

ISSUES PAPER

A Regulatory Framework for Adult Safeguarding

(LRC IP 18 – 2019)

Issues Paper

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular, by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. The *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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Seeking your views on the questions raised in the Issues Paper

An Issues Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. An Issues Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Issues Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the *Freedom of Information Act 2014*. Any person may make a submission saying that it is made on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. In the event that we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the persons concerned for their views.

Submissions can be sent in either of the following ways:

(a) You can email your submission – in whichever format is most convenient to you – to the Commission at p5p2@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
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We would like to receive submissions on this Issues Paper no later than close of business on **Thursday 30 April 2020** if possible.

CONTEXT AND OVERVIEW

1. Introduction

1. This Issues Paper is on a project that forms part of the Commission's Fifth Programme of Law Reform.¹ The project involves an examination of the form of a statutory regulatory framework for adult safeguarding in Ireland. As noted below, there is agreement on the need for an appropriate statutory framework on adult safeguarding.
2. The project, and this Issues Paper, will build on existing rights-based analysis and policy development, as well as legislation, notably the *Assisted Decision-Making (Capacity) Act 2015*, all of which seeks to include an appropriate balance between empowerment and protection. The project will therefore explore the possible content of a regulatory framework, building on existing arrangements and parallel policy and legislative developments. In general terms, the key elements of such a framework are that it should:
 - be rights-based, ensuring an appropriate balance between empowerment and protection;
 - be aimed at preventing, and protecting against, all form of abuse, including physical, psychological and financial abuse; and
 - actively promote, supervise and enforce a culture of high standards of behaviour and care.
3. In approaching the development of a framework, the Commission is conscious of the need to take account of a range of relevant legislative and policy developments.
4. The *Assisted Decision-Making (Capacity) Act 2015* (the 2015 Act) is based firmly on a rights-based approach, consistent with constitutional and international human rights standards, including a presumption of decision-making capacity for all persons aged 18 years upwards. The 2015 Act thus promotes empowerment of individuals, and it also provides for appropriate protections where a person's decision-making capacity may be in question. At the time of writing (December 2019), the majority of the provisions of the 2015 Act have not been brought into force. When the 2015 Act is fully in force, the Director of the Decision Support Service (DSS) appointed under the 2015 Act will have responsibility for supervising a range of statutory codes of practice concerning decision-making, including for assisted decision-making.

¹ Report on Fifth Programme of Law Reform (LRC 120-2019), Project 2.

5. While the 2015 Act is undoubtedly an important rights-based reference point for this project, as noted below in this Issues Paper, it remains the case that there is a need for a regulatory framework for adult safeguarding that goes beyond what is currently provided through the existing regulatory bodies. These include: the Department of Health, the Health Information and Quality Authority (HIQA), the Health Service Executive (HSE) and the Mental Health Commission (including the Director of the Decision Support Service) on health and, separately, decision-making capacity matters; the Central Bank of Ireland on financial matters; and the Department of Employment Affairs and Social Protection on social welfare matters.
6. Against the background of a number of reviews and reports that are discussed in the Issues Paper below, the *Adult Safeguarding Bill 2017* (the 2017 Bill), a Private Member's Bill, was introduced in Seanad Éireann in 2017. The 2017 Bill proposes a particular regulatory framework for adult safeguarding which is both rights-based and which also proposes additional protections and supports for adults who may be at risk of exploitation or abuse and who are unable to protect themselves. In April 2017, the 2017 Bill passed Second Stage in the Seanad and was sent forward to Committee Stage where it was discussed by the Joint Oireachtas Committee on Health in further detail during debates on adult safeguarding in October 2017. The Joint Oireachtas Committee agreed that the issues in the 2017 Bill require further research, and the Committee and the Minister for Health suggested that the Commission could consider undertaking this as part of its Fifth Programme of Law Reform, on which it was at the time consulting. Having applied the relevant selection criteria for inclusion in the Programme,² the Commission concluded that the project was suitable for inclusion in the Fifth Programme.

2. Positive practice and developments in adult safeguarding

7. In recent years, there has been positive progress in legislation and policy relevant to adult safeguarding. When fully commenced, the 2015 Act will provide a rights-based approach to a range of decision-making for adults, including for assisted-decision making for adults whose decision-making capacity is in question. This approach is underpinned by comprehensive guiding principles set out in section 8 of the 2015 Act. The guiding principles, which are discussed in further detail in Issue 1 below, include: a presumption of decision-making capacity; that intervention should only be provided where necessary in the circumstances; and that any intervention should be in a manner that minimises restrictions of the relevant person's rights.
8. When fully commenced, the 2015 Act will also replace the current Wards of Court system by repealing the *Lunacy Regulation (Ireland) Act 1871*. The current wards of

² On the selection criteria, see *Report on Fifth Programme of Law Reform* (LRC 120-2019), Part 2.

court system for adults will be phased out over a period of 3 years from the commencement of Part 6 of the 2015 Act. New administrative processes and support measures are at the time of writing (December 2019) being put in place before the 2015 Act can be fully commenced. These measures include the setting up of the Decision Support Service (DSS) within the Mental Health Commission.

