FIGHTING FOR CHILDREN'S RIGHTS IN INSTITUTIONAL SETTINGS

Submission to the Spending Review – Advocacy for all children and young people in mental health inpatient care

September 2021

Introduction

Article 39 fights for the rights of children living in state and privately-run institutions in England (boarding and residential schools, children's homes, immigration detention, mental health inpatient units and prisons). We do this through awareness-raising of the rights, views and experiences of children; legal education; practice development; and policy advocacy, research and strategic litigation. We take our name from Article 39 of the UN Convention on the Rights of the Child (UNCRC), which entitles children who have suffered rights violations to recover in environments where their health, self-respect and dignity are nurtured.

Article 39 works with all children in institutional settings, and more broadly to promote children's rights in England. In the course of our work we have called for funding for a range of services and systems that would further ensure these children's rights are protected, including the provision of additional secure children's home (at the cost of c. £11m)[1] for children entering via welfare or criminal justice routes and increased funding for children's social care, to ensure obligations under domestic and international law can be fulfilled.[2]

This submission concerns the specific issue of advocacy for children and young people in mental health inpatient care, and the need for the government to commit to funding the expansion of this advocacy provision. This focus is for a number of reasons. For one, the Department for Education has committed to revising the national advocacy standards and accompanying statutory guidance and for the implementation of these standards to be truly effective, local authorities must have sufficient funds to commission these vital services. Furthermore, the government has made explicit and recent commitment to ensuring a broader group of children and adults have access to independent mental health advocacy but whilst making clear that this is subject to the Spending Review.

Last year Article 39 published *'A safe space? The rights of children in mental health inpatient care'*,[3] which considers children and young people's access to independent advocacy services in mental health inpatient care and the concerns and issues which they bring to their advocates. We run the Children and Young People's Advocates Network, with over 300 members, and have held a number of discussion groups with children's advocates which have informed this submission.

---

[1] See https://article39.org.uk/wp-content/uploads/2020/12/The-Case-for-Ending-Child-Imprisonment-10-December-2020.pdf p 20

[2] Article-39-response-to-Case-for-Change-13-August-2021.pdf (article39.org.uk)

[3] Article 39, *A safe space? The rights of children in mental health inpatient care*, November 2020

Access to advocacy

Article 12 of the UNCRC grants all children the right to be heard and taken seriously in all matters affecting them. It applies to decision-making processes affecting individual children as well as children collectively. There is a specific requirement in article 12(2) for children to be heard in all formal (judicial and administrative) proceedings affecting them, either directly or through a representative. The Committee on the Rights of the Child's General Comment on Article 12 makes it clear that these proceedings include, for example, "decisions about children's education, health, environment, living conditions, or protection" and that "the right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment… as well as to those initiated by others which affect the child".[4]

Access to advocacy is a key part of ensuring that all children are heard and their rights are respected. The statutory right to advocacy exists for many of the most vulnerable children and young people who are at heightened risk of not being heard or suffering rights violations, including abuse while they are living away from home in institutional settings. Advocates not only help address problems but also work with other professionals and practitioners and service providers to promote a culture where children's wishes, feelings and rights are understood, heard, respected and upheld in practice.

Independent mental health advocates (IMHA) have a fundamental role in supporting children in mental health hospitals. They can help them understand their rights and the complex systems in which they find themselves and participate meaningfully in decision-making processes affecting them. While an advocate cannot always ensure that a child's wishes and views are acted upon entirely, they can ensure their voice is heard and that breaches of their rights are challenged. In 'A safe space?' we shared examples of the roles advocates play in supporting children to, among other things, communicate their wishes and feelings to medical professionals, shape their care and treatment plans, raise concerns about abusive restraint and challenge their detention and plan for leaving hospital.[5]

While the Mental Health Act 1983 (MHA) provides the right to access support from an IMHA to those who are formally detained,[6] this same right is not afforded to informal patients who are in hospital on the basis of their, or their parents/carers', consent.

Over 3,500 children are placed in mental health inpatient care each year; of these, around two-thirds are informal patients.[7] There is little published information on this group, where they are placed and reasons for admission. The law concerning admission and treatment for children who are informal patients is complex but they are not legally entitled to information or support to understand (and apply) it.

Advocates have raised concerns that, although legally allowed to leave hospital, children admitted to hospital 'informally' often live under exactly the same conditions as those detained under the MHA.

---

[4] Committee on the Rights of the Child, *General Comment No. 12 (2009) The right of the child to be heard*, CRC/C/GC/12 1 July 2009

[5] Article 39, *A safe space? The rights of children in mental health inpatient care*, November 2020

[6] Section 130 of the Mental Health Act 1983, as amended by the Mental Health Act 2007

[7] Published statistics on this group offer different figures – see Article 39, *Children in hospital (Mental health) Statistics briefing* , February 2021

There are 'informal in theory' because their physical environment is the same as for detained patients. Furthermore, many young informal patients do not understand their rights and feel an underlying threat that if they in some way 'break the rules' they will be sectioned. As highlighted by the Children's Commissioner for England, this raises serious questions about whether these children are there genuinely on the basis of consent and whether children are also at risk of being unlawfully deprived of their liberty as they do not, in practice, have the ability to leave, a potential breach of Article 5 of the European Convention on Human Rights.[8]

The gap in protection for informal patients has been addressed in some hospitals through the development of drop-ins and ad hoc or contractual advocacy provision for that group. However, this often relies on the 'goodwill' of advocacy services, many of whom are not funded to help informal patients but do so anyway. Without a statutory duty to provide advocacy there remains a significant risk of children in need of support not receiving essential advice, support and representation.

