

Safeguarding Ireland Submission

in respect of

The Law Reform Commission's Issues Paper

A Regulatory Framework for

Adult Safeguarding (LRC IP 18 – 2019).

17th May, 2020

Safeguarding Ireland welcomes the publication of this Issues Paper on **“A Regulatory Framework for Adult Safeguarding”**. Safeguarding Ireland is registered with both the Charities Regulator and the Companies Registration Office. The main objective of Safeguarding Ireland is to promote safeguarding of adults who may be vulnerable, protect them from all forms of abuse by persons, organisations and institutions and develop a national plan for promoting their welfare. This is achieved by promoting inter-sectoral collaboration, developing public and professional awareness and education and undertaking research to inform policy, practice and legislation in the Republic of Ireland. In addition, Safeguarding Ireland undertakes the following for the benefit of adults in the Republic of Ireland who may be vulnerable –

(a) Raises public understanding of attitudes, behaviours, circumstances and systems that create vulnerability that may result in abuse and that may require a safeguarding response.

(b) Promotes the protection and rights of people who may be vulnerable by encouraging organisations and services to recognise, prevent and deal with exploitation and abuse effectively.

(c) Informs and tries to influence Government policy and legislation to safeguard the rights of people who may be vulnerable.

It is in the context of the above objectives that Safeguarding Ireland very much welcomes the publication of this paper and the opportunity to make submissions in respect of it.

Safeguarding Ireland’s submission is formatted as follows. Each Issue is firstly outlined. Following that, the Law Reform Commission’s specific questions for consultation are outlined underneath each issue. The submission from Safeguarding Ireland is then outlined in the subsequent paragraphs. In forwarding these submissions, please note that Safeguarding Ireland is available to elaborate on any submission or part thereof or discuss in more detail any element that the Law Reform Commission deems appropriate.

Issue 1. Values and Principles underpinning Adult Safeguarding.

Q. 1.1 Do you consider that the proposed guiding principles, as set out above in paragraph 1.14 of the Issues Paper, would be a suitable basis to underpin adult safeguarding legislation in Ireland?

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Q. 1.2 Do you consider that additional guiding principles should underpin the legislation? If yes, please outline the relevant additional guiding principles.

Comments/Answers:

In its paper, the Law Reform Commission (LRC) presents a number of proposed principles following consideration of various principles within adult safeguarding in Ireland and principles underpinning adult safeguarding in other jurisdictions. The LRC's proposed principles are –

- *Human rights: ensure that the rights of an individual are respected including the rights to dignity, bodily integrity, privacy and respect for culture and beliefs;*
- *Empowerment: presumption of decision-making capacity, informed consent and the right to participation and independent advocacy;*
- *Protection: provision of support and care to ensure safety and dignity, and to promote individual physical, mental and emotional well-being;*
- *Prevention: taking proactive steps to ensure that safeguarding measures are in place to prevent abuse from occurring;*
- *Proportionality: ensuring that any interventions are necessary with regard to the circumstances of the individual; that any interventions are the least intrusive and restrictive of a person's freedom as possible; and that any interventions are proportionate to the level of risk presented;*
- *Integration and cooperation: multiagency approaches to ensuring effective safeguarding for all at risk adults on a local level;*
- *Accountability: accountability and transparency in adult safeguarding.*

1.1

Safeguarding Ireland considers the above principles as most appropriate in any legislation underpinning adult safeguarding. However, given the level of financial abuse in Ireland, Safeguarding Ireland is of the view that control over financial affairs and property, as set out in Section 8(6) (b) of the *Assisted Decision-Making (Capacity) Act 2015*, is also a right that should be respected for any adult at risk of abuse. We therefore suggest that the first proposed principle should read – *Human Rights: ensure that the rights of an individual are respected including the rights to dignity, bodily integrity, privacy, control over financial affairs and property and respect for culture and beliefs.*

1.2

We do not believe that the addition of any further principles will provide any benefit to the legislation.

Issue 2. Defining Key Terms for Adult Safeguarding.

Q. 2.1 Do you consider that the statutory regulatory framework for adult safeguarding should define the categories of adults who come within its scope?

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Q. 2.2 If the answer to Q. 2.1 is yes, what definition of the categories of adults who come within its scope would you suggest?

Q. 2.3 Do you consider that the Commission has, in Issue 2 of the Issues Paper, defined the following terms with sufficient clarity:

(a) “safeguarding”;

(b) “abuse” and “harm” (including whether you consider that the definition of “abuse” should include “harm” or whether “abuse” and “harm” should be separately defined).

(c) “neglect”;

(d) “capacity”

Comments/Answers:

2.1

Safeguarding Ireland considers that any statutory regulatory framework for adult safeguarding must define the categories of adults who come within its scope. This would help to ensure clarity in relation to the roles of various individuals and agencies. In addition, this would also help to ensure that safeguarding efforts are targeted at those in need of safeguarding services. In the absence of such definitions, it is likely that much time and resources may be spent on debate and consideration of the appropriateness of interventions or otherwise. A clear definition of the categories of adults who come within the scope of safeguarding legislation will facilitate a common and shared understanding which will be necessary, not least in supporting the principles of integration and cooperation across two or more agencies or departments.

2.2

There may, either now or in the future, be differences in opinion on the most appropriate terminology to be used in defining the categories of people to be supported. Safeguarding Ireland concurs with the move away from the term “vulnerable person” or “vulnerable adult” as those terms may, unintentionally, lead to a societal classification of people in need of safeguarding as a particular sub-group of the population. This could contribute to a view that those people are inherently inferior. Safeguarding Ireland would propose that the most appropriate term is “adult at risk of abuse”, while acknowledging that even this term might not be considered the most appropriate in time to come.

Developing a definition of an “adult at risk of abuse” that sufficiently captures what is required is difficult. Safeguarding Ireland considers that many of the definitions outlined in the Issues Paper have some merit but also may not capture the cohort of people that may need safeguarding. For example, the HSE definition considers only abuse, neglect or exploitation by a third party, thereby excluding a significant number of people who, because of impaired capacity, or impaired physical or mental well-being, may be severely neglecting themselves. The definition in England’s *Care Act 2014* requires that the person is in need of “care and support”. Safeguarding Ireland is in agreement with the LRC that a person may be capable of living independently without care and support but may still be at risk of abuse or harm.

Safeguarding Ireland would support a modified definition of an adult at risk of abuse as outlined in the *Adult Support and Protection (Scotland) Act 2007*. Safeguarding Ireland suggests the modified definition as follows –

Page | 5 ***An adult in need of protection is a person aged 18 or over, whose exposure to harm through abuse, exploitation or neglect, including self-neglect, may be increased by their***
a) personal characteristics, and/or
b) life circumstances and
c) who is unable to protect their own well-being, property, assets, rights or other interests, and/or
d) where the action or inaction of another person or persons is causing, or likely to cause, him/her to be harmed.

The above definition encompasses people who may be at risk of abuse by a third party and also those who may be neglecting themselves. Safeguarding Ireland is of the view that serious self-neglect should be included in any regulatory framework on adult safeguarding. However, this is a very complex area and the incidence of self-neglect can be influenced by a number of factors, including bereavement and poverty. In any consideration of responses to self-neglect, the person's circumstances, wills, preferences, lifestyle choices and values must be considered.