9. In relation to at risk adults with disabilities more specifically, the United Nations Convention on the Rights of Persons with Disabilities was ratified by Ireland in 2018, and came into force in April 2019. There are a number of measures underway to ensure implementation of the UNCRPD. The National Disability Inclusion Strategy (NDIS) 2017–2021 contains a range of practical commitments to improve the position of people with disabilities including the provision of disability awareness training to all staff in Government Departments and public bodies. It provides a mechanism for delivering on Ireland’s commitments to implementing the UNCRPD, and the NDIS Steering Group, which oversees and monitors the implementation of the Strategy, is guiding progress in this area. The National Disability Authority (NDA) is providing guidance on the implementation of the UNCRPD’s provisions, and the implementation of the NDIS.
10. There is also an ongoing programme of reform to ensure that persons with disabilities have equal recognition before the law. The 2015 Act, when fully commenced, is a key element in this respect. The *Disability (Miscellaneous Provisions) Bill 2016*, which contains key legislative amendments needed for compliance with the UNCRPD, was published on December 2016 and reached Committee Stage of the legislative process on 30 January 2019. The Bill includes provisions to establish the monitoring framework required by Article 33 of the UNCRPD to promote, protect and monitor implementation of the Convention. It requires the involvement and participation of civil society, in particular, persons with disabilities, in the monitoring process.
11. The monitoring framework includes both the Irish Human Rights and Equality Commission (IHREC) and the National Disability Authority (NDA) and will be governed by a formal Memorandum of Understanding. The IHREC established a Disability Advisory Committee in January 2019, composed of a diverse group of persons with lived experience of disability, to ensure the direct participation of persons with disabilities and the organisations representing them in monitoring how the UNCRPD is implemented in Ireland.
12. In October 2019, the decision of the Supreme Court in *AC and Ors v Cork University Hospital and Ors*³ provided important guidance on the application of the relevant principles concerning decision-making capacity. The case concerned an appeal from a

³ [2019] IESC 73.

decision by the Court of Appeal that Cork University Hospital had acted unlawfully in refusing to release the applicant woman, AC, in circumstances in which medical staff had concerns for her welfare and believed that she did not have the capacity to make the decision to discharge herself. The Supreme Court held that the analysis of the Court of Appeal was “flawed insofar as it did not sufficiently engage with evidence indicating that Mrs. C might not, in fact, have wanted to leave hospital on those occasions but was simply complying with the issues of others”⁴ and that the procedures under which she had been held were flawed as her fair procedure rights were not vindicated.⁵ The Supreme Court also set out guidance on the interventions or steps that should be taken by the HSE in determining whether a patient will remain in or be discharged from hospital. These include the following:

- Firstly, it must be ascertained whether the patient truly wants to leave the hospital or place where the patient is being cared for, or is in reality being removed by third parties in circumstances where there is a real risk to the patient’s health and welfare. If it is a case of removal, rather than a wish to depart, the hospital’s duty of care extends to protecting the patient’s wish to remain and protecting the patient against such third parties. If the person does wish to depart, and has capacity to make that decision, the hospital can do no more than attempt to persuade the patient that it is in the patient’s own interests to stay.⁶
- If the hospital is concerned that the patient lacks capacity to make the decision, those concerns must be addressed. Persuasion will not necessarily be an appropriate legal solution, as the lack of capacity implies an inability to process the information provided and to make decisions based on it. The hospital is entitled to take a brief period of time to carry out an assessment of capacity.⁷
- It is essential that the voice of the individual be heard in the process. Where capacity is at issue or where a person cannot speak for himself or herself, a person independent of any of the disputes such an independent advocate must be found to support or speak for the patient.⁸
- If the patient lacks capacity, the hospital must bear in mind that it has no general power of detention and no general right to make itself a substitute decision-maker. It must therefore seek the assistance of the courts, if it is felt that the patient is at risk. The doctrine of necessity permits the hospital to detain the patient, in the interests of the patient’s personal safety, provided

⁴ [2019] IESC 73, at paragraph 390.

⁵ *Ibid*, at paragraph 396.

⁶ *Ibid*, at paragraph 392.

⁷ *Ibid*, at paragraph 393.

⁸ *Ibid*, at paragraphs 393 and 397.

that such detention lasts no longer than is necessary to take appropriate legal steps. Compliance on the part of a patient who lacks capacity will not on its own amount to justification, as if the patient cannot give valid consent then some other lawful authority is necessary if other persons are to make decisions for the patient.⁹

13. This guidance by the Supreme Court will provide a greater degree of clarity to the HSE and individual medical professionals on the appropriate steps to take in determining whether a patient should remain in or be discharged from hospital. This will assist with safeguarding at risk adults in circumstances in which they do not have capacity to make a decision to discharge themselves, and with protecting the liberty of persons who have capacity to decide to leave hospital.
14. A further important development is the publication, in November 2019, by Safeguarding Ireland and HIQA of their jointly produced *Guidance on a Human Rights-based Approach in Health and Social Care Services*. The Guidance is aimed at promoting a human rights-based approach to care and support for adults in health and social care services, which seeks to ensure that the human rights of people using services are protected, promoted and supported by staff and services.¹⁰ The Guidance adopts the FREDA principles of fairness, respect, equality, dignity and autonomy, as these principles have been established as the basics of good care and form part of what health and social care practitioners already do on a daily basis.¹¹
15. Another important development on standard setting in adult safeguarding was the publication in December 2019 by HIQA and the Mental Health Commission (MHC) of their *National Standards for Adult Safeguarding*.¹² The National Standards were developed to promote improvements in the quality and safety of care and support provided, and to help to set the expectations of people using services, the public, providers and professionals.¹³ The principles underpinning the standards include empowerment, a rights-based approach and proportionality.¹⁴
16. All of these measures are positive steps in ensuring that the capacity of at risk adults is maximised and that all individuals are empowered to participate as fully as possible in decisions that affect them and in society as a whole. This shift from a narrative of

⁹ [2019] IESC 73, at paragraph 393.

¹⁰ Safeguarding Ireland and HIQA, *Guidance on a Human Rights-based Approach in Health and Social Care Services* (Safeguarding Ireland and HIQA 2019) at 4.

¹¹ *Ibid*, at 11-12.

¹² HIQA and the MHC, *National Standards for Adult Safeguarding* (HIQA and the MHC 2019).