Even for those with an existing legal entitlement, access may not be straightforward. Many children will be so unwell on arrival that it will be hard to take in information and an offer of advocacy will need to be provided consistently throughout their time in hospital. Some units have a system of automatic referrals (known as 'opt out' or 'open access') where every child detained under the MHA is referred to an IMHA unless they specifically say they do not want to be. But not all settings offer this and advocates told us that access to advocacy can rely too heavily on the setting in which a child is placed, the knowledge and the understanding of medical staff.[9] Many advocates felt that they are too often seen as 'causing trouble' rather than as a vital support role for children and young people and this could negatively impact access.

There is also little available data on how many children are actually accessing an advocate. The responsibility for commissioning IMHA services lies with local authorities.[10] Article 39 sent freedom of information requests to all authorities with Tier 4 child and adolescent inpatient units in this area – of those that responded only 21% were able to provide data on the number of children accessing advocacy.[11] One local authority claimed not to have any Tier 4 child and adolescent inpatient units in its area despite there being a Priory Hospital with capacity to look after 22 children and adolescents in the borough, while another explained that IMHAs for children were not commissioned at all, with an adult advocacy provider picking up any requests for help that did arise. A recent report from the Children's Commissioner for England found that 13% of wards had not had any advocates visiting children there prior to March 2020.[12]

Most local authorities told Article 39 that data on children's advocacy was held by (Clinical Commissioning Group) CCGs or NHS Foundation Trusts. Many CCGs would conversely claim that local authorities held the data. Of the NHS Foundation Trusts we contacted, only a third were able to provide data on the number of children who had received support from an advocate over the past

[8] Children's Commissioner for England, *Who are they? Where are they? 2020 – Children locked up*, November 2020
[9] Sections 6.15-6.17 of the Mental Health Act Code of Practice makes clear that services have a duty to make sure that people understand how they can get help from an advocate. Where someone lacks the capacity to decide whether they want the help of an advocate, the hospital manager should ask an advocate to meet the person so they can explain directly how they can help.
[10] Section 43 of the Health and Social Care Act 2012
[11] 9 local authorities out of the 42 that responded.
[12] Children's Commissioner, *Inpatient mental health wards during Covid-19*, 2020

three years.[13] Of those who could provide data, nearly all recorded that NHS complaints had been submitted without the assistance of an advocate, despite the legal right to request the support of an advocate when making a complaint.[14] No data is available showing whether children are automatically offered the assistance of an advocate when they raise concerns or seek to make a complaint,[15] or when they report abuse.[16]

The 2018 Independent Review of the Mental Health Act[17] recommended that children and adults who are in hospital voluntarily should have the statutory right to an advocate, just like those who are formally detained, and that advocacy should operate on an opt-out basis, so people can more easily get the support to which they are entitled. This was echoed by the Care Quality Commission which has called for advocacy to be "offered on an opt-out basis in future".[18]

The White Paper on Mental Health Act Reform recognises that IMHAs are "well placed to support informal patients to understand their rights" but states that, as it would create an "additional burden" for local authorities and advocacy providers "expanding the statutory duty to all inpatients will therefore be subject to future funding decisions". The government's response to the consultation on the White Paper commits to taking forward "legislative changes to extend eligibility of IMHA services to all mental health inpatients, including informal patients" but reiterates the dependence of this on "future funding decisions, including at Spending Review 2021".[19]

The impact assessment for the White Paper state that the additional cost of introducing wider access to advocacy over the ten year period from 2023/24 to 2032/33 would be £147 million.[20]

Improving access to advocacy is a vital part of delivering on the UK's human rights obligations and the government's stated intention of empowering individuals and ensuring they have a voice. It is an essential part of addressing the current gap in rights protections, especially given the continuing concerns about very serious human rights violations in these settings – highlighted by the Joint Committee on Human Rights and others. The UN Committee on the Rights of the Child as part of its periodic review of the UK has also asked the government to outline the measures it has taken to ensure "the right of the child to be heard, with adequate support" in decisions affecting them in mental health settings.[21]

---

[13] 6 out of 18. We contacted those NHS Mental Health Trusts who had provided data to NHS England on children detained under the Mental Health Act. Two of those Trusts provided data that appears unreliable in that more children are recorded as receiving help from an advocate each year than were actually inpatients that year.

[14] Chapter 4 of the Mental Health Act 1983: Code of Practice includes guidance on complaints

[15] There is a statutory right to access an advocate when making an NHS complaint under Section 223A of the Local Government and Public Involvement in Health Act 2007

[16] Previous research by Article 39 highlighted 20 to 40 abuse allegations against adults working in mental health inpatient units a year between 2012 and 2015. See Article 39, *Abuse in children's institutional settings: How much is known?* November 2017

[17] *Modernising the Mental Health Act – final report from the independent review*, 2018

[18] Care Quality Commission, *Monitoring the Mental Health Act in 2019/20: The Mental Health Act in the coronavirus (COVID-19) pandemic*, 2021

[19] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002885/reforming-mental-health-act-consultation-response-print-ready.pdf

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002694/mha-consultation-response-impact-assessment.pdf

[21] See UN Committee on the Rights of the Child, List of issues prior to submission of the combined sixth and seventh reports of the United Kingdom of Great Britain and Northern Ireland, March 2021, para 15

We urge the government to commit without qualification to funding the expansion of the right to support from an advocate in the forthcoming Mental Health Bill. This should include:

- **Legislating for 'opt-out' advocacy so that children and adults automatically receive support from an advocate when they are admitted to hospital, rather than having to ask for one, but can still choose to 'opt-out' if they don't want an advocate.**
- **Extending the right to an advocate to voluntary patients, who are often on locked wards and subject to restrictions and coercion which can amount to deprivation of liberty. This positive protection is already provided to patients in Wales.**

For more information please contact Kamena Dorling, Head of Policy and Advocacy, Article 39 at kamena.dorling@article39.org.uk