

Guidelines for Compliance with Non Age-mixing Provisions in Article 37(c) of the United Nations Convention on the Rights of the Child (UNCROC)

Preface

These guidelines are to assist District Health Boards and service providers in all health residential and in-patient contexts to comply with the non age-mixing provisions of article 37(c) of the United Nations Charter on the Rights of the Child.

The age-mixing provisions of UNCROC apply to children and youth that are mandatorily detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT)) or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCC&R). However the age-mixing principle is relevant for all children within in-patient and residential settings, therefore these guidelines should be applied to voluntary patients also.

The Ministry of Health recommends that mental health and disability services establish procedures that will ensure compliance with the standards set out in the UNCROC. DAMHS and Care Managers should always refer to the Rights sections of the relevant legislation for further guidance on any matter. However, questions or feedback on these guidelines can be directed to the Directors of Mental Health, IDCC&R Operations Section or the Mental Health Rights and Protection Team at the Ministry of Health.

1 Definitions

1.1 Child

UNCROC defines a child as any person under the age of 18 years.

1.2 Age-mixing

There are separate adult and young person's in-patient units and residential facilities within or funded by District Health Boards. Disability Services also purchases many services on an age specific basis (i.e. respite), however residential and secure services are generally purchased for adults, including those under IDCC&R.

Age-mixing refers to the practice of placing a child (under 18 year old) into an adult unit or an adult (18 years or older) into a youth unit. There are special circumstances under which this may be in the child's best interest.

1.3 Best Interest

The provision that decisions should be based on the best interests of the child respects the concept that a child's wellbeing should be the primary consideration when seeking to protect their rights.

2 UNCROC Principles

2.1 Relevant principles are to be found in article 37(c) of the United Nations Charter of the Rights of the Child (UNCROC).

- 2.2 Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age.
- 2.3 Every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.
- 2.4 Every child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
- 2.5 The requirements for non age-mixing also take into account the following provisions; the child's best interest (article 3(1)), clinical safety (patient volumes; sufficient qualified staff to be safe (article 3(3)) and within resources available (article 4).
- 2.6 3(1) In all actions concerning children, the best interests of the child shall be a primary consideration.
- 2.7 3(3) Institutions, services and facilities responsible for the care or protection of children are to conform with health and safety standards in particular the number and suitability of staff and supervision.
- 2.8 4 All appropriate measures for the implementation of economic, social and cultural rights within UNCROC should be undertaken to the maximum extent of available resources.

3 Relevant legislation

- 3.1 Other relevant legislative principles are to be found in Part 8, Special provisions relating to children and young persons, of the Mental Health (Compulsory Assessment and Treatment) Act 1992 and Part 2 section 12, Principles governing decisions affecting children and young persons, of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (see appendix 2).
- 3.2 Section 86 and 89 of the MH(CAT) Act provide for a child psychiatrist to conduct assessment examinations and be involved in tribunal reviews for patients under the age of 17 years wherever practicable.
- 3.3 Section 12 of the IDCC&R Act ensures that the welfare of the child is considered in the context of the family and ensures the involvement of the family / whanau in decisions. This section also advocates that the child's wishes are considered and that decisions are implemented within a suitable timeframe.
- 3.4 The Criminal Procedure (Mentally Impaired Persons) Act 2003 covers all those charged with an imprisonable offence and found guilty or unfit to stand trial, or those acquitted on account of insanity. These offenders can be detained under the MH(CAT) or IDCC&R Act in a hospital or secure facility.
- 3.5 In 2005 advice from Crown Law stipulated that the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP) and consequently the IDCC&R Act could be applied in the Youth Court. This has led to higher numbers of youth being disposed into services that were predominantly designed for adults, increasing the need for protection of a child's right to separation from adults.