¹³ *Ibid*, at 10.

¹⁴ *Ibid*, at 9-10.

abuse and vulnerability to a narrative of capacity and empowerment is hugely positive, and is something that should be built on in any further policy and legislation.

17. While there has been significant recent progress, it has occurred against a backdrop of shortcomings in adult safeguarding. The introduction of a statutory regulatory framework would therefore provide legislative certainty and ensure greater protections for at risk adults. The establishment of a regulatory framework, including powers to set and enforce standards in all areas of adult safeguarding, would help to place the focus on proactive practice rather than reactionary practice. The existence of a rights focused regulatory framework would also help to ensure a focus on positive, preventative action in ensuring that the rights of at risk adults are protected. A preventative, rights-based approach is not something that can be achieved by one body in isolation and the existence of a regulatory framework would therefore facilitate coordination of the relevant powers and roles of existing bodies with a remit in adult safeguarding, and facilitate cooperation between the various bodies to ensure a cross cutting, whole-of-government approach.

3. Studies on abuse and the need for adult safeguarding legislation

18. The abuse and safeguarding of at risk adults has received increasing research attention in Ireland. While there is a lack of comprehensive statistics on abuse and neglect, the existing research indicates a high level of abuse suffered by older people in particular. The *National Study of Elder Abuse and Neglect* in 2010 estimated that over 10,000 older people experience mistreatment or neglect in a year, with in excess of 6,000 cases of financial abuse and 5,000 cases of psychological abuse.¹⁵ The study also showed that rates of mistreatment are highest among those whose only income is the minimum state pension.¹⁶ As the State pays more than €7 billion in pension payments and more than €3 billion in illness, disability and carers' payments annually, the scale of financial abuse is potentially huge. Research has shown that people with dementia are especially likely to suffer abuse in the community,¹⁷ and this problem could be set to worsen with rates of dementia in Ireland expected to increase substantially over the coming decades.¹⁸

¹⁵ Naughton et al., *Abuse and Neglect of Older People in Ireland: Report on the National Study of Elder Abuse and Neglect* (NCPOP 2010) at 44.

¹⁶ *Ibid.* at 49.

¹⁷ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 9 and 12.

¹⁸ *Ibid.* at 17.

19. Addressing adult safeguarding as a public policy issue at a government level has been a relatively recent development in the Irish context.¹⁹ The publication of a research study on the abuse, neglect and mistreatment of older people²⁰ in 1998 led to the establishment of the Working Group on Elder Abuse in 1999. A key milestone in policy development was the publication of the first Irish policy research document on responding to elder abuse by the Working Group on Elder Abuse in 2002, which recommended the establishment of a specialised service in the HSE to respond to suspected cases of physical abuse, psychological abuse, sexual abuse, financial abuse and neglect of older people.²¹
20. The need for a legislative provision to safeguard adults from harm and abuse has been highlighted by various bodies in recent years. The Commission recommended in its *Report on Legal Aspects of Professional Home Care*²² that legislation should be amended to extend the functions of HIQA to include the setting of standards in relation to professional home care services and that a guiding principle of the proposed legislative framework should be the protection of adults in receipt of professional home care. In 2014, RTÉ's *Prime Time* investigation exposed high levels of abuse of adults at risk in Áras Attracta, a residential care facility in Mayo. This investigation resulted in increased public awareness of the abuse of adults nationally and the need for comprehensive action and reform. Following the RTÉ investigation, the HSE published its safeguarding policy, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures*, in 2014. This expanded the HSE's safeguarding services to include vulnerable adults at risk of abuse, but the HSE's safeguarding powers only extend to HSE owned or funded services. In July 2016, the HSE published the independent review of the Áras Attracta case. This review called for the HSE safeguarding policy to be put on a statutory footing. It noted:

"The HSE's safeguarding procedures are now being put in place and activated throughout Ireland. In order for these procedures to have teeth, however, they

¹⁹ Donnelly and O'Brien, *Speaking Up About Adult Harm: Options for Policy and Practice in the Irish Context* (UCD 2018) at 8.

²⁰ O'Loughlin and Duggan, *Abuse, Neglect and Mistreatment of Older People: An Exploratory Study* (National Council on Ageing and Older People 1998).

²¹ Working Group on Elder Abuse (WGEA), *Protecting our future: Report of the Working Group on Elder Abuse* (Department of Health and Children 2002).

²² Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at 1.55.

are required to be placed on a statutory basis. This would ensure that they are fully implemented.”²³

21. HIQA, in its submission to the Oireachtas Select Committee on the Future of Healthcare in 2017, noted:

“We believe that now is the time to introduce safeguarding legislation to protect at risk adults from abuse and neglect. While national safeguarding protocols are in place following recent high-profile revelations of abuse, these do not go far enough to ensure the safety and rights of vulnerable people.”²⁴

22. In a statement in October 2018, HIQA further emphasised the need for adult safeguarding legislation:

“There are legislative shortcomings around the protection of adults who may be vulnerable. One of the key pieces of legislation needed to protect vulnerable people is the Adult Safeguarding Bill. This legislation is essential to ensuring that the State protects its vulnerable citizens and that cases of abuse and neglect that still occurs are addressed.”²⁵

23. The strategic plan 2017-2021 of Safeguarding Ireland (formerly the National Safeguarding Committee) sets out the not-for-profit organisation’s commitment to “initiate conversations with Government and Oireachtas Committees on the development of legislation to include adult safeguarding...”.²⁶

24. The Joint Oireachtas Committee on Health has acknowledged the stakeholders’ concerns regarding the limits to their powers in ensuring adequate safeguarding measures.²⁷ There were over 10,000 notifications of safeguarding concerns submitted