2.3

The Law Reform Commission has outlined a number of definitions of safeguarding, abuse and harm used in various policies and in different jurisdictions. However, it does not appear to have settled on any proposed definitions of these terms.

Safeguarding: Safeguarding Ireland, in proposing a definition of safeguarding, has taken the view that a slightly amended version of the *Care Act 2014* definition may offer the best option thus -

“Safeguarding is the promotion and protection of the right to live in safety, free from abuse, harm and neglect of an adult at risk. It is about people and organisations working together to prevent and stop both the risks and experiences of abuse or neglect, while at the same time making sure that the adult’s wellbeing is promoted including, where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action. This must recognise that adults sometimes have complex interpersonal relationships and may be ambivalent, unclear or unrealistic about their personal circumstances.”

The above definition has the benefit of including the terms *abuse, harm and neglect*, all of which have different meanings. It encompasses the notion of neglect, including self-neglect. In addition, it recognises the importance of the adult's views, wishes, feelings and beliefs, thereby explicitly stating the adult's preferences as crucial to the definition of safeguarding. A further advantage is that it clearly recognizes the need for “*people and organisations to work together*”. (This element is discussed further under Issue 11 below).

Abuse: In defining abuse, Safeguarding Ireland supports the definition outlined in the HSE's 2014 National Policy and Procedures, and in HIQA's and the MHC's National Standards for Adult Safeguarding definition as:

"A single, or repeated act, or omission, which violates a person's human rights or causes harm or distress to a person".

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Harm: In defining harm, Safeguarding Ireland believes that the *Scottish Adult Support and Protection (Scotland) Act 2007* provides the most appropriate definition –

"harm" includes all harmful conduct and, in particular, includes:

- *conduct which causes physical harm;*
- *conduct which causes psychological harm (for example by causing fear, alarm or distress);*
- *unlawful conduct which appropriates or adversely affects property, rights or interests (for example theft, fraud, embezzlement or extortion); or*
- *conduct which causes self-harm.*

Neglect: The British Columbia Adult Guardianship Act 1996 defines neglect as "any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs, and includes self-neglect". Safeguarding Ireland is of the view that this definition is appropriate, easily understood and captures the salient issues.

Capacity: Safeguarding Ireland fully endorses the view that in order to achieve clarity and certainty, it is important that there is consistency in the definitions set out in the safeguarding legislation with that provided for in the *Assisted Decision-Making (Capacity) Act 2015*. We therefore agree that it is particularly important that there is consistency in the definition of "capacity" adopted in the adult safeguarding legislation.

Issue 3. Physical, Sexual, Discriminatory and Psychological Abuse, Neglect and Deprivation of Liberty.

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Q. 3.1 Do you consider that adult safeguarding legislation should impose a statutory duty on an adult safeguarding service provider to prepare a care plan for each adult in receipt of safeguarding services?

Q. 3.2 Do you consider that adult safeguarding legislation should impose a duty on an adult safeguarding service provider to safeguard adults at risk?

Q. 3.3 If the answer to 3.1 is yes, do you consider that such a care plan should address the prevention of physical, sexual or psychological abuse, or neglect?

Q. 3.4 If the answer to either 3.1 or 3.2 is yes, do you consider that breach of such a duty or, as the case may be, duties should give rise to civil liability on the part of an adult safeguarding service provider?

Q. 3.5 If the answer to either 3.1 or 3.2 is yes, do you consider that breach of such a duty or, as the case may be, duties should give rise to criminal liability on the part of an adult safeguarding service provider?

Q. 3.6 If the answer to 3.2 is yes, do you consider that breach of such a duty by a person responsible for providing adult safeguarding services, where this occurs in the course of his or her duties or, as the case may be, within the scope of employment of an adult safeguarding service provider, should give rise to a complaint to a professional body with regulatory functions in relation to a person who is a member of that professional body?

Q. 3.7 Do you consider that there are any additional legal measures that could be introduced to prevent physical, sexual, psychological abuse or neglect?

Comments and Answers:

3.1

The short answer to the first question above is yes. As referenced on page 51 of the LRC's Issues paper, the Chair of Safeguarding Ireland has suggested that adult safeguarding legislation could provide for a general statutory duty of care to promote an individual's well-being and to protect an individual from abuse or neglect. The Department of Health has also stated that it sees a lot of advantages in providing for a statutory duty to safeguard vulnerable or at-risk adults. The potential consequences for an adult at risk of abuse can be significant and, in some cases, catastrophic. In addition, it is recognized as good practice that any adult in receipt of care services should have a care plan in place. Because of the fact that significant harm can occur to an adult at risk of abuse, Safeguarding Ireland considers it vital that a care plan is in place for any adult who has come to the attention of an adult safeguarding service and if that service considers the person in need of safeguarding. In considering the introduction of a statutory duty of care into these regulations, Safeguarding Ireland is of the belief that this duty should be similarly reflected as a provider responsibility in the Health Act 2007, the Mental Health Act 2001 and any prospective legislation such as the Patient Safety (Licensing) Bill.

3.2

In ensuring that those most in need of safeguarding are protected, legislation should impose a duty on adult safeguarding service providers to safeguard adults at risk. If there is an absence of an obligation to provide safeguarding services, the services would likely be applied inconsistently, be dependent on the diligence or otherwise of the service staff and would have to compete with other priorities.

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3.3

Care Plans should address the prevention of all forms of abuse or harm, including physical, sexual and psychological abuse, and neglect, including self-neglect.

3.4 and 3.5

The whole area of safeguarding, abuse, harm and neglect can be complex and, sometimes, interpretations may differ, particularly in cases where family members have differing views. There is anecdotal evidence of family members trying to use the HSE's Safeguarding and Protection Teams to resolve family differences where no evidence of actual abuse or harm exists. There are also situations where "concerned" relatives or neighbours may consider unwise decisions by people who have decision-making capacity as ones that require interventions, against a person's wishes, by the Safeguarding and Protection Teams. In addition, if one of the principles underpinning safeguarding legislation is that of proportionality, (ensuring that any interventions are necessary with regard to the circumstances of the individual; that any interventions are the least intrusive and restrictive of a person's freedom as possible; and that any interventions are proportionate to the level of risk presented) it would seem to Safeguarding Ireland that a statutory duty on an adult safeguarding service provider to prepare a care plan for each adult in receipt of safeguarding services should give rise to a criminal rather than civil liability. Moreover, if a civil liability is imposed, this may not, by virtue of the adult's circumstances, be a remedy to those in greatest need.

3.6

The professional staff of an adult safeguarding provider should be subject to "fitness to practice" assessments by their professional body in cases of complaints of poor practice regarding adult safeguarding, in accordance with standard practice as required by many professional bodies

3.7

The *Assisted Decision-Making (Capacity) Act 2015* already provides at Section 145 for an offence for decision supporters who ill-treat or willfully neglects a relevant person. Again, to maintain consistency with the 2015 Act similar provisions should apply to any person who ill-treats or willfully neglects an adult at risk.

The Issues Paper refers to the gap in the *Domestic Violence Act 2018* in that the offence of coercive control does not extend to family relationships. Safeguarding Ireland has made a submission to the Minister for Justice and Equality on this issue in March 2019 (copy attached) and suggested the amendment of the definition of ‘relevant person’ in Section 39 of the 2018 Act. Safeguarding Ireland would urge the Law Reform Commission to make a recommendation in its final Report that the applicability of the offence of coercive control be extended to family relationships generally but not confined, as is provided in the *Serious Crime Act 2015* in England and Wales, to those who live together. The experience of members of Safeguarding Ireland is that even where a person is not living with a family member the control over a vulnerable adult by another family member can be seriously coercive. See also under Issue 7 below.