4 Guidance for compliance with Article 37(c)

- 4.1** Article 37(c) of UNCROC requires that “every child deprived of liberty be separated from adults unless it is considered to be in the child’s best interest not to do so”. Therefore those aged under 18 years should be admitted to facilities specifically designed for children and adolescents, with distinct child-centred staff, personnel, policies and practices.
- 4.2** The Nationwide Service Specifications for Child, Adolescent and Youth Mental Health Services states the age of eligible users as 0-19 years recognising that chronological age may not be the best indicator of service appropriateness. Adult mental health and Alcohol and Other Drug service provision begins at 18 years. The two year overlap allows flexibility to access the most appropriate service based on emotional, physical and social maturity, and clinical need.
- 4.3** The most appropriate service to meet the needs is to be determined clinically by or in conjunction with a child and adolescent specialist. Health services require an agreed mechanism for determining and ensuring access to put this into effect.
- 4.4** Within the context of service flexibility the concept of best interests of the child should be considered paramount (Article 3(1)). A youth user may be treated in an adult service if it is thought to better meet their needs than the alternative and an adult may be admitted to a youth unit so long as it is not to the detriment of those children around him / her.
- 4.5** Upholding the right of detained children to separation from adults should not be limited by financial or resource constraints. DHB’s should take measures to ensure children are separated from adults to the maximum extent of available resources (Article 4). There is a margin of discretion in meeting needs in the most appropriate way and taking steps to progressively realise the right to separation.
- 4.6** A balance must be sought between competing interests for the child. For example, a child’s needs may be better met by providing child and adolescent specialist input to treatment in an adult setting close to family than by admitting the child to a child in-patient unit in another city in circumstances where family could not participate in treatment. Other situations in which age-mixing of children and adults may be appropriate and consistent with UNCROC:
 - a 16 or 17 year old youth is temporarily admitted to Adult Mental Health Services, when urgent treatment is required and no other options are available, until a bed in a youth facility becomes available
 - a suitably mature 16 or 17 year old youth is referred to Adult Mental Health Services or an adult residential unit, when no other options are available, to avoid solitary confinement due to low numbers of similar youth
 - a 19 year old turning 20 in a youth unit is permitted to remain for continuation of treatment if in the person’s best interest and not contrary to younger children’s best interests
 - a vulnerable young adult over 18 years is accepted into a youth mental health unit or residential unit to be more appropriately treated with those who have similar developmental needs

- where a mother is permitted to keep her infant with her in an adult inpatient setting
- 4.7** For 15 year olds when there is no youth in-patient alternative available it would usually be preferable to provide care in a paediatric setting than an adult one.
- 4.8** In all situations it is the interests of the under 18 year olds that must be protected. In all situations specialist child and adolescent clinicians must be involved in placement decisions and in the child's treatment as soon as practicable after admission.

5 Best Interests Assessment

- 5.1** In order to comply with the UNCROC Article 37(c) non age-mixing provision there must be reasonable grounds for deciding that placing a child in a facility that does not allow separation from adults is in their best interests.
- 5.2** Although no conclusive definition can be given the wellbeing of a child will depend on the individual circumstances of each case; the age, clinical needs and maturity of the child and the nature of the health problems.
- 5.3** Wherever practicable the best interest assessment should be conducted by a specialist child and adolescent psychiatrist or senior child and youth clinician.
- 5.4** To determine a child's best interests, the psychiatrist, specialist assessor or responsible clinician must consider all relevant clinical or personal information. Safety, family and close relationships, developmental and clinical needs and the views of the child are important factors to consider.
- 5.5** These factors provide a checklist to guide clinicians in deciding which, among the available options, better secures the attainment of the child's needs and rights (see appendix). The weight given to each factor will vary according to the individual child and their situation.

6 Guidance for when age-mixing is considered to be in the best interest of the child

- 6.1** The Ministry of Health expects that, when age-mixing is considered to be in the best interest of the child, certain protective measures are put in place.
- 6.2** Services should have protocols for referral of youth to adult facilities and vice versa that address the priority of needs and joint care or consultation arrangements.
- 6.3** A child and adolescent psychiatrist or senior child and adolescent clinician should be involved in determining whether best interests are met post-assessment and work closely with adult psychiatrists and clinicians during the duration of the admission.
- 6.4** The adult service should ensure access to age appropriate specialist care via other child and adolescent mental health services (CAMHS), Paediatric services or services with expertise in caring for children with disabilities such as Child Development Centres (CDC's).

