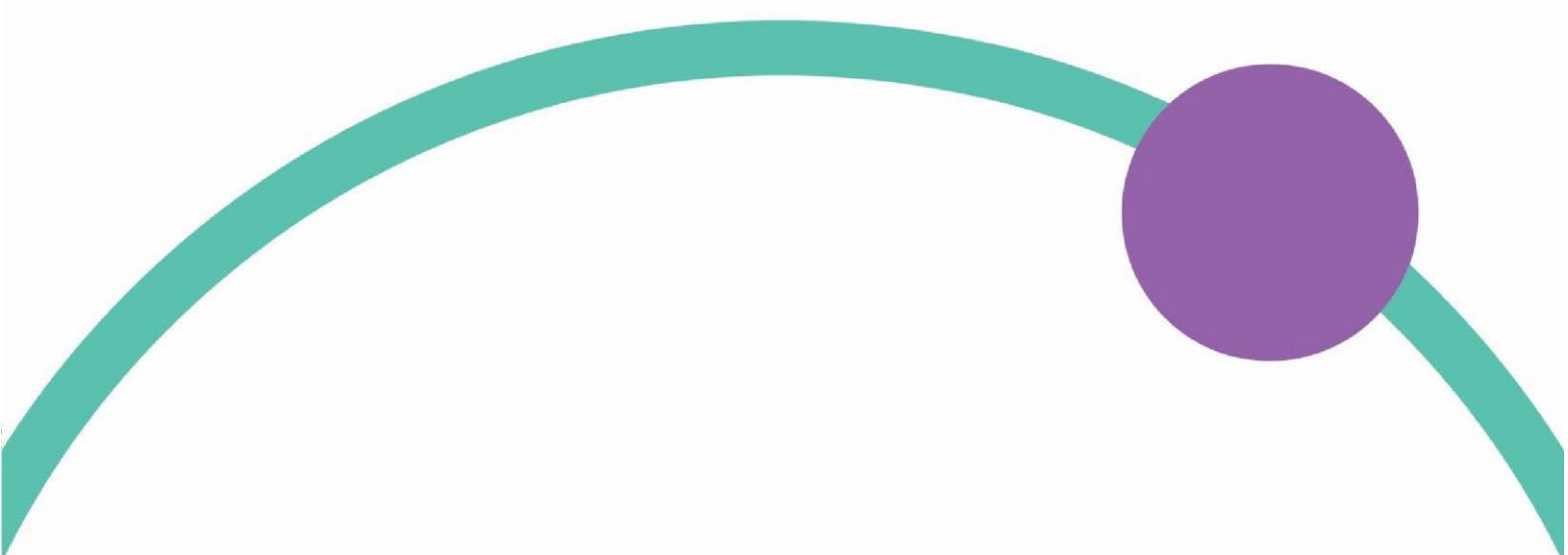




**seirbhís tacaíochta
cinnteoireachta**
decision support service



mhc
coimisiun meabhair - shláinte
mental health commission



Submission:

CP158

**Consultation Paper on the Consumer Protection
Code**

19 June 2024

Introduction

The Mental Health Commission (the MHC) is an independent statutory body established under 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.

The MHC's remit was extended by the Assisted Decision Making (Capacity) Act 2015, as amended, ('the 2015 Act') to include the establishment of the Decision Support Service ('DSS'). The 2015 Act was commenced on 26 April 2023 and the DSS has been fully operational since that date.

The 2015 Act repeals the wards of court system for adults, replaces the concept of a 'person of unsound mind' with a statutory functional approach to capacity which is time-specific and issue-specific, and introduces a tiered framework of decision supports and instruments for advance planning underpinned by rights-based guiding principles.

The DSS's functions under the 2015 Act are primarily to promote public awareness and public confidence in relation to the 2015 Act and related matters including the United Nations Convention on the Rights of Persons with Disabilities, to provide information and guidance and to register and supervise decision support arrangements. Of relevance to this submission, the DSS has specific statutory functions:

- to provide information and guidance to organisations and bodies in the State in relation to their interaction with relevant persons
- to identify and make recommendations for changes of practice in organisations and bodies in which the practices may prevent a relevant person from exercising his or her capacity under this Act¹

A relevant person is defined as a person whose decision-making capacity is in question or may shortly be in question in relation to a matter or matters or who lacks capacity in relation to one or more than one matter².