Issue 4. Financial Abuse.

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Q. 4.1 Do you consider that sectoral regulators and bodies such as the Central Bank of Ireland and the Department of Employment Affairs and Social Protection currently have sufficient regulatory powers to address financial abuse in the context of adult safeguarding?

Q. 4.2 If the answer to 4.1 is no, do you consider that either or both of the following would be suitable to address financial abuse:

(a) a statutory financial abuse code of practice or protocol;

(b) a statutory form of protected disclosure, along the lines of the Protected Disclosures Act 2014, for financial institutions that engage in responses to suspected financial abuse in good faith.

Q. 4.3 Do you consider that further additional regulatory powers are required to address financial abuse? If yes, please give examples.

Comments and Answers:

4.1

As outlined in the LRC's Issues Paper, financial abuse would appear to be prevalent in Ireland, particularly among older people. The abuse may be perpetrated by family members, carers, neighbours, strangers or organisations. While there would seem to have been significant efforts to address financial abuse in a number of sectors over the last few years, it is evident to Safeguarding Ireland that more needs to be done. While the Central Bank of Ireland and the Department of Employment Affairs and Social Protection have regulatory powers, they are not sufficient. It is noted that the Central Bank has commenced the revision of its *Consumer Protection Code 2012*. It is suggested that the revised Code contain details on duty of care towards adults who are at risk of financial abuse. However, the Central Bank's *Consumer Protection Code* is only binding on regulated entities.

4.2

As suggested in the Issues Paper, a statutory financial abuse code of practice for all financial institutions both regulated and unregulated financial sector entities, the Department of Employment Affairs and Social Protection and the Department of Public Expenditure and Reform (who are responsible for the occupational pensions of retired public servants estimated to be €640million in 2020) should be introduced to combat financial abuse. A key component to prevent abuse must be a requirement of financial institutions to ensure training and education of staff on issues of decision-making capacity and exploitation of vulnerable customers.

4.3

This code of practice should include the provision of a statutory form of protected disclosure but this should not be limited to financial institutions regulated by the Central Bank but also include all financial sector entities and Government Departments who become aware of financial abuse.

Some of the other forms of financial abuse are more difficult to detect and rectify, particularly where the abuse is perpetrated by family members and the amounts involved may be small. This element of financial abuse tends to be more insidious and often, the perpetrator doesn't consider their actions abusive.

Social Welfare Payments and financial abuse:

Safeguarding Ireland is of the view that the State has a major role to play in ensuring that its legislation, policies and procedures are adequate to ensure the prevention of financial abuse for those in receipt of payments from the State.

Given the level of state payments projected for 2020 at €13.1 billion (over €8.4 billion of State Pension and €4.7 billion for Disability benefits and Carers' allowances), the higher level of financial abuse of older people and the research findings indicating that rates of mistreatment in relation to financial abuse were highest among those whose only income is the state pension then it necessary to ensure that there is a robust regulatory approach to the appointment of and review and oversight of agents when appointed.

Agency Arrangements

It is likely that the need for a "Type 2" Agent will no longer be necessary on the commencement of the *Assisted Decision-Making (Capacity) Act 2015* as the arrangements under the 2015 Act with reporting obligations to and oversight by the Director will include persons whose decision-making capacity is in question or who lack capacity and need support and assistance in relation to payments they are entitled to receive from the State. In this regard, it should be noted that the *Social Welfare Consolidation Act 2005* predates the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and therefore the arrangements provided for in the 2015 Act enable the State to comply with its specific obligations under Article 12(4) of the UNCRPD.

Safeguarding Ireland is concerned that even for those who have capacity there is a need to ensure that each person who is entitled to their pension or benefit is not being subject to financial abuse. A recent Red C survey commissioned by Safeguarding Ireland (*Advance Healthcare Directives and Place of Care* February 2020) indicated that a majority were of the view that they could make decisions for another person who may be frail but does have decision-making capacity and the consent of the person is not required. This bears out the view of members of Safeguarding Ireland who have to deal with the financial concerns of persons who are vulnerable. There is therefore a need to ensure that 'temporary agents' and "Type 1" Agent are 'suitable' persons, that they understand and comply with their obligations and that where conflicts of interest arise they are known and managed. Safeguarding Ireland would also welcome a more robust oversight of both 'temporary agent' arrangements and Type 1 agency arrangements to ensure that they continue only during the time where the person is unable to collect his or her welfare payment directly but still has decision-making capacity. Safeguarding Ireland is aware of some incidences where these particular agency arrangements extend inappropriately outside the scope of their purpose. It is again suggested that adult safeguarding legislation be consistent with the *Assisted Decision-Making (Capacity) Act 2015* so that the criteria set out in the 2015 Act for the suitability to be appointed, requirement for reporting and oversight of Agents under the social welfare code be as robust as those appointed as decision supporters under the 2015 Act.

Given that the majority of the perpetrators of financial abuse are family members, the Department should reconsider the very prescriptive list in the current regulation, which mainly include family members, who may be appointed as agent and instead look at the suitability of the person to be appointed and in particular to ensure that the 'will and preference' of the beneficiary of the payment is obtained in so far as possible and that the person to be appointed is a trusted person by that beneficiary and that there is no issue of fraud, coercion or undue influence by the proposed agent.

The Issues Paper also notes that a large portion of social welfare payments are paid directly into bank accounts which may present issues in terms of financial abuse being perpetrated through access to those bank accounts. The following are examples of safeguarding issues that need to be addressed. The continuing use of online banking by a third party when a person lacks the capacity to operate the account, where an agent has been appointed in relation to welfare payments, monies are directed to be lodged to the nominated bank account but the bank is not aware that an agent has been appointed. Or, in order to receive welfare payments by ETF (electronic transfer of funds) a bank account is opened in the name of a person who lacks decision-making capacity (with no capacity to enter into a contract with the bank) and an agent with no designation that it is simply an agency account. Further comments will be made under Issue 10 Data Sharing.

Safeguarding Ireland is also of the view that the Department of Employment Affairs and Social Protection develop a regulation or protocol for organisations (e.g. private nursing homes/residential centres) who may be appointed an Agent to include the requirement to identify and account for each resident's pension or benefit. There should be an absolute requirement that residents' monies must at all times be kept separate from the funds of the organisation.

Carers Allowance

Safeguarding Ireland suggests that safeguarding regulations should require that 'suitability' to provide care be one of the qualifying criteria for a person to receive a Carers Allowance. There should also be provision for a periodic review to ensure that care is being provided to the 'cared for' person. Safeguarding Ireland is aware of abuses where the recipient of a Carers Allowance is not providing care and is not a 'suitable' person to provide such care.

Because the entitlement to Carers Allowance is a means tested payment there is understandably an emphasis in the application form on the disclosure of financial resources of the applicant to ensure that he/she qualifies for the allowance.¹ Safeguarding Ireland accepts that the interest of the State must be protected to ensure that only those who genuinely qualify for the allowance receive it. However, Safeguarding Ireland would also argue that the State's obligation also extends to the cared-for person to ensure that the person being recognised as a carer is a suitable person to carry out the care needs and to ensure that the care is provided.