²³ McCoy Review Group, *Independent Report of the Áras Attracta (McCoy) Review Group* (HSE 2016),

<https://www.hse.ie/eng/services/news/media/pressrel/arasattractaindependentreview.html>

²⁴ Oireachtas Committee on the Future of Healthcare, *Submissions A to I made to the Committee on the Future of Healthcare* (30 May 2017), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee_on_the_future_of_healthcare/submissions/2017/2017-05-30_submissions-a-to-i-made-to-the-committee-on-the-future-of-healthcare_en.pdf

²⁵ Irish Examiner, *Hiqa plans to share info with gardai after 4,600 allegations of abuse* (2 October 2018), <https://www.irishexaminer.com/breakingnews/specialreports/hiqa-plans-to-share-info-with-gardai-after-4600-allegations-of-abuse-872820.html>

²⁶ National Safeguarding Committee (Safeguarding Ireland), *National Safeguarding Committee Strategic Plan 2017-2021* (November 2016) at 11.

²⁷ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 9.

to the HSE safeguarding teams in 2017.²⁸ While such statistics demonstrate that the new guidelines are identifying abuse of adults at risk, the Joint Oireachtas Committee has stated that they also illustrate the scale of such abuse.²⁹ The scale of abuse is indicative of the need to introduce a comprehensive statutory framework for the safeguarding of at risk adults. Following a pattern of what has been termed "reactionary" policy and reports in the wake of high profile cases of adult abuse, the *Adult Safeguarding Bill 2017* has been hailed as signifying the first firm commitment and motivation to respond to the issue of adult safeguarding in a laudable, proactive manner.³⁰

25. While the Joint Oireachtas Committee on Health has agreed that further research is required on the issues contained in the *Adult Safeguarding Bill 2017*, the Committee has acknowledged the necessity for legislation. It has noted the urgency for such legislation and expressed its cognisance of the long delay in establishing safeguarding for children.³¹ The Committee has agreed that a similar timeframe is not acceptable and that legislation for adult safeguarding is essential.³² In its *Report on Adult Safeguarding*, the Committee concluded by recommending that there should be no unnecessary delay in implementing legislation on Adult Safeguarding.³³

4. Legal context for adult safeguarding legislation

26. The rationale for the provision of adult safeguarding legislation is underpinned by personal rights enshrined in the Constitution. Article 40.1 of the Constitution of Ireland (Bunreacht na hÉireann) states:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

27. This suggests that the State could have regard to such differences in capacity by making statutory provision for adult safeguarding in order to protect the rights of

²⁸ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

²⁹ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 9.

³⁰ Donnelly and O'Brien, *Speaking Up About Adult Harm: Options for Policy and Practice in the Irish Context* (UCD 2018) at 8.

³¹ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 9.

³² *Ibid.*

³³ *Ibid.*, at 7 and 9.

those with differences in capacity. This is particularly important in the context of defending the personal rights of those whose capacity is in question. Article 40.3.1° provides that the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The right to vindication of such personal rights, regardless of capacity, was recognised by the Supreme Court in *Re a Ward of Court (No.2)*,³⁴ in which the Court stated that the loss by an individual of his or her decision-making (mental) capacity does not result in any diminution of his or her personal rights recognised by the Constitution. This includes the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care and treatment. The Court added that an individual is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they were in no way lessened or diminished by reason of any lack of capacity.³⁵

28. The provision of adult safeguarding legislation is also underpinned by international human rights obligations. At risk adults have rights under the Council of Europe Convention on Human Rights and Fundamental Freedoms (ECHR), incorporated into Irish law by the *European Convention on Human Rights Act 2003*. The ECHR rights include to have rights respected by the State (Article 1), to freedom from torture, inhuman and degrading treatment (Article 3), to liberty and security of person (Article 5), to respect for private and family life (Article 8), to freedom from discrimination (Article 14) and to freedom from abuse of their rights (Article 17). These rights are relevant to the protections that would be provided under adult safeguarding legislation and a statutory framework would be required to ensure that these rights are fully vindicated.
29. Adult safeguarding legislation is necessary to ensure compliance with Article 16 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which provides that State Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. Article 16.5 of the UNCRPD requires that effective legislation and policies are put in place "to ensure that instances of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted."
30. The Commission now turns to provide an overview of the issues discussed in the Issues Paper.

³⁴ [1995] IESC 1; [1996] 2 IR 73.

³⁵ *Ibid*, at paragraphs 163-164.

5. Outline of the Issues Paper

31. In **Issue 1**, the Commission discusses the rights-based values and principles that would underpin any regulatory framework concerning adult safeguarding. These include notably the guiding principles enacted in section 8 of the *Assisted Decision-Making (Capacity) Act 2015* (the 2015 Act). These principles provide for an important balance between rights-based empowerment and protection against abuse. They are thus fully consistent with the equality principle in the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD), which also requires States to ensure appropriate protection against abuse and exploitation and accompanying enforcement mechanisms. The Commission also refers to the guiding principles enacted in adult safeguarding legislation in other jurisdictions, and those proposed in the *Adult Safeguarding Bill 2017*. The Commission concludes the discussion in Issue 1 by setting out a suggested set of tentative principles that could underpin adult safeguarding legislation, and asks consultees for their views on these.
32. In **Issue 2**, the Commission discusses the need to define a number of key terms in the context of any legislative framework for adult safeguarding. This includes the need to provide clear definitions of terms such as "safeguarding" itself, as well as related matters such as "abuse", "harm" and "vulnerable". Defining these terms will provide vital clarity concerning the roles and responsibilities of those involved in implementing adult safeguarding legislation, and also those who come within the scope of the regulatory framework. The Commission therefore seeks the views of consultees on the suggested definitions of these terms set out in Issue 2.
33. In **Issue 3**, the Commission discusses in more detail the different forms that the concepts of "abuse" and "neglect" can take in the context of adult safeguarding. Abuse in this context can include physical, sexual, discriminatory and psychological abuse. Neglect may include acts of omission such as ignoring medical or physical care needs, routinely depriving someone of essentials such as food and warmth and failing to provide access to appropriate health, social care or education services. It may also include failure to provide clothing, entitlements, hygiene, intellectual stimulation, supervision and safety, or attention. The Commission also discusses the issue of deprivation of liberty, discussed in the decision of the Supreme Court in *AC and Ors v Cork University Hospital and Ors*³⁶ and in respect of which at the time of writing (December 2019) it is expected that the Government will publish a Protection of Liberty Bill. The Commission discusses possible options for legislative proposals to address abuse and neglect (other than on protection of liberty), and seeks the views of consultees on these.