In its submission on the Consumer Protection Code Review Discussion Paper published by the Central Bank in October 2002, the MHC noted that the revised Consumer Protection Code ('the Code') must take account of the 2015 Act as a part of the domestic legislative framework.

¹ Section 95(1) Assisted Decision-Making (Capacity) Act 2015

² Section 2 (1) Assisted Decision-Making (Capacity) Act 2015

The MHC welcomes the acknowledgement in the Consultation Paper and the Guidance in Annex 5 that the 2015 Act is relevant to financial services and consumer protection. The MHC also welcomes the inclusion of references to the Code of Practice for Financial Service Providers, published by the DSS in 2023. This code was originally drafted by a working group chaired by the National Disability Authority and with expert input from representatives of the banking and financial services sector.

In this submission, the MHC will focus on those proposals contained in the Consultation Paper and annexed Guidance that interface with the principles and processes of the 2015 Act and the statutory remit of the DSS.

1. ‘Securing Customers’ Interests’

Question:

Do you have any comments on the Securing Customers’ Interests Standard for Business, Supporting Standards for Business or the draft Guidance on Securing Customers’ Interests set out in Annex 5?

MHC response

1.1 ‘Best interests’: a need for definitional clarity

At paragraph 1.1.5, the Guidance on Securing Customers’ Interests at Annex 5 of the Consultation Paper states that the Consumer Protection Code reflects the fundamental obligation for firms to act in the best interests of their customers.

Paragraph 2.1 of the Consultation Paper states that many stakeholders responding to the Discussion Paper agreed that the fundamental responsibility of firms is to act in the best interests of customers but believed that there was a lack of clarity about what that obligation means in practice. Paragraph 1.2.1 of Annex 5 states that there must be a collective understanding of what securing customers’ interests means and how it should be implemented in a firm’s culture and operations.

The MHC is aware from the DSS’s engagement with stakeholders in financial services in relation to the implementation of the 2015 Act, that there is often a strong appetite for the certainty of a ‘rulebook’ approach. The MHC agrees with the sentiment of paragraph 2.1.5 of Annex 5 which states that firms must take ownership of the obligation to secure customers’ interests, to ensure that this is embedded in the culture of the firms and that it goes beyond a rules-based, box-ticking exercise.

As a starting point for creating the right culture, it is submitted that clarity of language will be essential in the revised Code and accompanying Guidance. The Consultation Paper and Annex 5 refer to ‘best interests’ and an obligation to securing customers’ ‘interests’ – are these terms intended to be interchangeable? There does not appear to be an attempt to define what

customers' interests or best interests are, although there is detailed consideration of why this requirement is important and how a firm can act to ensure these interests are secured.

In its earlier submission on the Discussion Paper, the MHC commented that 'best interests' is a problematic term and tends to carry associations of paternalism. The implication is that a third party decides what is good for a person, rather than endeavouring to give effect to the person's will and preferences. The MHC also acknowledged in its submission that, at present, the Central Bank may be constrained to adopt a 'best interests' standard because of other legislation including international instruments.

The MHC repeats the observation made in its prior submission that there is a move away from a best interests approach in other legislation and policy and it may not be long before the retention of best interests in the language of the Code appears out of step. The Government has committed to the ongoing review of existing legislation³ to ensure continuous advancement of rights guaranteed by United Nations Convention on the Rights of Persons with Disabilities. The United Nations Committee has expressly rejected a best interests approach as a means of upholding the rights of persons with disabilities.

