include a mechanism to allow information in relation to decisions of Review Boards to be published in anonymised form which will ensure patient confidentiality. This will allow such decisions to be available for the Mental Health Commission and/or the public to view and would reassure patients and families about transparency and about the ongoing learning for service, policy and legislative provision in the future.

The Importance of Family Members, Carers and Friends in Recovery

Given the importance of birth and foster families in the care and wellbeing of both children and vulnerable adults with mental health difficulties, IFCA is concerned that the Expert Group Report did not to make any recommendation on amending legislation to include rights for families.

IFCA believes that the revised legislation should place a duty on the health service to provide information of a general nature on mental health to the family/foster family members of a person with a mental health condition upon request and with the permission of the service user if the service user is aged over 18 years.

IFCA calls for the revised legislation to require the health service to assess the support needs of family members of a person receiving treatment for a mental health condition upon request of the family member and with the permission of the service user. The revised Act should be amended to place a duty on the Clinical Director to involve the family in discharge planning where the individual concerned is being discharged to the family's home and the individual has given their permission. Where the family members include children or adolescents under the age of 18, there should be a duty on the health service to assess the needs of the children and provide appropriate supports.

Children:

Children of any age can suffer from a mental illness or mental health difficulties, but adolescence is a typical time for the development of such problems with very often long-term implications. For children and adolescents who have experienced early developmental trauma and the associated impacts on brain development, and may have long-term difficulties in the areas of attachment, regulation, socialisation and learning, they may be at greater risk of having mental health difficulties both as children and as they go on into adulthood. While most children and adolescence who develop mental health problems are dealt with by CAMHS, there is an ongoing need for appropriate child and adolescent in-patient services to be available.

There are 74 (plus 2 high observation) child and adolescent beds operational nationally. While it is acknowledged that there have been advances in recent years, more needs to be achieved and achieved more quickly. Progress needs to continue to drive down admissions of children to adult units and to drive down waiting lists and waiting times for child and adolescent mental health services.

IFCA welcomes the recommendation that all the provisions of the 2001 Act relating to children be included in a standalone section of any future mental health legislation. This is essential to ensure that their particular needs are responded to and that the necessary protection of their rights and the necessary service provision is put in place.

The definition of a child under the Mental Health Act 2001 should define a child as 'a person under the age of 18 years'.

IFCA welcomes the child-appropriate guiding principles recommended by the Expert Group which include the highest attainable standard of child mental health; respect for the autonomy and self-determination of the child insofar as practicable in conjunction with parents or persons as required acting in loco parentis; consultation with the child at each and every stage of diagnosis and treatment with due weight given to his/her views consistent with his/her age, evolving capacity and maturity and with due regard to his/her will and preferences; provisions of services should be in an age-appropriate environment; provision of services in close proximity to family and/or carers; least intrusive treatment; least restrictive environment; child's best interests to be taken into account, and 'best interests'

must be defined in a way that is informed by the views of the child, bearing in mind that those views should be given due weight in accordance with his/her age, evolving capacity and maturity and with due regard to his/her will and preferences.

Each child or young person experiencing mental health difficulties should have an individual care plan and all necessary information relating to admission, detention and treatment should be provided as appropriate in an age appropriate way to them.

Section 25 of the 2001 Act, which is the only section that applies solely to a child, provides for the involuntary admission of children and adolescents. This section sets out certain procedural safeguards which are different to the system in place for the involuntary admission and treatment of adults. The current Act provides that in order to have a child involuntarily admitted, the Health Service Executive (HSE) must apply to the District Court for an order authorising the detention in an approved centre. This is done where it is considered that the child is suffering from a mental disorder and the child requires treatment which he or she is unlikely to receive unless an order for involuntary admission is made. The initial admission order is for a period not exceeding 21 days while the first renewal order is for a period not exceeding three months, with the second and subsequent renewal orders allowing detention for a period not exceeding six months. IFCA agrees with the Expert Group Report that where the involuntary admission of a child is concerned it is and remains appropriate that such decisions be referred to a child friendly District Family Law Court for determination and confirmation that such detention is sought as a last resort.

The Group did, however, give serious consideration to the support voiced for a more informal review mechanism as recommended by the Law Reform Commission (Children and the Law: Medical Treatment) specifically where decisions on renewal orders are concerned. The Group sees merit in having a more informal setting for children but ultimately decided that it remains in the best interests of the child that renewal orders also require the approval of the District Family Law Court which should seek to be as child friendly as possible. The duration of initial admission orders should continue to be for a period not exceeding 21 days and renewal orders for periods of 3 and 6 months. At present the Mental Health Commission's Code of Practice requires that information relating to admission and discharge of children is notified to the Commission. IFCA agrees that this should be a specific requirement under the Act.

Under section 19 of the Act adult patients have a right of appeal to the Circuit Court. This right of appeal should also apply in respect of children and adolescents whose detention is subject to review. The option to change status from involuntary to voluntary should be available to them assuming they satisfy the relevant criteria. It is recognised that children and adolescents detained under the Mental Health Act 2001 are in a particularly vulnerable situation and that it is appropriate that they be given every support. These children, their families and/or guardians should have advocacy services available to them in all cases.

The role of the Gardaí under the Child Care Act 1991 refers to taking a child to a 'place of safety' for assessment, very often this is an emergency department. Gardaí need to be given the specific power to remove a child believed to be suffering from a mental disorder to a place where an age-appropriate assessment of their needs can be carried out. The revised legislation should include a reference to ensuring that this practice is used only where appropriate and there is no other alternative. Places to which children are taken for the

purpose of such assessments should fulfil certain specific criteria (e.g. availability of child and adolescent psychiatry) and that relevant stakeholders are available, involved and informed (Gardaí, parents, foster carers etc).

Independent Complaints Mechanism

IFCA believes that an independent mechanism for dealing with complaints is essential in a rights-based approach to the care and treatment of children and adults with mental health difficulties. An independent body with a direct role in receiving, investigating and resolving complaints about mental health service delivery is required to ensure safe care, transparency and the best quality of care.

Protection from Abuse

The previous mental health legislation of 1945 included a section (253), which criminalised the ill- treatment or neglect of a patient in a psychiatric setting. The current Mental Health Act repealed this section but offered nothing in its place. In light of the history of abuse in various institutions in Ireland, it is important that provision is made in legislation to underscore the unacceptability of abusive behaviour. Furthermore, given the widespread presence of users of mental health services in community-based services including day hospitals, day centres and HSE-supervised community residences, such a provision should also be extended to cover all mental health services.