¹ [file:///C:/Users/XPS/Downloads/19942_5c857d64529f42b78db3dc4afe8feb5a%20\(1\).pdf](file:///C:/Users/XPS/Downloads/19942_5c857d64529f42b78db3dc4afe8feb5a%20(1).pdf)
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Financial abuse arising from joint accounts:

Safeguarding Ireland is very aware of the inherent dangers in having a joint account or a third party account as raised in the Issues Paper and is also aware of the lack of understanding of the legal implications of such accounts. In particular, it is important that financial institutions ensure that all staff understand the legal nuances and clarify for customers at the time of the establishment of a joint account the legal issues that may arise. The intention of persons opening such accounts is a critical issue as to the ownership of such accounts, whether there is an intention to make a gift at the time of the opening of the joint account or at a later stage, whether the joint account holders benefit by survivorship or whether any of the joint owners of the account hold on a resulting trust for the estate of a deceased joint owner.

Safeguarding Ireland refers to the Guidelines on the website of the Law Society <https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Joint-Bank-Accounts---Guidelines-for-Solicitors/#.XIJcdGj7Q2w> which sets out the legal implications of such accounts. However, Safeguarding Ireland also believes that there should be statutory clarification with regard to such accounts such as the need to clearly state the intention of the parties when opening a joint account. Safeguarding Ireland therefore suggest that the following provisions be included in adult safeguarding legislation –

'Where property (other than land) is transferred in to the joint names of the original owner and another person, then on the death of the original owner the property shall pass on a resulting trust to his/her estate unless there is evidence of an intention to benefit the joint owner and an intention that the property should pass by survivorship to the surviving joint owner.'

The legislation should also provide that the civil standard, the balance of probabilities, should be the applicable standard to rebut the presumption of a resulting trust.

In addition, the legislation should also provide that the common law presumption of advancement to adult children should be abolished. This has been abolished in many jurisdictions and should also be abolished in Ireland. It is no longer appropriate in modern society.

Legal Services Regulatory Authority/Law Society of Ireland:

Safeguarding Ireland is aware of Regulation S.I 375 of 2012 - *Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012* - which prohibit a solicitor acting for both Vendor and Purchaser but there is anecdotal evidence that some solicitors continue to act for both parties so more needs to be done.

The Legal Services Regulatory Authority, who has a statutory responsibility of protecting and promoting the public interest, to regulate the provision of legal services by legal practitioners and to ensure the maintenance and improvement of standards in the provision of such services together with the Law Society as the educational body for solicitors, should positively recognise that legal professionals have a direct role to play in the prevention of financial abuse. Given the levels of financial abuse is Irish Society, particularly by family members who wish to have property and assets transferred to them, the regulatory bodies should ensure that the training and education of legal professionals is such as to instill a duty to care to vulnerable clients to prevent abuse and have the skills to readily recognise fraud, coercion and undue influence.

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New offence: In line with provisions in the *Assisted Decision-Making (Capacity) Act 2015*, Safeguarding Ireland suggests that safeguarding legislation provides that any person who uses fraud, coercion or undue influence to force another person to transfer property or assets to him or her commits an offence.



Issue 5. What body or bodies should have responsibility for the Regulation of Adult Safeguarding?

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Q. 5.1 The Commission has discussed the following 5 possible institutional or organisational models for the regulation of adult safeguarding:

- **Establishing a regulatory body within the Health Service Executive;**
- **Establishing a regulatory body as an executive office of the Department of Health;**
- **Establishing a regulatory body as an independent agency;**
- **Amalgamating a regulatory body with an existing agency;**
- **Conferring additional regulatory powers on an existing body or bodies.**

In your view:

(a) which of the above is the most appropriate institutional or organisational model for the regulation of adult safeguarding?

(b) do you consider that any of the models discussed would be completely inappropriate?

Please give reasons for your answers to (a) and (b).

Q. 5.2 Do you consider that any, or all, of the 6 core regulatory powers that the Commission has identified in paragraph 5.38 of the Issues Paper should be applied in the case of adult safeguarding and, if so, whether they would be sufficient in the context of adult safeguarding legislation?

Q. 5.3 Do you consider that there is a need for a statutory regional adult safeguarding structure, which would have a broad remit in respect of all safeguarding services for adults? If so, how would such a regional structure be best integrated into existing structures?

Comments and Answers:

5.1

Safeguarding Ireland has considered the various institutional model options for the regulation of adult safeguarding. Traditionally, the HSE has been at the forefront in the provision of adult safeguarding services with agencies like HIQA and the Mental Health Commission providing significant elements of safeguarding in designated centres and settings. In assessing the most appropriate model, Safeguarding Ireland considered the advantages and disadvantages of each.

At the present time, the HSE plays a leading role in adult safeguarding. However, it has long recognized its inability to act in isolation of other agencies in the statutory, voluntary and business sectors. Many of the safeguarding issues that arise require a multi-agency response. In addition, the HSE is very restricted and has virtually no powers in investigating concerns of abuse, neglect or exploitation outside of HSE settings. These include concerns that might arise in a community or private and voluntary nursing home settings. When there are safeguarding concerns of abuse within HSE facilities, these may obviously present conflicts of interest. Indeed, this was one of the reasons that led to the establishment of an independent inspectorate of private and HSE nursing homes. The generally held view was that the HSE could not be truly objective in assessing the standards of care when they were both provider of services, either indirectly through funding services or through direct provision. The HSE has many competing demands (budget constraints, scarce resources and an ever-increasing

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demand, increasing public expectations) and it may add a further layer of difficulty to reconcile these demands if a safeguarding authority was vested in the HSE. Even if a new authority with statutory powers was vested in the HSE, potential conflicts of interest will still arise.

Safeguarding Ireland considers the option of establishing the authority as an executive office of the Department of Health as presenting similar difficulties to that of establishing it within the HSE.

Amalgamating the authority with an existing agency is probably the least preferred option of those outlined in the Issues Paper of Safeguarding Ireland. The agencies suggested are the Mental Health Commission, the Health Information and Quality Authority and the Child and Family Agency (TUSLA). Each of these agencies have very specific and defined functions, particularly in the case of the Mental Health Commission and the Health Information and Quality Authority. Aside from concerns of expansion of the roles, legislative requirements and capacity concerns, an amalgamation of the authority with any of these agencies would dilute their current well established identities and somewhat dilute their functions. Similarly, TUSLA is well established and recognized for its role with children and amalgamating an adult safeguarding authority within its body will likely lead to confusion, at least among the general public, about its roles and responsibilities. Safeguarding Ireland is also of the view that the skill set required for child and adult safeguarding are substantially distinct from one another and a separate focused approach is required for each area.

The independence, expertise, responsiveness and branding of the authority are critical elements within a service dealing with an area as complex as adult safeguarding. For this reason, Safeguarding Ireland considers that establishing the authority as an independent agency is the preferred and vastly superior model to the other proposed. Safeguarding Ireland notes the concerns in relation to costs of a stand-alone agency. However, Safeguarding Ireland is of the view that any additional costs in setting up a stand-alone agency will be offset by the establishment of an expertise within the agency and less time taken to handle concerns and consider implications for a wider agency if the authority was vested within, or amalgamated with, another agency. Safeguarding Ireland is also of the view that safeguarding is not exclusively a 'health' issue and that an all of society approach must be developed to tackle the unacceptable levels of abuse of vulnerable adults in Ireland. An independent authority with overarching responsibility, to ensure a societal approach to prevent and tackle abuse, is required.