³⁶ [2019] IESC 73.

34. In **Issue 4**, the Commission examines the specific issue of financial abuse in the context of adult safeguarding. This includes financial abuse in the banking and financial services context generally (including mis-selling of financial products), and also in the context of social welfare payments. The Commission then discusses current measures in place to prevent financial abuse, and also measures that have been adopted in other jurisdictions to address this issue. The Commission then seeks the views of consultees as to what additional measures may be required in Ireland.
35. In **Issue 5**, the Commission discusses what body, or bodies, should have responsibility for the regulation of adult safeguarding in the State. The *Adult Safeguarding Bill 2017* proposes establishing a new overarching national adult safeguarding authority with wide-ranging responsibility for adult safeguarding. The Commission discusses this proposal, and also other possible models, including integrating the proposed Authority into existing bodies or conferring additional functions on those existing bodies. Existing bodies with relevant responsibilities include: the Department of Health, the Health Information and Quality Authority, the Health Service Executive and the Mental Health Commission on health; the Director of the Decision Support Service on decision-making capacity matters; the Central Bank of Ireland on financial matters; and the Department of Employment Affairs and Social Protection on social welfare matters. The Commission also discusses relevant governance arrangements for an adult safeguarding regulatory framework, including arrangements enacted in other jurisdictions. The Commission then seeks the views of consultees on possible institutional and organisational arrangements for adult safeguarding.
36. In **Issue 6**, the Commission turns to discuss the first of a series of specific regulatory powers of relevance to adult safeguarding, namely, powers of entry and inspection. The Commission discusses the constitutional background to this, notably in connection with powers of entry to private dwellings, and then outlines current legislative arrangements as well as provisions on entry and inspection in other jurisdictions. The Commission then seeks the views of consultees on possible powers of entry and inspection in connection with adult safeguarding.
37. In **Issue 7**, the Commission discusses the possible scope of safeguarding investigative powers, including the use of barring and protection orders. The Commission discusses current legislative powers in Ireland as well as comparable powers in other jurisdictions. The Commission then seeks the views of consultees on the appropriate range of safeguarding investigative powers.
38. In **Issue 8**, the Commission discusses the question of reporting obligations that might arise where suspected or actual abuse or neglect arises. The Commission discusses current legislative provisions in the State on reporting abuse in the child care context, as well as comparable powers in other jurisdictions. The Commission discusses the

arguments for and against a mandatory reporting regime, and then seeks the views of consultees as to whether such a reporting obligation should be a matter of relevant judgment or be mandatory in scope.

39. In **Issue 9**, the Commission discusses the question as to whether there should be a statutory independent advocacy service established for adult safeguarding. The Commission discusses the provisions on advocacy in the *Citizens Information Act 2007* (not commenced at the time of writing, December 2019), as well as models in other jurisdictions. The Commission then seeks the views of consultees on independent advocacy service.
40. In **Issue 10**, the Commission discusses the scope of access to sensitive personal data and data sharing, taking account of the requirements of the 2016 *General Data Protection Regulation* (GDPR) and the *Data Protection Act 2018* and the *Data Sharing and Governance Act 2019*. Having examined arrangements in other jurisdictions, the Commission seeks the views of consultees on the scope of access and data sharing.
41. In **Issue 11**, the Commission examines the need for multi-agency coordination and collaboration in adult safeguarding. The Commission explores the extent to which this is currently provided for, as well as arrangements concerning coordination and collaboration in other jurisdictions. The Commission then seeks the views of consultees on coordination and collaboration between relevant bodies.
42. The Commission seeks the views of consultees on the issues raised in this Issues Paper by **Thursday 30 April 2020** if possible. Submissions may address some or all of the issues raised, and may also address other issues that consultees believe may be of relevance to the development of a regulatory framework for adult safeguarding.

ISSUE 1 VALUES AND PRINCIPLES UNDERPINNING ADULT SAFEGUARDING

- [1.1] Existing legislation and policy relating to the safeguarding of at risk adults in Ireland and in other jurisdictions are generally, and very importantly, underpinned by relevant human rights based values and principles.

1. Values and principles underpinning adult safeguarding practice in Ireland currently

- [1.2] In its *Report on Vulnerable Adults and the Law*, the Commission formulated a number of overarching statutory principles to guide assisting decision-makers, the proposed Guardianship Board and the courts in their tasks and to ensure that the rights and freedoms of individuals who have limited capacity are upheld.¹ The Commission recommended the inclusion of the following statutory guiding principles:

- (i) No intervention is to take place unless it is necessary having regard to the needs and individual circumstances of the person including whether the person is likely to increase or regain capacity;
- (ii) Any intervention must be the method of achieving the purpose of the intervention which is least restrictive of the person's freedom;
- (iii) Account must be taken of the person's past and present wishes where they are ascertainable;
- (iv) Account must be taken of the views of the person's relatives, their primary carer, the person with whom he or she resides, any person named as someone who should be consulted and any other person with an interest in the welfare of the person or the proposed decision where these views have been made known to the person responsible;
- (v) Due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.²

- [1.3] While these principles may have been reflected in the drafting of the largely still to be commenced *Assisted Decision-making (Capacity) Act 2015*, the guiding principles set out in section 8 of the Act also include a presumption of decision-making capacity unless proven otherwise and provisions for participation of the relevant adult as fully

¹ Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006) at 67, paragraph 2.93.