The MHC submits that the revised Code and/or Guidance on Securing Customers' Interests would benefit from a paragraph explaining what is meant by "securing a customer's interests" and why this terminology has been adopted. If it is the position of the Central Bank that 'best interests' for the purposes of the Code has a meaning that is particular to its remit and that this meaning does not conflict with other legislation, including the 2015 Act, which explicitly adopts a 'will and preferences approach, then that should be explained to avoid confusion. It would assist if the Code were to state that the best interests approach in the Code is not inconsistent with giving effect insofar as practicable to the customer's past and present will and preferences insofar as these are reasonably ascertainable. There will be situations when a person in a firm has to apply both the Code and the 2015 Act in respect of a customer and clarity of approach is vitally important.

1.2 Customer Autonomy

Under 'Securing Customers' Interests', paragraph 2.1 of the Consultation Paper states that firms acting in the best interests of customers must also recognise the importance of customer autonomy. The concept of customer autonomy is developed further in the Guidance set out in Annex 5.

Paragraph 1.5.1 refers to customers having the right and responsibility to make their own decisions about financial products and services. Paragraph 1.5.2 states that a firm acting to secure a customer's interests does not decide for the customer, who must be free to make their own decisions. Paragraph 1.5.3 states that customers can only be expected to take

³ Department of Children, Equality, Disability, Integration and Youth, *Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities* November 2021

responsibility for their actions and decisions if empowered to do so and that supports should be available to ensure that they are able to make fully informed decisions.

The MHC welcomes the statements in these paragraphs of the Guidance. The guiding principles of the 2015 Act emphasise minimal interference with rights and freedom of action and respect for a relevant person's right to privacy and control over his or her financial affairs and property. The guiding principles also state that a relevant person whose capacity is in question must not be considered to lack capacity to make a decision, unless all practicable steps have been taken without success to help him or her to do so.⁴

The MHC submits that it is important that this recognition of and support for customer autonomy in the Code is understood to apply equally to relevant persons or 'vulnerable' persons. We return to this point at 3.1 below.

In this regard the MHC welcomes the language in paragraph 2.9.2 'Delivering Fair Outcomes for Consumers' in the Guidance, which states that firms effectively securing customers' interest will:

- Provide consumers identified as in vulnerable circumstances with the support they need when engaging with financial services; and
- Ensure their communication and engagement with customers empowers them to make decisions in their own interests

The MHC submits that effective and continuous training of staff will be crucial to the delivery of this approach. On training, please see also paragraph 3.2 below.

2. Informing Effectively

Questions:

Do you have any comments on the 'informing effectively' proposals?

Are there any specific challenges regarding implementation of the new Informing Effectively Standard for Business

MHC response

2.1

As noted at 1.2, the MHC welcomes the acknowledgement in the Consultation Paper that a customer cannot meaningfully exercise autonomous decision-making unless properly supported to do so and that this depends on effective communication of information. In the New Standard for Business, the MHC welcomes the move away from simply 'providing information' to ensuring practical understanding by the customer.

⁴ Section 8 (3) Assisted Decision-Making (Capacity) Act 2015

Under the 2015 Act, the functional approach to capacity is based not on a relevant person's diagnosis or presentation but on how they are able to engage with the information relevant to a specific decision. The 2015 Act states that a person is not to be regarded as unable to understand the information relevant to decision if he or she is able to understand an explanation of it in a way that is appropriate to his or her circumstances, whether using clear language, visual aids or any other means.⁵

The MHC welcomes the commitment in the New Standard for Business to expand on the general duty to supply information that is clear, accurate, accessible and non-technical. Information is critical to empowerment and individual customer needs will vary.

In terms of challenges in implementing this standard, the MHC submits that a person's practical understanding will often be enhanced by a face-to-face meeting with a service provider and such meetings may be less feasible with the decline of in-person banking. Further challenges may be the scarcity of time to communicate potentially complex information effectively and the availability of staff with the necessary aptitudes and the right level of training if the customer is a relevant or 'vulnerable' person.

The MHC welcomes the proposed requirement that firms must monitor their customer communications to ensure these communications are effective and well understood to facilitate customers' decision-making.

The MHC submits that there must be support for firms to deliver on this requirement, verifiable standards for compliance and external oversight.

3. Protecting Consumers in Vulnerable Circumstances

Questions:

What are your views on the proposed amendments to the Consumer Protection Code in relation to consumers in vulnerable circumstances?