Safeguarding Ireland is, therefore, of the view that an independent National Safeguarding Authority is required to provide overarching governance to a National Safeguarding Service, Mental Health Commission, Decision Support Service and to an Independent Advocacy Service.

5.2

The six core regulatory powers outlined in section 5.38 are

- (1) Power to issue a range of warning directions or notices, including to obtain information by written request, and “cease and desist” notices;
- (2) Power to enter and search premises and take documents and other material; *
- (3) Power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents (including provision for determining issues of privilege);
- (4) Power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);
- (5) Power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes;
- (6) Power to bring summary criminal prosecutions (prosecutions on indictment are referred to the Director of Public Prosecutions).

**See reference in Section 6 below.*

In addition to powers outlined above, Safeguarding Ireland would suggest the following two powers for a new safeguarding authority –

1. Power to direct a state body, or, if relevant, a number of state bodies, to provide services, protection or support: and
2. By notice in writing require a specified person, including a State authority, to provide them with information.

In addition to above, the legislation should also provide that the safeguarding authority has the power to apply for and execute a search warrant if necessary.

5.3

In considering the need, or otherwise, for a regional adult safeguarding structure, one must firstly consider the scale of concerns of adult abuse in Ireland. For example, in 2018, there were 11,780 safeguarding concerns received by the HSE, representing a 14% increase on 2017. In total, there have been over 30,000 safeguarding concerns referred to the HSE’s safeguarding services over the past three years. However, by common agreement and in line with research, this is most likely to represent a significant understatement of the extent of the prevalence of safeguarding concerns. Abuse may be detected by other agencies and, while some collect and collate this data, there is no obligation or requirement to do so. (See section below on data collection). In relation to financial abuse alone, prevalence estimates vary. The National Centre for the Protection of Older People in UCD, in its review of prevalence rates of financial abuse, found that the rate reported varied from 1 per cent of over 2,000 older people in England, Scotland and Northern Ireland (O’Keefe et al., 2007), to 8.9 per cent from a sample of older people in Israel (Cohen et al., 2007). Naughton et al. (2010) reported that the prevalence of financial abuse in Ireland was 1.3 per cent, making it the most prevalent form of elder abuse in Ireland. (Financial Abuse of Older People: A Review (NCPOP: 2012). This study only considered financial abuse of older people. In its Annual Safeguarding Report for 2018, the HSE Safeguarding service found that, for persons aged over 65, the third most alleged form of abuse

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was financial abuse at 21% with a higher number of females suffering this abuse. In addition, alleged financial abuse increases with age, with the highest level of reporting in those over 80 years. In a more recent Red C Poll commissioned by Safeguarding Ireland the level of financial abuse was in the order of 20% across all age groups and figures collected by the HSE over the past few years indicate a higher level of abuse for those over the age of 65 years.

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It is evident from the above that there are very many abuse concerns. In addition, it is estimated that the numbers of people suffering abuse, neglect and/or exploitation is very much greater than the HSE figures. With abuse such a widespread problem, it is evident, in the opinion of Safeguarding Ireland, that safeguarding officers will be required across the country based in regional safeguarding offices. This would be best supported by having a regional safeguarding structure with a national authority supported by a non-executive board. Any new statutory safeguarding service will need to work closely with a number of agencies, including, but not limited to, the HSE, Government Departments, financial organisations, An Garda and private health and social care providers.

Data Collection:

Safeguarding Ireland is aware that there is generally a dearth of evidence on the actual levels of abuse. While some few agencies do collect data, there is no national/central repository and no collaboration as to what data should be collected and classified. In addition, there is no mechanism currently in place to ensure data is not duplicated across two or more agencies. In order to enable policies to be developed and inform a legislative framework to prevent abuse, it is necessary that appropriate data be available. Safeguarding Ireland, therefore, suggests that organisations should be obliged to have systems in place to collect data. For example, all Section 38 and 39 organisations should be obliged to produce an annual return to the HSE and other organisations should report to their regulatory bodies. In addition, there should be a statutory requirement for all agencies to report their abuse data to the new Safeguarding Authority.

Issue 6. Powers of Entry and Inspection.

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Q. 6.1 Do you consider that adult safeguarding legislation should include a statutory power of entry and inspection of premises, including a private dwelling, where there is a reasonable belief on the part of a safeguarding professional, a health care professional or a member of An Garda Síochána that an adult within the scope of the legislation may be at risk of abuse or neglect in the premises or dwelling, and where either a third party is preventing them from gaining access or an adult within the scope of the legislation appears to lack capacity to refuse access? Please give reasons for your answer.

Q. 6.2 If the answer to Q.6.1 is yes, do you consider that evidence of reasonable belief that a person may be at risk of abuse or neglect would constitute a sufficient safeguard to ensure that such a power would be used effectively and proportionately, or would any other safeguards be required?

Q. 6.3 If the answer to Q.6.1 is yes, do you consider that such a power of entry and inspection: (a) should be conferred directly on a safeguarding professional, a health care professional or a member of An Garda Síochána, or (b) that such entry and inspection should require an application to court for a search warrant, whether in all instances or only where entry and inspection is to a private dwelling. Please give reasons for your answers to (a) and (b).

Q. 6.4 If a power of entry and inspection to a private dwelling were to be conferred on a member of An Garda Síochána, do you believe that a member should be permitted to use reasonable force, if necessary, to gain access to a dwelling?

Comments and Answers:

6.1

Adult safeguarding concerns can take many forms. In some cases, particularly in a number of financial abuse cases, when the abuse is pointed out to the perpetrator as abuse, the behavior stops. The vast majority of cases can be dealt with without the need to resort to a power of entry. However, there are likely to be cases of concerns where safeguarding services are prevented from entering a dwelling by an abusive person.

Safeguarding Ireland notes the concerns expressed in the UK's *Government Response to the Safeguarding Power of Entry Consultation (2013)*. However, much of the concerns about powers of entry expressed in that document related to concerns about the abuse of such powers and concerns that such powers might make a situation worse for the victim. Safeguarding Ireland also notes Lord Howe's concerns, namely that a power of entry risks being viewed as a quick solution, in place of greater focus on community engagement, cooperation and a preventative approach. There were also concerns expressed that there would be potential for disproportionate interference with the rights of adults. There was a view that social workers or other professionals should have the skills to gain entry and the use of a multi-agency approach could be used to secure access.

The likelihood is that cases where entry is prohibited by an alleged perpetrator are the ones of greatest concern where the victim is suffering the most severe forms of abuse or neglect. At present, entry to a private dwelling, including a private nursing home, by members of the HSE's Safeguarding and Protection Teams can be refused. Some forms of abuse are most commonly perpetrated by family members and occur in people's own homes. Psychological or emotional abuse is likely to be occurring in parallel with other forms of abuse such as physical and financial abuse and neglect.

Having carefully considered the advantages and disadvantages of conferring powers of entry, Safeguarding Ireland is of the view that a safeguarding authority must have a statutory power to enter and inspect premises including private dwellings, where there are concerns of abuse.