² *Ibid*, at 74, paragraph 2.106.

as possible in decision-making processes. Section 8 of the Act sets out a series of principles in subsections (2) to (10) and once commenced, will provide that those principles shall apply for the purposes of an intervention in respect of a relevant person, and the intervener shall give effect to those principles accordingly. Subsections (2) to (10) set out the following principles:

"(2) It shall be presumed that a relevant person who falls within paragraph (a) of the definition of "relevant person" in section 2(1) has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.

(3) A relevant person who falls within paragraph (a) of the definition of "relevant person" in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.

(4) A relevant person who falls within paragraph (a) of the definition of "relevant person" in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.

(5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.

(6) An intervention in respect of a relevant person shall—

(a) be made in a manner that minimises—

(i) the restriction of the relevant person's rights, and

(ii) the restriction of the relevant person's freedom of action,

(b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,

(c) be proportionate to the significance and urgency of the matter the subject of the intervention, and

(d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.

(7) The intervener, in making an intervention in respect of a relevant person, shall—

- (a) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
 - (b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
 - (c) take into account—
 - (i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and
 - (ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,
 - (d) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of—
 - (i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and
 - (ii) any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person,
 - (e) act at all times in good faith and for the benefit of the relevant person, and
 - (f) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.
- (8) The intervener, in making an intervention in respect of a relevant person, may consider the views of—
- (a) any person engaged in caring for the relevant person,
 - (b) any person who has a bona fide interest in the welfare of the relevant person, or
 - (c) healthcare professionals.
- (9) In the case of an intervention in respect of a person who lacks capacity, regard shall be had to—
- (a) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and

(b) the urgency of making the intervention prior to such recovery.

(10) The intervener, in making an intervention in respect of a relevant person—

(a) shall not attempt to obtain relevant information that is not reasonably required for making a relevant decision,

(b) shall not use relevant information for a purpose other than in relation to a relevant decision, and

(c) shall take reasonable steps to ensure that relevant information—

(i) is kept secure from unauthorised access, use or disclosure, and

(ii) is safely disposed of when he or she believes it is no longer required."

[1.4] The HSE's *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures 2014* (currently under review) identifies a number of principles as being critical to the safeguarding of vulnerable persons from abuse. Those principles are as follows:

- Human rights
- Person Centeredness
- Advocacy
- Confidentiality
- Empowerment
- Collaboration.³

[1.5] The HSE's *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures 2014* is currently under review. In the final draft version of the HSE's *Adult Safeguarding Policy* (2019), the HSE also proposes to adopt the above principles with the addition of two important principles: prevention and proportionality.⁴

[1.6] HIQA and the MHC's *National Standards for Adult Safeguarding* are underpinned by a number of key principles, and it is stipulated that these principles should be reflected in the ways health and social care services deliver care and support to all people using

³ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE 2014) at 13-19.

⁴ HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE June 2019) at 18-19.

their services.⁵ These principles are as follows: empowerment; a rights-based approach; proportionality; prevention; partnership; and accountability.⁶

- [1.7] A number of principles have also been said to underpin the *Adult Safeguarding Bill* 2017. Senator Colette Kelleher, who introduced the Private Member's Bill in the Seanad, has stated that the proposed legislation has a human rights focus and is informed by the following principles:
- the promotion of individual physical, mental and emotional well-being;
 - the right to assistance, support and an independent advocate;
 - the right to protection from abuse and neglect;
 - interventions in people's lives must be necessary and proportionate;
 - respect for people's autonomy in decisions and interventions that affect them.⁷
- [1.8] Senator Kelleher also stated that the Bill was aimed at striking a balance between the right to autonomy and the right to protection from harm.⁸ In an Oireachtas debate on the proposed legislation, a representative of the HSE stated that legislation providing powers of intervention in the lives of at risk adults should give due regard to a person's capacity to keep himself or herself safe and to the appropriate application of consent.⁹ It was added that the framing of the legislation needs to be careful to balance human rights principles in areas such as autonomy with the need for protective measures.¹⁰ It was further stated that the law should be proportionate in its application and scope, and needs to include essential safeguards on a person's right to express his or her will and preference on how he or she lives his or her life.¹¹
- [1.9] Such principles are already said to underpin existing legislation relevant to certain categories of at risk adults, including the *Mental Health Act 2001*. Section 4(3) of the *Mental Health Act 2001* provides that in making a decision under the Act concerning the care or treatment of a person (including a decision to make an admission order in

⁵ HIQA and the MHC, *National Standards for Adult Safeguarding* (HIQA and the MHC 2019) at 9.

⁶ *Ibid.*, at 9-10.