- 6.5** Appropriate Child, Youth and Family (CYF) services can be consulted to provide support to the child and / or family and should be involved where the child is in CYF care.
- 6.6** The adult service provided will reflect the special needs and safety of these service users, with respect to family, staffing, treatment and provision for parents / whanau / caregivers.
- 6.7** A precautionary plan in age-mixing situations must include awareness of the young person's potential physical, emotional and sexual vulnerability (level of supervision, visiting policies and smoking and other drug use policies may need modification).
- 6.8** The young person will have access to appropriate therapeutic and recreational activities and their educational needs will be met.
- 6.9** The child's links with family / whanau, hapu, iwi, and family group should be managed and maintained through correspondence, visits and video conferencing.
- 6.10** Staff should be made aware of the rights of the young person and additional provisions for those under the age of 17¹.
- 6.11** An area of an adult unit should be identified for admissions for young people, under exceptional circumstances, so that in such cases staff members are as familiar as possible with working with these patients.
- 6.12** DHB's and service providers will notify the Ministry of Health of any instances of age-mixing.

7 Reporting requirements

- 7.1** The Ministry of Health must be notified of all instances where a DHB or service provider does not comply with the non age-mixing requirement, that all those aged 17 or under are separated from adults. This applies to situations where an under 18 year old is placed in an adult unit and when an adult is placed in a young persons unit. The reporting requirements apply to children that are mandatorily detained to meet UNCROC provisions but services should also report on age-mixing of voluntary patients.
- 7.2** The DHB or service provider must be able to provide a comprehensive justification for age-mixing that confirms it is in the best interest of the child and not be restricted by financial aspects. Services should be prepared to provide a robust clinical assessment of the risk and benefits of the situation and the alternative options considered.
- 7.3** Notifications will enable the Ministry of Health to monitor New Zealand's progress with compliance of Article 37(c). The reporting is for information and awareness purposes rather than for investigation.

¹ As in Part 8 of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

7.4 Disability Services and Directors of Area Mental Health Services have direct reporting responsibility for critical incidents on a quarterly basis, this will include cases of age-mixing.

Appendix 1: Best Interest Assessment Checklist

Safety

Fundamental international human rights norms are to protect the right to life and physical safety therefore clinical safety would normally outweigh any other factor.

Considerations for safety include:

- need for secure care
- risk of harm to self or others
- substance use / abuse
- level of supervision required and capacity of service to provide this (staff numbers and competency)
- vulnerability (especially survivors of abuse)
- risk of and from exposure to adult behaviour (eg sexual behaviour, substance use, psychosis, aggression and restraint of acting-out adult patients)
- level of specialised care by child psychiatrist required (capacity to do this)
- adequacy of facilities for youth (visitation / recreation / privacy), environment that recognises the special physical, cultural, and emotional needs of children and young people

Family and close relationships

One of the fundamental principles for child and youth mental health is for services to be family centred. Aspects of family and close relationships are likely to be highly important to the welfare of the child, and should be part of the best interest decision process. The decision to place a child in a geographically removed location from his or her parents should only be taken if their needs cannot be addressed in a closer facility.

Considerations for family and close relationships include:

- proximity to family / caregivers / other support network and options for maintaining therapeutic contact with family
- quality of family relationships and the potential effect of separation
- the views of the family/ whānau
- the stability of the family given that intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection

Developmental and clinical / treatment needs of the child

Children and youth have unique mental health needs that are different from those of adults, a developmental approach is taken when treating children.

Considerations for developmental and clinical / treatment needs are:

- the social development opportunities / constraints in each option
- learning and educational needs
- intellectual capacity / disability
- the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child
- available options for mixing young person with clinically similar young adults
- the possible detrimental affects of the alternative (isolation)
- suitability of the clinical treatment model / programme(s) to meet needs (re: age, sex, developmental stage, clinical diagnosis, interest, capability)
- willingness and capacity to engage in the programme
- capacity of programme to meet other health needs

- capacity of programme to meet education needs in an in-patient setting

Views of the child

A decision that is in the best interests of the child is likely to be that which takes account of the views of the child.