Do you have any comments on the draft Guidance on Protecting Consumers in Vulnerable Circumstances? Is the role of the trusted contact person clear? What more could a Trusted Contact Person do?

MHC response

3.1

By way of initial observation, the MHC welcomes the recognition in the Consultation Paper that vulnerability is not a fixed status or inherent to a person but a function of their circumstances. A relevant person under the 2015 Act whose capacity is in question may not be vulnerable in respect of financial decision-making if properly supported.

⁵ Section 3 Assisted Decision-Making (Capacity) Act 2015

This aligns to the social model of disability adopted in UNCRPD which recognises disability as resulting from the interaction between persons with impairments, and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.⁶

Equally, a person may not have any difficulty with decision-making capacity but may be vulnerable in respect of their financial affairs due to other reasons such as coercion or undue influence.

The MHC notes that at paragraph 2.7 of the Consultation Paper under ‘What is a Consumer in Vulnerable Circumstances’ there is recognition of the fact that, unless a firm exercises an appropriate standard of care, certain persons may be exposed to harm or poor outcomes. The MHC commends the practical proposals around Disclosure by Customers of Sensitive Information. It is important that if a person discloses circumstances giving rise to their vulnerability, this information is recorded, and the person is not required to repeat this disclosure thereafter to continue to access appropriate supports.

The MHC submits that care should be taken so that this approach and the definition of a vulnerable person as someone who is at heightened risk of harm does not promote an overly protective response. It is correct that a firm should be alert to external risk factors, but harm may also arise from a firm’s own failure to apply the statutory presumption of capacity and/or to provide the required supports to allow access to services.

On this point, the MHC welcomes the recognition under this heading that a person with disability may be made vulnerable in respect of financial decision-making if they do not have access to good information.

As already noted at 1.2 of this submission, the MHC submit that the Code must be clear that persons in vulnerable circumstances have the same entitlements as any consumer under the Code. These entitlements include recognition of their autonomy and effective communication of information. A firm will have to be adaptable and responsive to individual needs to ensure the realisation of these entitlements when a person is in vulnerable circumstances.

The MHC welcomes the development of a requirement for firms to understand and recognise factors giving rise to vulnerability and to design their processes and systems accordingly.

3.2 Training

The MHC agrees that training will have to be deployed so that firms are properly equipped to meet the new requirements to support customers in vulnerable circumstances. The MHC welcomes the proposal that all firms will be required to ensure that staff receive appropriate training.

⁶ Preamble, United Nations Convention on the Rights of Persons with Disabilities, 2006

The MHC notes the Central Bank's position that firms may access training from a range of sources and that it need not be formal. The MHC submits that it is critical that the Central Bank provides comprehensive guidance on the content of this training to ensure uniformity and that a certain level of training is mandatory.

The MHC notes that the Guidance on Protecting Consumers in Vulnerable Circumstances at Annex 5 sets out the core components of training on vulnerability. It is submitted that these components appear to focus very much on the identification of risk and the need for safeguards rather than on empowering the person. Elsewhere the Guidance is clear that a firm must act to maximise a persons' ability to make their own decisions about their finances. The promotion of empowerment should be an element of the training design.

The MHC would strongly encourage the Central Bank to take steps to ensure that relevant representative bodies and disabled persons' organisations are involved in the design of training on vulnerability.

The MHC notes that one proposed element of this training will be 'Compliance with obligations under the 2015 Act'.

The category of 'property and affairs' decisions which may be supported under the 2015 Act is broadly defined and includes decisions about

- *the custody, control and management of a person's property and property right*
- *the acquisition of property*
- *the sale, exchange, mortgaging or other disposition of the person's property*
- *the discharge of debts, taxes and other liabilities.*

It is likely that persons working in firms will encounter customers who are party to a support arrangement under the 2015 Act. The DSS is aware that this has been happening in the year since commencement of the 2015 Act.

It is submitted that training in respect of the 2015 Act should not just include information about the new support framework and potential interactions with decision supporters and the DSS, but a primer on the ethos of the 2015 Act and the guiding principles.