⁷ Senator Colette Kelleher, *Seanad Éireann debate - Wednesday, 5 Apr 2017 - Adult Safeguarding Bill: Second Stage* (5 April 2017) Volume 251, Number 5, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

⁸ *Ibid.*

⁹ Pat Healy (National Director of the Social Care Division, HSE), *Joint Committee on Health debate -Wednesday, 4 October 2017 Adult Safeguarding: Discussion*, available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

¹⁰ *Ibid.*

¹¹ *Ibid.*

relation to a person), due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.¹²

2. Principles underpinning adult safeguarding in other jurisdictions

(a) England

[1.10] In the English context, there are six principles of adult safeguarding underpinning the *Care Act 2014*. The principles are set out in the *Care Act 2014*'s statutory guidance for implementation, and are as follows:

- Empowerment: presumption of person-led decisions and informed consent
- Protection: support and representation for those in greatest need
- Prevention: taking action before harm occurs
- Proportionate and least intrusive responses: appropriate to the risk presented
- Partnership: local solutions through services working with their communities
- Accountability: accountability and transparency in delivering safeguarding.¹³

(b) Scotland

[1.11] In Scotland, sections 1 and 2 of the *Adult Support and Protection (Scotland) Act 2007* set out the general principles of the legislation.¹⁴ Section 1 of the Act provides that any intervention in an adult's affairs under Part 1 of the Act should provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and be the option that is least restrictive to the adult's freedom.¹⁵

[1.12] The principles set out in section 2 of the Act require that any public body or office holder performing a function under Part 1 of the Act must have regard to the following:

¹² *Mental Health Act 2001*, section 4(3).

¹³ Social Care Institute for Excellence, *Gaining access to an adult suspected to be at risk of neglect or abuse: a guide for social workers and their managers in England* (Social Care Institute for Excellence 2014) at 3, available at <https://www.scie.org.uk/safeguarding/adults/practice/gaining-access>

¹⁴ Scottish Government, *Adult Support and Protection (Scotland) Act 2007: Code of Practice* (Scottish Government April 2014) at 10.

¹⁵ *Ibid.*

- The general principle on intervention in an adult's affairs set out in section 1;
- The wishes and feelings of the adult;
- The views and feelings of the adult's nearest relative, primary carer, a guardian or attorney, and any other person who has an interest in the adult's well-being or property;
- The importance of the adult's participation as fully possible in any decisions;
- The importance of ensuring that the adult is not treated less favourably, without justification, than a person who is not an adult at risk in a comparable situation;
- The adult's abilities, background and characteristics (including the adult's age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage).¹⁶

(c) Wales

[1.13] Section 6 of the *Social Services and Well-being Wales (Act) 2014* provides that a person exercising functions under the Act in relation to an individual who has, or may have, needs for care and support must:

- In so far as is reasonably practicable, ascertain and have regard to the individual's views, wishes and feelings;
- Have regard to the importance of promoting and respecting the dignity of the individual;
- Have regard to the characteristics, culture and beliefs of the individual (including, for example, language);
- Have regard to the importance of providing appropriate support to enable the individual to participate in decisions that affect him or her to the extent that is appropriate in the circumstances, particularly where the individual's ability to communicate is limited for any reason;
- Have regard to the importance of beginning with the presumption that the adult is best placed to judge the adult's well-being, and
- Have regard to the importance of promoting the adult's independence where possible.¹⁷

3. Proposed principles to underpin adult safeguarding legislation in Ireland

[1.14] In relation to the proposed adult safeguarding legislation, it will be important that such values and principles are determined in advance to ensure that they are taken

¹⁶ *Adult Support and Protection (Scotland) Act 2007*, section 2; Scottish Government, *Adult Support and Protection (Scotland) Act 2007: Code of Practice* (Scottish Government April 2014) at 10-11.

¹⁷ *Social Services and Well-being Wales (Act) 2014*, section 6(2) and 6(3).

into consideration in the drafting of legislation, so that the legislation is truly underpinned by the relevant values and principles. The following is a list of proposed principles, which could underpin the statutory regulatory framework for adult safeguarding:

- 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.

Questions for Issue 1

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?

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

ISSUE 2 DEFINING KEY TERMS FOR ADULT SAFEGUARDING

- [2.1] It was noted during the Oireachtas debates on the *Adult Safeguarding Bill 2017* that further research should be conducted into the meaning of abuse and harm for the avoidance of any doubt regarding the meaning of such terms. The danger involved in not clearly defining terms such as "abuse", "harm", "vulnerable" and "safeguarding" has also been highlighted in the English context where the Commission for Social Care Inspection pointed out that the lack of such definitions contributes to a lack of clarity about roles and responsibilities.¹ The Commission therefore seeks views on defining key terms related to adult safeguarding.

1. Adult at risk

- [2.2] A number of terms have been used to describe adults in need of safeguarding including "vulnerable adults" or "vulnerable persons" and "adults at risk". It is important that any proposed legislation adopts the most appropriate term to ensure clarity as to whom the legislation is intended to protect, and to facilitate the determination of whether a person is entitled to protection under the legislation.

(a) 'Vulnerable person'

- [2.3] The HSE, Social Care Division, for the purposes of its 2014 national policy and procedures on adult safeguarding, defines a "vulnerable person" as "an adult who may be restricted in capacity to guard himself/herself against harm or exploitation or to report such harm or exploitation."²
- [2.4] A definition of a "vulnerable person" is set out in the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*. Section 1(1) of the Act defines "vulnerable person" as:

"a person (including, insofar as the offences specified at paragraph 8 of Schedule 2 are concerned, a child aged 17 years old):

¹ Commission for Social Care Inspection, *Raising voices: views on safeguarding adults* (Commission for Social Care Inspection 2008) at 7. The Commission for Social Care Inspection was a non-departmental public body and the single, independent inspectorate for social care in England. See: <https://www.gov.uk/government/organisations/commission-for-social-care-inspection>

² Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 3.

(a) who—

(i) is suffering from a disorder of the mind, whether as a result of mental illness or dementia, or

(ii) has an intellectual disability,

which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or

(b) who is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána or both."