6.2

There is a need, however, to ensure power of entry is used appropriately, proportionally and approached consistently. In that context, Safeguarding Ireland proposes that the legislation allowing powers of entry be such that it is allowed only in very limited circumstances. These circumstances should include –

- a) A reasonable concern on the part of a member of the safeguarding service of abuse, coercive control, exploitation or neglect; and
- b) Some objective evidence that supports such a belief; and
- c) that any attempt by safeguarding staff to enter without such a warrant would defeat the object of the visit or all other reasonable avenues of entry have been explored and failed;
- d) Generally, a requirement that a search warrant has been granted by the Courts.

6.3

Safeguarding Ireland is of the view that generally legislation should provide that there be a requirement that a search warrant has been granted by the Court. However, Safeguarding Ireland is of the view that the proposed statutory home care scheme with the likely extension of the functions of HIQA to regulate home care that HIQA's existing powers of entry and inspection apply where homecare services are being provided. This will be in addition to the powers proposed for the stand alone safeguarding authority in carrying out its regulatory functions as stated at 5 above in relation to a person who is at risk of abuse. Safeguarding Ireland while of the view that there should be a requirement that a search warrant be granted by the Courts it would also be of the view that Rules of Court set out procedures to be followed in the event that urgent applications have to be made to the Courts on safeguarding issues.

Powers of entry should be legislated for in respect of both private dwellings and other premises.

6.4

All such entries should be supported by An Garda where there are safety concerns for the safeguarding service staff. Reasonable force should be permitted in circumstances where entry is refused even with a search warrant.

In supporting the inclusion of powers of entry in safeguarding legislation, Safeguarding Ireland believes that such powers would only be employed very rarely. The potential to use such an available power would act as a deterrent to preventing entry.

Issue 7. Safeguarding Investigative Powers.

Q. 7.1 Do you consider that adult safeguarding legislation should include a statutory duty on relevant regulatory bodies to make inquiries with a view to assessing whether to apply for a court order for the removal of a person or for a safety order, barring order or protection order, similar to the orders in the Domestic Violence Act 2018, as discussed in Issue 7 of the Issues Paper? Please give reasons for your answer.

Q. 7.2 Do you consider that the Domestic Violence Act 2018 should be amended to empower bodies other than the Child and Family Agency, such as for example the Health Service Executive or any other adult safeguarding regulatory body, to apply to court for an order under the 2018 Act?

Q. 7.3 Do you consider that adult safeguarding legislation should include separate provisions for barring orders, protection orders and safety orders that would apply in situations outside of the circumstances set out in the Domestic Violence Act 2018 or section 10 of the Non-Fatal Offences Against the Person Act 1997?

Comments and Answers:

7.1

Any proposed adult safeguarding legislation should include a statutory duty on a safeguarding authority to make enquiries, interview and/or make assessments in cases of concern reported to it. Safety orders, barring orders and protection orders should be available to the safeguarding authority. The legislation should include separate provisions for such orders that would apply in situations outside of the circumstances set out in the Domestic Violence Act 2018 or under a number of the provisions of the Non-Fatal Offences Against the Person Act 1997. In the absence of such legislative options, the effectiveness of many safeguarding plans and solutions would be very limited and offer little or no solution to some safeguarding situations. Indeed, the lack of such options, particularly in cases where power of entry has been employed, may make the situation of the adult at risk more perilous. In addition, the legislation should allow for adults at risk of abuse to be interviewed in private without opportunities for coercion or undue influence. There is little value in providing legislation to safeguard adults that prevents a service from providing an adequate safeguarding response and solution. Concerns that such solutions can be a disproportionate interference with the rights of adults and can be used inappropriately can be overcome with appropriate framing of the legislation and supporting guidelines and protocols of the safeguarding service. Safeguarding Ireland concurs with the belief, as experience in Scotland supports, that such powers would be relied upon as a last resort in trying to resolve safeguarding concerns.

7.2

Safeguarding Ireland considers that the *Domestic Violence Act 2018* should be amended to empower bodies such as the HSE (Safeguarding and Protection Teams) to apply to court for an order under the 2018 Act and made a submission to the Minister for Justice and Equality to this effect in March 2019. Safeguarding Ireland regards the current exclusion of the HSE as an 'applicant' under the 2018 as untenable.

In addition and in order to further strengthen the safeguarding response, Safeguarding Ireland is of the view that the Domestic Violence Act 2018 should be amended to empower a safeguarding authority, to apply to the courts for an order under the 2018 Act. If the authority does not have the power to make such an application, it will slow the process and potentially create greater difficulties for the adult at risk. Moreover, if, as Safeguarding Ireland has proposed, there is an independent safeguarding authority, it is expected that it will have the expertise and be the best judge of when and in what situations it is most appropriate to make application to the courts for such orders.

7.3

Safeguarding Ireland is firmly of the view that adult safeguarding legislation should include very clear provisions for barring orders, protection orders and safety orders that would apply in situations outside of the circumstances set out in the Domestic Violence Act 2018 (which updated the Domestic Violence Act 1996) or the Non-Fatal Offences Against the Person Act 1997 and that the independent National Safeguarding Authority has the statutory power to apply for such orders.

The collected data on different types of abuse indicate that psychological abuse or coercive control permeates all other types of abuse and increased levels of such abuse are particularly prevalent among older adults. It is therefore necessary that safeguarding legislation should include an offence of coercive control irrespective of family relationships.

It might be argued that there is duplication in providing for barring orders, protection orders and safety orders and indeed providing for the offence of coercive control in both domestic violence legislation and the proposed adult safeguarding legislation. However, domestic violence legislation has been on the statute book since 1996 and is now very much part of family law jurisprudence so perhaps should remain as such. But it should be recognised that adult safeguarding legislation must be capable of addressing issues on the much broader adult safeguarding agenda.



Issue 8. Reporting.

Q.8.1 There are four possible reporting models for suspicions of abuse or neglect concerning adults within the scope of adult safeguarding legislation:

(i) permissive reporting;

(ii) universal mandatory reporting;

(iii) mandatory reporting by specific persons;

(iv) a hybrid or “reportable incidents” model.

In your opinion, which of these is the most appropriate model for reporting incidents of the abuse of adults within the scope of adult safeguarding legislation, or reporting reasonable suspicions regarding abuse of those adults? Please give reasons for your answer.

Q. 8.2 If the current permissive reporting model were to be retained, should it be placed on a statutory basis? If yes, should statutory protections be enacted for those who report concerns in good faith?

Q. 8.3 If a hybrid or “reportable incidents” model were to be enacted, to what incidents of abuse or neglect should mandatory reporting apply? Should mandatory reporting apply to financial abuse, for example?

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Comments and Answers:

8.1

Safeguarding Ireland’s view on mandatory reporting is outlined in the Issues Paper. In that regard, to restate, there is a need for overarching standards or guidance to prevent abuse rather than mandatory reporting. It is evident from other jurisdictions that mandatory reporting does not work. Safeguarding Ireland would favour adequate prevention and internal systems in organisations such as that in place by the HSE and external panels to manage complaints.

One of the fundamental difficulties with mandatory reporting is that it may be based on an incorrect assumption, i.e., it assumes that mandatory reporting will combat the most severe forms of abuse. However, mandatory reporting is likely to lead to all types and levels of abuse being reported making the work of the proposed safeguarding authority overly cumbersome and problematic. There is a need to set a threshold for reporting to the proposed adult safeguarding authority, as envisaged in the Adult Safeguarding Bill 2017, with minor complaints being dealt with internally and serious issues being referred to the authority.

