



**seirbhís tacaíochta  
cinnteoireachta**  
decision support service



**mhc**  
coimisiun meabhair - shláinte  
mental health commission



# **Consumer Protection Code Review – Discussion Paper**

**05 April 2023**

## Introduction

The Mental Health Commission (the 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.

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 new Decision Support Service ('DSS'). The DSS's function is to support decision-making by and for adults with capacity difficulties and to supervise individuals who are providing a range of supports to people with capacity difficulties.

The operative provisions of the 2001 Act came into effect on 1 November 2006 and there will be further legislative changes in the next few years of relevance to financial service providers.

The 2015 Act has been amended by the recent enactment of the Assisted Decision Making (Capacity) (Amendment) Act 2022 ('the 2022 Act'). The Department of Children, Equality, Disability, Integration and Youth has announced that full commencement of the 2015 Act as amended is due to take place on 26 April 2023. Following commencement there will be practical implications for financial service providers and in accordance with Section 103 of the 2015 Act there will be a code of practice for financial service providers.

There are certain key issues, outlined below, that the MHC would request be taken into consideration during the review of the Consumer Protection Code (CPC) as it our view that the CPC will not operate in parallel to the 2015 Act but the two shall require to be aligned.

**Please note that this is Preliminary Submission given the time allowed and the other work constraints of the organisation at the current time. The MHC proposes to make a more comprehensive submission at the Public Consultation stage later this year.**

## **1. Key Issues**

### **1.1 Aligning the CPC and the 2015 Act**

The 2015 Act and the forthcoming amendments to the 2001 Act shall not refer to 'best interests' but will refer to 'guiding principles' and with an emphasis on giving effect to a person's will and preference.

The 2015 Act applies across multiple sectors and the property and affairs decisions that may be supported under the new framework will involve significant interaction with financial service providers. It is for this reason that the 2015 Act provides for a code of practice to be published by the Director of the Decision Support Service for the guidance of financial service providers in relation to their dealings with relevant persons. A relevant person is 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 matter. Capacity is assessed in a functional and non-medical way that is always issue-specific and time -specific with no diagnostic component.

The CPC references 'best interests' throughout as the applicable standard. Although the CPC is sector-specific and not intended for a particular community of service users, consumers will include relevant persons as defined under the 2015 Act.

Therefore, the MHC recommends that consideration now be given to how financial service providers shall respect a person's will and preferences, as per the 2015 Act and DSS code of practice, while acting in their best interests under the CPC. We do not believe that the two regimes shall run parallel to each other but as a matter of practice shall interlink.

Furthermore, it should not be assumed that relevant persons under the 2015 Act will arrive to a financial service provider with supports fully in place, leaving the firm free to employ its own version of a best interests' standard. In some instances, it will be a financial service provider who engages first with a relevant person and their capacity and who must consider the appropriateness of available supports.

We are aware of reports of front-line bank staff applying inconsistent standards to deny disabled persons, access to banking services. This is inconsistent with the ethos of the 2015 Act and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by Ireland in 2018, which states that a person with a disability enjoys legal capacity on an equal basis with others

### **1.2 Move away from best interests and towards guiding principles**

The MHC believes that the CPC must make clear how it proposes that 'best interests' as interpreted by the Central Bank shall be applied. This must be done in a non-paternalistic way. There is a concern that the tone of certain sections of the CPC Discussion Document is

paternalistic and does not sufficiently reflect a person-centred approach. For example, page 29 ‘Developing Central Bank Guidance on ‘Best Interests’’ refers to the following:

*“How might such guidance look? In outline form it might be structured around a number of key components such as the following: - Acting in customers’ best interests is a holistic requirement. Firms need to satisfy themselves that their actions further the interests of their customers, not simply comply with the rules; - This means firms should focus on the outcomes for customers and whether those outcomes are what would be expected where firms are acting in the customers’ best interests; - In deciding what it means to ‘act in the best interests of customers’, a key determinant is the legitimate expectations of those customers. In determining legitimate expectations, relevant factors include: - The information provided, and how an ordinary, time-constrained consumer would reasonably have understood it; - What an ordinary consumer in the relevant market would have expected, on the assumption that that firm had the customer’s best interests at heart;”* the MHC would consider this a paternalistic view.