Consider:

- the child's competency to comprehend and assess the implications of the options
- the views of the child giving due weight in accordance with the age and maturity of the child
- the mental state of the child
- any previous contact the patient or proposed patient has had with other mental health service providers
- the impact of a placement in conflict with these views

Appendix 2: Relevant Legislation

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

Part 2: Principles and general duties

Section 12: Principles governing decisions affecting children and young persons

Whenever a court or a person exercises, or proposes to exercise, a power conferred by or under this Act over a child or young person, the court or person must be guided by any of the following principles that are relevant to the exercise or proposed exercise of the power:

- (a) wherever possible, the family, whanau, hapu, iwi, and family group of the child or young person should participate in the making of decisions affecting the child or young person, and, accordingly, regard should be had to the views of the family, whanau, hapu, iwi, and family group:
- (b) wherever possible, the links of the child or young person with his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:
- (c) a decision affecting the child or young person may be taken only after consideration of the likely impact of the decision—
 - (i) on the welfare of the child or young person; and
 - (ii) on the stability of the family, whanau, and family group of the child or young person:
- (d) consideration should be given to the wishes of the child or young person, to the extent that those wishes can reasonably be ascertained, and those wishes should be given the weight that is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
- (e) decisions affecting the child or young person should, whenever practicable, be made and implemented within a time frame that is appropriate to the sense of time of the child or young person.

Mental Health (Compulsory Assessment and Treatment) Act 1992

Part 8: Special provisions relating to children and young persons

Section 85: Application

In respect of any patient or proposed patient who is under the age of 17 years, the other provisions of this Act shall be read subject to the provisions of this Part.

Section 86: Assessment examination

Wherever practicable, an assessment examination of a [proposed patient] who is under the age of 17 years shall be conducted by a psychiatrist practising in the field of child psychiatry.

Section 87: Age of consent

Notwithstanding anything in [section 36 of the Care of Children Act 2004] or any other enactment or rule of law to the contrary, in respect of a patient who has

attained the age of 16 years, the consent of a parent or guardian to any assessment or treatment for mental disorder shall not be sufficient consent for the purposes of this Act.

Section 88:

Brain surgery

Notwithstanding anything in Part 5 or section 87 of this Act, brain surgery shall not be performed for mental disorder on any person who is under the age of 17 years.

Section 89:

Membership of Review Tribunal

Wherever practicable, for the purposes of a review by a Review Tribunal of the condition of a patient who is under the age of 17 years, 1 member of the Tribunal shall be a psychiatrist practising in the field of child psychiatry.

Section 90:

Review of patient about to attain age of 17 years

- (1) This section applies to every patient who is subject to a compulsory treatment order and who will attain the age of 17 years before the expiry of the compulsory treatment order.
- (2) Not earlier than 2 months and not later than 1 month before the date on which the patient will attain the age of 17 years, the responsible clinician shall review the patient's condition.
- (3) The provisions of subsections (3) to (9) of section 76, and the succeeding provisions of Part 7, of this Act, so far as they are applicable and with any necessary modifications, shall apply in respect of every review under this section.

United Nations Convention on the Rights of the Child

Article 3

3.6 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

3.7 3(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

3.8 4 States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.



Cabinet Social Development Committee

SDC Min (07) 17/6

Minute of Decision

Copy No: 38

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UNCROC Reservation on Age-Mixing When Children Are Deprived of Their Liberty

On 19 September 2007, the Cabinet Social Development Committee:

Compliance with Article 37(c) of UNCROC

- 1 **noted** that in April 2007 Cabinet invited the Minister of Justice, in consultation with the Minister of Police, Minister of Corrections and other relevant Ministers, to report to the Cabinet Social Development Committee (SDC) by August 2007 with options for the withdrawal of the reservation to Article 37(c) of the United Nations Convention on the Rights of the Child (UNCROC) [CAB Min (07) 11/8];
- 2 **noted** that departments anticipate that subject to successful Budget bids, legislation proceeding according to their timelines and operational constraints, they can implement the necessary work to comply with Article 37(c) of UNCROC by December 2008;
- 3 **noted** that the steps outlined below and the usual steps of the treaty-making process, including parliamentary consideration, are required to be taken in order for New Zealand to be in a position to withdraw its reservation to Article 37(c) of UNCROC;
- 4 **noted** that, while one option to comply with Article 37(c) of UNCROC is to build or purchase new, or alter existing, facilities or vehicles, there are alternative options that seek to make better use of existing resources through changes to operational practices;
- 5 **agreed** that officials should explore the alternative options before seeking to build or purchase new, or alter existing, facilities or vehicles;

Detention at New Zealand's borders

- 6 **noted** that the New Zealand Customs Service considers that its practices currently comply with Article 37(c) of UNCROC;