Mandatory reporting is also likely to result in vast numbers of referrals. This has been the experience generally in childcare services, where mandatory reporting has been introduced. Most of the research on mandatory reporting relates to childcare services as child abuse services are generally much more developed than in adult services. For example, in 2002, Frank Ainsworth, Senior Principal Research Fellow of the School of Social Work and Community Work at James Cook University, undertook a study comparing the 1999-2000 reporting and substantiation of child abuse statistics from New South Wales, which had mandatory reporting, and Western Australia which did not at that time. He discovered that New South Wales had a much higher proportion of unsubstantiated reports (45.2%, 1196 in total) than Western Australia (25.1%, 7628 in total). The percentage of substantiated reports in Western Australia (44.2%) was much higher than in New South Wales (21.3%). He also found that the proportion

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of reports investigated in New South Wales was 59.6%, whereas in Western Australia it was 97.4%. The comparative proportion of final investigations completed was 46.4% (NSW) to 89.4% (WA).

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These statistics are quite alarming for they point to large proportions of the child protection budget being spent on unsubstantiated case investigations. His view is that *“everywhere in the world that has adopted mandatory reporting, has found that the mandatory reporting system has distorted the child welfare system to the point where it becomes largely an investigative or forensic system, rather than the system that’s designed to provide support services to children of families where there are difficulties of the kind that we know exist in some of these situations”*. He further suggests that *“mandatory reporting systems are overburdened with notifications, many of which prove not to be substantiated but which are time consuming and costly”*. (*Mandatory Reporting of Child Abuse: Does it really make a difference? Ainsworth. Child and Family Social Work. 2002*).

In many cases of trying to resolve issues of abuse or neglect of vulnerable adults, the social worker or professional involved relies on establishing relationships and engendering trust in the relationship with both the victim and their family members. Mandatory reporting could adversely change the dynamic of relationships within families, and between families and professionals.

Safeguarding Ireland is of the view that mandatory reporting would result in over reporting to the point that the safeguarding authority would not be able to carry out its core functions and would potentially impede the efficacy of the safeguarding response.

8.2

Safeguarding Ireland is of the view that permissive reporting should be on a legislative basis those who report concerns in good faith. The legislation should clearly set out the obligations of all organisations and institutions to have a proper system of complaints and internal reporting. This approach would very much enhance the prevention of abuse in each organisation.

8.3

Safeguarding Ireland is not in favour of a hybrid or a ‘reportable incidents’ model.

Issue 9. Independent Advocacy.

Q. 9.1 Do you consider that there should be statutory provision for independent advocacy in the context of adult safeguarding?

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Q. 9.2 If the answer to Q.9.1 is yes, do you consider that:

(a) it would be sufficient to commence the relevant provisions of the Citizens Information Act 2007 providing for a Personal Advocacy Service; or

(b) additional statutory provisions should be enacted providing that advocacy services could be provided in addition to those under the 2007 Act?

Please give reasons for your answer to (a) and (b).

Q. 9.3 If the answer to Q. 9.2(b) is yes, do you consider that there is a need for a national advocacy body in the context of adult safeguarding? If yes, do you believe that this should operate as an independent agency or that it should be located within an existing agency?

Comments and Answers:

9.1

In any situation where there are concerns relating to adult safeguarding, the involvement of the adult in both the assessment and in offering solutions is critical to the process. If the adult is not included in the assessment or decisions regarding his/her safeguarding needs, then the safeguarding concerns are likely to be compounded by this lack of involvement. As outlined in the Issues Paper, reliance on the adult's family, his/her carer and/or GP may not represent the wishes of, or best outcome for, the adult. Indeed, in some instances, such reliance can actually make the adult's situation worse. It is well recognized that independent advocacy has an important role to play in adult safeguarding to ensure that the voice of the person is heard. Reliance on guidelines or codes will not ensure that advocacy services are provided in all cases where needed. In addition, a lack of statutory provision will likely result in inconsistencies in the application of advocacy services. Therefore, Safeguarding Ireland is of the view that statutory provision for independent advocacy in the context of adult safeguarding is essential. Access to an independent advocate is particularly essential for those who are termed a 'relevant person' for the purposes of the Assisted Decision-Making (Capacity) 2015 but also for those who because of their vulnerability require a mechanism to ensure that fundamental safeguards are in place to protect their interest.²

While the Assisted Decision-Making (Capacity) Act 2015 makes some provision for advocacy in that it provides that codes of practice be prepared and Safeguarding Ireland understands that provision will also be made in the forthcoming legislation on Protection of Liberty Safeguards for access to an independent advocate, it is particularly important that adult safeguarding legislation make specific provision for adults at risk to have access to an independent advocate. In this context, Safeguarding Ireland endorses the relevant provisions in the Adult Safeguarding Bill 2017.

²See AC v Cork University Hospital and Ors & AC v Fitzpatrick and Ors [2019] IESC 73 para 366

Safeguarding Ireland in its *Advocacy in Ireland: A Scoping Document (2017)* set out the need for a legal framework and the Roundtable held in October 2018 endorsed the need for a National Council for Advocacy and suggested that the role for such a Council, in addition to providing for uniform access to independent advocacy by all vulnerable adults, should include responsibility for funding, standards, qualifications and training, codes of practice, research, monitoring and data information systems.

9.2

Safeguarding Ireland is of the view that the thinking and the promotion of, and respect for, the rights of persons with disabilities and adults at risk have advanced since the enactment of the Citizens Information Act in 2007 providing for a Personal Advocacy Service. Safeguarding Ireland is therefore of the view that it would not be sufficient to commence or supplement the advocacy provisions of the 2017 Act which are limited in scope. There is need for a modern legal framework for independent advocacy to facilitate the implementation of the *Assisted Decision-Making (Capacity) Act 2015*, the requirements of the emerging legislation for the protection of liberty safeguarding, the right of autonomy of adult at risk to be balanced with obligations around safeguarding to be provided for in the planned adult safeguarding legislation, the right of a person at risk to participate in health research and many other aspects that will require the voice of the person to be fully respected by all organisations both private and public. (See comments of Chair Designate of the CIB before Oireachtas Joint Committee on Education and Social Protection on 10th June 2015).³

9.3

Safeguarding Ireland, as already stated, is of the view that there should be a national advocacy body but believes that this should fall under the governance of the proposed Adult Safeguarding Authority. Safeguarding Ireland is of this view because advocacy is an important element in safeguarding people who may be at risk of abuse. If one refers back to the principles proposed that would underpin adult safeguarding legislation in Section 1 above, a number of those principles are supported and supplemented through advocacy. These include protection and promotion of human rights, empowerment of individuals and protection.

If advocacy is vested in a separate body to the proposed National Safeguarding Authority, in practical terms, the tools and responses available to protect and safeguard adults at risk and promote their rights and independence, would be fragmented. If the proposed Authority was to rely on a separate entity to provide or arrange for advocacy services for an individual, its response to safeguarding concerns may be somewhat diminished.

³ "The Citizens Information Act 2007 provides for the establishment of a statutory personal advocacy service, the relevant provisions of which have not been implemented. There is a need for statutory arrangements, but the statutory arrangements contained in that Act probably are not the most appropriate for the current environment because advocacy services are needed in the context of the new assisted decision-making legislation and also to a significant degree in the context of patients' rights in the health services. There is a need for a co-ordinated approach to advocacy services that would cover those with disabilities, those with assisted decision-making problems and patients within the health services who need help in establishing their rights. Such a co-ordinated approach would require new legislation".