The above is not consistent with the 2015 Act, which sets out guiding Principles at Part 2 Section 8 as follows:

- (1) The principles set out in subsections (2) to (10) shall apply for the purposes of an intervention in respect of a relevant person, and the intervener shall give effect to those principles accordingly.
- (2) It shall be presumed that a relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2(1) has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.
- (3) A relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.
- (4) A relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.
- (5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.
- (6) An intervention in respect of a relevant person shall—
  - (a) be made in a manner that minimises— (i) the restriction of the relevant person’s rights, and (ii) the restriction of the relevant person’s freedom of action,
  - (b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,
  - (c) be proportionate to the significance and urgency of the matter the subject of the

- intervention, and
- (d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.
- (7) The intervener, in making an intervention in respect of a relevant person, shall—
- (a) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
  - (b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
  - (c) take into account— (i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and (ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,
  - (d) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of— (i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and (ii) any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person,
  - (e) act at all times in good faith and for the benefit of the relevant person, and
  - (f) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.
- (8) The intervener, in making an intervention in respect of a relevant person, may consider the views of—
- (a) any person engaged in caring for the relevant person,
  - (b) any person who has a bona fide interest in the welfare of the relevant person, or
  - (c) healthcare professionals.
- (9) In the case of an intervention in respect of a person who lacks capacity, regard shall be had to—
- (a) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and
  - (b) the urgency of making the intervention prior to such recovery.
- (10) The intervener, in making an intervention in respect of a relevant person—
- (a) shall not attempt to obtain relevant information that is not reasonably required for making a relevant decision,
  - (b) shall not use relevant information for a purpose other than in relation to a relevant decision, and
  - (c) shall take reasonable steps to ensure that relevant information— (i) is kept secure from unauthorised access, use or disclosure, and (ii) is safely disposed of when he or she believes it is no longer required.

The MHC is aware that the concept of ‘best interests’ in the CPC has been primarily informed by the OECD’s ongoing review of, and proposed changes to, the High-Level Principles on Financial Consumer Protection. We also understand that the ‘best interests’ concept is contained in Central Bank legislation. While it is the view of the MHC that it would be preferable to remove the term altogether, we accept that the Central Bank may have to retain it for now. However, such retention of terminology should not facilitate non-compliance with the more rights-focused 2015 Act.

### **1.3 2015 Act and 2001 Act as amended**

The full implementation of the 2015 Act has been identified as essential to Ireland’s compliance with UNCRPD. The 2015 Act was signed into law at the end of 2015 and as noted above will be fully commenced on 26 April 2023.

The primary focus and intent of the 2015 Act is to support all persons to make their own decisions as far as possible. This is in the form of assisted and not substituted decision making, which should only be used as a last resort.

The 2015 Act abolishes the wards of court system for adults under the Lunacy Regulation (Ireland) Act of 1871 and introduces a tiered framework of decision supports, aligned to a person’s needs, together with enhanced tools to allow adults to plan ahead by way of enduring powers of attorney and advance healthcare directives.

The Act also establishes the Decision Support Service (DSS), with duties to promote awareness of and confidence in the new statutory framework, to register and supervise the support arrangements and to promote organisational change.

The 2015 Act does not attempt to amend every existing piece of legislation with which it is incompatible. However, of note, the 2015 Act amends the Credit Union Act 1997, repealing a provision which allows another person to apply the proceeds of an account ‘in the best interests’ of the account holder if there is medical evidence that the account holder is ‘incapable by reason of a mental condition’. Furthermore, the Government has committed to the ongoing review of existing legislation and policy to ensure continuous advancement of rights guaranteed by UNCRPD.

Therefore, it would be the MHC’s view that any new or revised Codes such as the CPC should align with the 2015 Act.

The Discussion Paper does not indicate any awareness of the 2015 Act and its relevance to financial service providers in the area of consumer protection and we submit that it should be included under ‘Domestic Legislative Frameworks’ (page 12).

## **1.4 2015 Act - Code of Practice for Financial Service Providers**

As noted above, the DSS is required to draft and implement codes of practice under the 2015 Act. There will be a Code of Practice for financial service providers, which shall come into effect on or before 26 April 2026.

## **2 Questions**

### ***Broad Theme B – Firms Acting in Consumers’ Best Interests***

Q.4 Do you agree that the Central Bank should develop guidance on what it means for a firm to act in the best interests of its customers?