It is important that firms apply the presumption of capacity for adults irrespective of how a person presents. Firms must understand that the fact that a framework of supports now exists does not mean that any person is necessarily required to put a decision support arrangement in place. That will always depend on individual circumstances and the decisions that the person needs to take.

Since commencement of the 2015 Act, the DSS has received reports of incidents which indicate that the latter point is not always well understood in banking. In one recent case, a person with an intellectual disability who has always managed his bank account independently with the support of a key worker in his disability service was questioned on his own by a bank official about his understanding of his bank account. The DSS was informed

that the bank official told him, incorrectly, that he could no longer have access to his account until he put a formal support arrangement in place and that his key worker was not authorised to assist.

3.3 Specific References to the 2015 Act in the Guidance on Protecting Consumers in Vulnerable Circumstances

The MHC welcomes the inclusion in the Guidance of key aspects of the 2015 Act and the reference to the Director's Code of Practice for Financial Service Providers.

It is important that firms are aware of the requirement to supply supports to help a person to make decisions as set out at 3.1.5 and 3.1.6. of the Guidance.

The MHC submits that further detail should be included at 3.14 to make clear that when a person appears to need formal assistance with decision-making and nothing is in place, the person should be directed to the DSS. The DSS can provide the person with information and support if necessary to help to put a decision support arrangement in place.

This Guidance should also include practical information about how to search the DSS register to find out if a decision support arrangement is in place. Regulated financial service providers within the meaning of section 2(1) of the Central Bank Act 1942 (No. 22 of 1942) are bodies whose members are permitted to search the DSS register and take up authenticated copies of instruments.⁷

3.4 Reporting of Concerns by Staff

The MHC welcomes the inclusion in the Guidance of a section about reporting concerns and the need for firms to have defined pathways for escalation to the appropriate authorities.

This could arise where there is a concern relating to a decision supporter under the 2015 Act (decision-making assistant, co-decision-maker, decision-making representative or attorney under an enduring power of attorney) and could form the basis for a complaint to the Director of the DSS.

The MHC submits that it will be important for firms to know how and in what circumstances a complaint can be made to the Director of the DSS, who is authorised to conduct an investigation and if necessary to apply to court for a determination about whether the decision supporter should be removed their role. In urgent cases where there is an immediate risk of harm, the supporter may be temporarily prohibited from acting.⁸

⁷ S.I. No. 206 of 2023 Assisted Decision-Making (Capacity) Act 2015 (Inspection of Registers Inspection of Registers and Receipt of Copies of Documents) Regulations 2023

⁸ Sections 96- 96A Decision-Making (Capacity) Act 2015

3.5 Trusted Contact Person

The MHC agrees that it may be helpful for any personal customer to provide the name of trusted contact person who may be notified in certain circumstances. This contact may be well placed to help the customer to understand information and to decide what they want to do in a given situation. The role of the trusted contact will have to be precisely set out in the Code.

When the customer is considered to be a person in vulnerable circumstances, it will be very important that the limitations of the role of trusted contact are clearly understood and not confused with any of the formal legal roles under the 2015 Act.

Firms will also need to be aware of the potential for the role of trusted contact to be misused and to have appropriate safeguards and escalations in place.

A trusted contact will not be authorised to make decisions on behalf of, or jointly with the person unless the trusted contact is also a decision supporter and the decision support arrangement provides for their involvement in the relevant decision.

Equally, it will be important that a person is facilitated if they seek to rely on practical support from someone whom they know and trust even if they have not nominated that person as their trusted contact at the outset.

The MHC submits that the operation of a trusted contact scheme, if adopted, should be kept under review.

Conclusion

The MHC appreciates the opportunity to provide commentary on the proposals contained in the Consultation Paper.

The MHC notes that the revised Code is to be kept under review in the context of an evolving financial landscape and may be revisited in line with legislative developments in the State and in Europe.

The MHC believes that it is important that the Code is also responsive to developments beyond the financial landscape and is adaptable to take account of firms' obligations in the broader area of human rights, including in the areas of disability rights equality and supported decision-making to promote the exercise of capacity.

Mental Health Commission

19 June 2024