Issue 10. Access to Sensitive Data and Sharing Information.

Q. 10.1 Do you consider that existing arrangements for access to sensitive data and information sharing between relevant regulatory bodies are sufficient to underpin adult safeguarding legislation?

Q. 10.2 If the answer to Q. 10.1 is no, should arrangements for access to sensitive data and information sharing between relevant regulatory bodies include interagency protocols coupled with statutory powers? If so, please indicate your view on the form of such powers.

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Comments and Answers:

10.1

Multi-agency and inter-agency working and collaboration, in very many cases, is a prerequisite for adequate safeguarding responses. In addition, all agencies need to promote a safeguarding culture within their organisations through, for example, training and education of staff, proactive and skilled leadership and a “no tolerance” approach to any form of abuse. Currently, there is uncertainty, confusion and lack of understanding in relation to the issue of information sharing between individuals and agencies in the context of safeguarding concerns. This is leading, in some cases, to delays in implementing safeguarding assessments and responses and, most likely in some other cases, leading to incomplete and inaccurate assessments and, consequently, poor safeguarding responses. For this reason, Safeguarding Ireland is of the view that existing arrangements for access to sensitive data sharing are insufficient.

10.2

Safeguarding Ireland’s view is that existing Data Protection legislation be amended. It would potentially be of considerable benefit to vulnerable adults who lack capacity and who may be experiencing abuse, neglect and/or exploitation if a specific defence against liability, where there is an informed reasonable belief that there is a safeguarding issue, was included in data protection legislation. Additionally, Safeguarding Ireland proposes that there be a separate section in Data Protection legislation specifically on vulnerable adults. In a separate section on vulnerable adults, Safeguarding Ireland proposes the following activities that the DPC and a new safeguarding authority should undertake in this regard –

- Initiating, developing through consultation with relevant agencies, and actively promoting codes of conduct on the processing of the personal data of vulnerable adults. These codes of conduct should address issues of consent in relation to vulnerable adults and detail the particular circumstances where consent may not be required or not attainable.
- Defining the specific protections required to safeguard the rights of vulnerable adults in the protection of their personal data and providing guidance for people and organisations.
- Collaborating with and drawing from the advice and experiences of advocates and experts in the field of protection and promotion of the rights of vulnerable adults, including other regulators and statutory bodies.



- Conducting detailed research on how data protection law applies to vulnerable adults, both internally and through research partnerships.
- In making data sharing decisions and in assessing data protection concerns, cross-referencing decision-making capacity and the Assisted Decision Making Capacity Act, 2015.

Safeguarding Ireland notes the provisions of the *Data Sharing and Governance Act 2019* which provides for the regulation of sharing of information between public bodies and for the management of information by public bodies and the establishment of a Data Governance Board. However, as indicated in paragraph 4.21 of the Issues Paper a large portion of social welfare payments are paid directly into bank accounts by the Department of Employment Affairs and Social Protection which do present opportunities in terms of financial abuse being perpetrated through access to those bank accounts. Specifically, this occurs when an agent is appointed under the provisions of the *Social Welfare (Consolidation) Act 2005* for a person who lacks decision-making capacity but a bank is not informed of the agency arrangement. Banks would not come under the definition of a public body in the 2019 Act so it is necessary that a protocol be developed for such circumstances.

Safeguarding Ireland suggests a further statutory provision in the adult safeguarding legislation, similar to section 45 of the English *Care Act 2014* to provide –

'If the Adult Safeguarding Authority requests a person to supply information to it, or to some other person specified in the request, the person to whom the request is made must comply with the request, if a number of conditions are met, including that the request is made for the purpose of enabling or assisting the Adult Safeguarding Authority to exercise its functions.'

In line with the provisions of section 96 of the *Assisted Decision-Making (Capacity) Act 2015*, the legislation should also provide that a person who fails to comply with a request from the Adult Safeguarding Authority or hinders or obstructs the Authority in the performance of its functions shall be guilty of an offence.

Issue 11. Multi Agency Collaboration.

Q. 11.1 Do you consider that:

(a) non-statutory interagency protocols are sufficient to ensure multi-agency cooperation in adult safeguarding, or

(b) a statutory duty to cooperate should be enacted?

Q. 11.2 If the answer to Q. 11.1(b) is yes, to which bodies with adult safeguarding regulatory responsibilities should the duty apply?

Q. 11.3 Do you consider that there should be statutory provision for transitional care arrangements between child care services and adult safeguarding services?

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Comments and Answers:

11.1

Safeguarding Ireland has long recognized and promoted the need for multi-agency and inter-agency collaboration. Safeguarding Ireland has multi-agency representation. Multi-agency collaboration is key to early and effective identification of risk, improved information sharing, joint decision making and coordinated action in relation to safeguarding concerns. However, multi-agency collaboration does not supersede a single agency's duty to identify, protect and support an adult at risk of abuse.

Multi-agency collaboration is a cornerstone of good safeguarding responses. Safeguarding concerns can span a number of agencies and, similar to a requirement for information sharing in the context of safeguarding concerns (see Issue 10 submission above), collaboration plays a vital role in protecting adults at risk of abuse. Effective collaboration facilitates early risk identification, improved information sharing, joint decision making and coordinated action.

Current collaborative arrangements, if they exist, tend to be informal and inconsistent. Moreover, there can be a tendency to operate in silos insulated from the concerns of other agencies. This mitigates against effective safeguarding prevention and responses. Therefore, a statutory duty to collaborate in safeguarding situations should be enacted.

11.2

Statutory co-operation should apply to the following agencies –

- The HSE and agencies that it funds through Section 38 and 39 agreements.
- Private and voluntary hospitals and nursing homes.
- Private providers of Home Care
- HIQA.
- Mental Health Commission.
- Government Departments.
- An Garda Síochána
- Central Bank of Ireland
- Decision Support Service

Safeguarding Ireland is of the view that there is a requirement for statutory transitional care arrangements between child care services and adult safeguarding services where there are safeguarding concerns. In section 11.10, the LRC Issues Paper references the “Mary” case. That review’s findings, among other findings, were that –

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- Coordination of service delivery between the HSE Disability Services and the voluntary organisation was ineffective. (Page 50)
- A clear and formal written referral from Tusla to the HSE in 2014 could have contributed to progressing the case and bringing clarity to the roles of both organisations. (Page 50) W
- When interagency cooperation was formalised in 2016 via the complex case meeting mechanism, it was efficient in making decisions. (Page 50)
- There was a lack of a shared understanding among all the agencies involved with regard to referral pathways between Tusla, HSE Disability Services and the voluntary organisation. (Page 54)
- The lack of clarity around role and function of post holders had a negative impact on the overall management of the case.

Though the HSE and TUSLA are aware that there is an information-sharing protocol in place between the agencies, there may be a lack of a consistent approach across the country. IN addition, there may be more than those two agencies involved in safeguarding plans and it is important that statutory arrangements apply to all such agencies. This is very much linked to the area of multi-agency collaboration (Issue 11 above) and information and data sharing (Issue 10 above).

Conclusion:

Safeguarding Ireland wishes to thank the Law Reform Commission for the comprehensive considerations of issues contained in the Issues Paper and is available if further elaboration or clarification is required on points made in this submission.