A. The MHC would refer you to the above. If the concept of best interests is retained, it must be applied in a non-paternalistic manner and in conjunction with the 2015 and the obligations to respect a person’s will and preferences.

Q.5 Does the suggested outline of ‘customer best interest’ guidance capture the essence of the obligation to act in customers’ best interests? What other guidance would you suggest?

A. The MHC would refer you to the above. The MHC would request that you seek to review and understand the statutory support framework relating to the 2015 and that you direct customers and providers towards it. It is essential that providers are aware how the 2015 Act operates and their obligations thereunder, including their interactions with decision supporters.

### ***Theme 1 – Innovation and Disruption***

Q.7 What more should be done to support innovation while ensuring consumers’ best interests are protected?

A – The MHC would suggest that you consult with the relevant interest groups, including disabled persons’ organisations to ascertain how best technology will support them in a way that ensures accessibility. Focus group work conducted by the DSS in relation to the development of systems found that persons with a disability were broadly receptive to a digital first approach but that this is not suited to everyone

### ***Theme 2 – Digitalisation***

Q.9 Do you agree with our analysis of the benefits, challenges and risks around digitalisation in the area of financial services? What are the key issues for you?

Q.10 How do you think the personalisation and individual targeting of ads can be made compatible with the requirement for firms to act in the best interests of customers?

A – We would refer to the reply to Theme1 Q7 above.

#### ***Theme 4 – Pricing Matters***

Q.14 What can firms do to improve transparency of pricing for consumers?

Q.15 In relation to pricing, are there examples of firms using unfair practices to take advantage of customer vulnerabilities?

A – The MHC recommends that information is provided clearly and in plain English (and all other relevant languages required) in an accessible manner, having regard to the diverse needs of stakeholders. This might be by way of a document, a video or a voice recording.

#### ***Theme 5 – Informing Effectively***

Q.16 How can regulation improve effectiveness of information disclosure to consumers?

A. As per the above, the MHC recommends there should be plain English versions of all relevant documentation which is accessible to all. Furthermore, staff should be obliged to attend enhanced communication skills courses to ensure that all relevant efforts are made to facilitate a person before any question is raised about capacity. Please note that the law requires that a person is presumed to have capacity until it is established that they do not.

Q.17 How can firms' better support consumers' understanding – can technology play a role?

A. Please refer to the above replies. The DSS can confirm based on its own research in establishing this new service that the "Digital first" approach has the potential to minimise errors associated with paper processes.

#### ***Theme 6 – Vulnerability***

At the outset, the MHC notes that terms such as "cognitive or age-related impairment" and 'the elderly' are not now acceptable and the language used must reflect the presumption of capacity and the de-medicalised approach to the assessment of capacity. Overall, the language used must be more consistent with a person centred and human rights-based approach.

Q.19 Given that vulnerability should be considered more as a spectrum of risk than a binary distinction, how should firms' duty to act in their customers' best interests reflect this?

A. The reference to moving away from a binary distinction is helpful. There is a growing recognition that vulnerability is not inherent to a person but arises in circumstances in which they are placed at risk. As stated above the fact that the Discussion Paper refers to measures in other jurisdictions and shows no awareness of 2015 Act is a concern. The concept of best interests, if used, must align with the 2015 Act supports and firms must be aware of their obligations to engage with supporters in legal arrangements who are mandated to apply principles other than best interests.

Q.20 What other specific measures might be adopted to protect consumers in vulnerable circumstances while respecting their privacy and autonomy?

A. Please refer to the above. In addition, the CPC must take into account and be aware of requirements relating to adult safeguarding and the associated supports.



## ***Theme 7 – Financial Literacy***

The MHC welcomes this section which follows from the comments above. The DSS would be willing to liaise with you on how best to promote this for those in the mental health / decision support arena.

The 2015 Act financial code will be published together with a plain English guide as well as a video summarising the contents. We can share examples of good accessibility e.g., videos if so requested.

The DSS has statutory functions to provide information to persons in relation to the support options available under the 2015 Act and to make recommendations for changes of practice in organisations that may prevent a person from exercising capacity under the 2015 Act. The MHC believes it would be helpful for the CPC to require firms to be aware of the 2015 Act framework and to direct consumers to the DSS and the supports available, where appropriate.