Detention under military law

- 7 **noted** that the New Zealand Defence Force considers that the regime of detention under military law is consistent with Article 37(c) of UNCROC;

Mental health facilities and compulsory care for young persons with disabilities

- 8 **noted** that the Ministry of Health will develop guidelines for interpreting the “best interest” provision of Article 37(c) of UNCROC and distribute guidelines to all district health boards and relevant service providers by December 2008;

Prison detention

- 9 **noted** that the Department of Corrections’ roll-out of the “Test of Best Interests” nationwide will facilitate compliance with Article 37(c) of UNCROC at correctional facilities;
- 10 **noted** that the Department of Corrections is considering an amendment to the Corrections Regulations 2005 to remove the ability to mix prisoners in transit according to age, “where practicable”;

Police custody

- 11 **noted** that the New Zealand Police has indicated a willingness to change the Police General Instruction to align New Zealand Police policy with UNCROC, subject to the development of feasible alternatives to make better use of existing facilities and adequate successful future requests for funding;
- 12 **noted** that the Commissioner of Police would need to amend current General Instructions to align New Zealand Police policy with UNCROC;
- 13 **noted** that, while the financial implications of New Zealand Police compliance with UNCROC could be as high as \$6.0 million to \$8.0 million, the actual cost will be dependent on the development of feasible alternatives to make better use of existing facilities;
- 14 **noted** that New Zealand Police could be criticised for implementing policy affecting young offenders without applying the Children, Young Persons and Their Families Act 1989 definition of a young person;
- 15 **noted** that there will continue to be occasions when operational realities mean that compliance cannot be guaranteed, particularly in the unpredictable environment away from police stations and other holding facilities;
- 16 **invited** the Minister of Police to report to SDC by 31 March 2008 with the joint protocol and implementation plan (see paragraphs 17 and 18 below), with more detailed financial implications, and providing other options if the proposed work is not going to be sufficient;

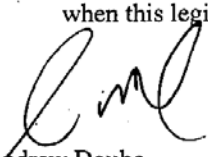
Custody for court appearances

- 17 **directed** the Ministry of Justice, New Zealand Police and Department of Corrections, in consultation with other interested agencies (Customs, Ministry of Social Development (Child, Youth and Family), Ministry of Health and Department of Labour) to:
- 17.1 develop a joint protocol for the transportation and custody of children under the age of 18 years for court appearances;

- 17.2 develop proposals for operational measures to facilitate more efficient and safer court appearances for young people, including advice about any legislative amendments required and the financial implications of any proposals;
- 17.3 develop an implementation plan to support and facilitate agency compliance with Article 37(c) of UNCROC by December 2008;
- 18 **invited** the Minister for Courts, in consultation with the Minister of Police and Minister of Corrections, to report to SDC by 31 March 2008 with a joint protocol, proposals and an implementation plan resulting from the work set out in paragraph 16 above;

Detention of asylum seekers

- 19 **noted** that the Department of Labour has already inserted an amendment into the Immigration Bill to redefine "minor" as a person below the age of 18 years, meaning that when this legislation is enacted, it will be compliant with Article 37(c) of UNCROC.


Andrew Doube
Secretary

Reference: SDC (07) 86

Present:
Hon Steve Maharey (Chair)
Hon Annette King
Hon Pete Hodgson
Hon Parekura Horomia
Hon Ruth Dyson
Hon Rick Barker
Hon Lianne Dalziel

Officials present from:
Department of the Prime Minister and Cabinet

Copies to:
Cabinet Social Development Committee
Chief Executive, DPMC
Helen Wyn, DPMC
PAG Subject Advisor, DPMC
Secretary to the Treasury
Chief Executive, Ministry of Social Development
Minister of Defence
Secretary of Defence
Chief of Defence Force
Secretary of Foreign Affairs and Trade
Commissioner of Police
→ Director-General of Health
Chief Executive, Te Puni Kokiri
Secretary for Justice
Chief Executive, Ministry of Social Development (CYF)
Secretary for Justice (Courts)
Chief Executive, Ministry of Women's Affairs
Chief Executive, Department of Corrections
Minister of Immigration
Secretary of Labour (Immigration)
Comptroller of Customs
Chief Executive, Ministry of Social Development (Youth Development)
Minister of Foreign Affairs