- [2.5] The *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* defines a "vulnerable person" as:

"a person, other than a child, who—

- (a) is suffering from a disorder of the mind, whether as a result of mental illness or dementia,
- (b) has an intellectual disability,
- (c) is suffering from a physical impairment, whether as a result of injury, illness or age, or
- (d) has a physical disability, which is of such a nature or degree –
 - (i) as to restrict the capacity of the person to guard himself or herself against harm by another person, or
 - (ii) that results in the person requiring assistance with the activities of daily living including dressing, eating, walking, washing and bathing."

(b) 'Adult at risk'

- [2.6] The HSE is in the process of revising its national policy on adult safeguarding. The final draft of the yet to be published policy was published in June 2019. It proposes to define an "adult at risk of abuse" as:

"A person over 18 years of age who is:

- at risk of experiencing abuse, neglect, or exploitation by a third party and
- lacks mental or physical capacity to protect themselves from harm at this time in their lives."³

³ HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE, June 2019) at 10.

[2.7] The *Adult Safeguarding Bill 2017* adopts the term “adult at risk”. Section 6 of the *Adult Safeguarding Bill 2017* defines an “adult at risk” as “a person, who has attained the age of 18 years who is unable to take care of himself or herself, or is unable to protect him or herself from abuse or harm”. It has been suggested that the term “unable to take care of himself or herself” may cause some difficulties as the term “taking care” is not defined in the Bill. It has been suggested that the term “unable to protect him or herself” would be more appropriate.⁴

[2.8] It could be argued that the definition of an adult at risk is more precise in the legislation of other jurisdictions. The *Adult Support and Protection (Scotland) Act 2007* provides three specific criteria that must be met for a person to be defined as an “adult at risk”:

“Adults at risk are adults (aged 16 and above) who:

- (a) Are unable to safeguard their own well-being, property, rights or other interests
- (b) Are at risk of harm, and
- (c) Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.”⁵

[2.9] In England, an adult “at risk”, about whom a local authority has a duty to make enquiries, is defined in the *Care Act 2014* as a person who meets all of the following criteria:

- (a) Has needs for care and support (whether or not, the authority is meeting any of those needs),
- (b) Is experiencing, or is at risk of, abuse or neglect, and
- (c) As a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.⁶

[2.10] The *Care Act 2014* definition requires that a person have needs for care and support in order to meet the definition. However, it could be possible that a person may be capable of living independently without care and support but may still be at risk of abuse or harm, or at risk of their needs changing very rapidly if there was a

⁴ This suggestion was made in a presentation to the Joint Oireachtas Committee on Health. See: Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 5.

⁵ *Adult Support and Protection (Scotland) Act 2007*, section 3.

⁶ *Care Act 2014*, section 42(1); Department of Health (England), *Care and Support Statutory Guidance* (Department of Health 2014) at 229, paragraph 14.2.

deterioration in their condition, and as such may need to be monitored or to benefit from protection under safeguarding legislation.

- [2.11] Prior to the introduction of the *Care Act 2014*, “vulnerable adult” was the term used in England.⁷ The HSE has moved from referring to persons affected by the policy as “vulnerable persons” in its 2014 national policy and procedures to “adults at risk of abuse” in the final draft of its revised policy.⁸ The draft policy stated that the change in terminology from “a vulnerable person” to the term “adult at risk” reflects a desire to avoid assumptions regarding inherent vulnerability and the stigmatising of particular groups of people.⁹ It appears that there has been a widespread gradual move away from the use of “vulnerable” to describe adults in need of safeguarding, as the term “vulnerable” was widely interpreted as implying that it is the person’s characteristics, namely a weakness on the part of the adult, that result in them being abused or harmed.¹⁰ The Northern Ireland safeguarding policy has also moved away from the concept of “vulnerability” to the concept of an adult “at risk of harm” stating that it places the responsibility for harm caused with those who perpetrate it.¹¹
- [2.12] It is important that there is certainty regarding the definition of an adult at risk as ambiguities may lead to difficulties in determining whether an adult is at risk, which may result in underreporting of suspected abuse, thereby increasing the level of risk and vulnerability to abuse.

2. Adult Safeguarding

- [2.13] The first express policy or legislative reference to adult safeguarding in the Irish context was in the HSE’s 2014 national safeguarding policy, *Safeguarding Vulnerable Persons at Risk of Abuse – National Policy and Procedures*, but “safeguarding” was not defined in the policy. However, the final draft version of the HSE’s revised adult safeguarding policy, published in June 2019, proposes to define “safeguarding” as “putting measures in place to promote people’s human rights and their health and

⁷ Norrie et al., “The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation” (2016) *The Journal of Adult Protection*, Vol. 18, Issue: 5, at 256.

⁸ HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy* (2019) (HSE, June 2019) at 8.

⁹ *Ibid.*

¹⁰ Department of Health, Social Services and Public Safety and Department of Justice (Northern Ireland), *Adult Safeguarding: Prevention and Protection in Partnership* (DHSSPSNI and DOJNI 2015) at 5.

¹¹ *Ibid.*

wellbeing, and empowering them to protect themselves.¹² It also states that the express focus of the proposed policy is on the process of recognising, responding to, reporting and assessing abuse concerns.¹³

- [2.14] HIQA and the MHC's *National Standards for Adult Safeguarding* define safeguarding as "measures that are put in place to reduce the risk of harm, promote and protect people's human rights and their health and wellbeing, and empowering people to protect themselves."¹⁴
- [2.15] The Department of Health has suggested that lessons for adult safeguarding can be taken from child safeguarding experience including the *Children First Act 2015*.¹⁵ The Act does not define safeguarding explicitly. However, section 10 of the Act, which is entitled "child safeguarding", states that: "A provider of a relevant service shall ensure, as far as is practicable, that each child availing of the service from the provider is safe from harm while availing of that service". It could therefore be inferred that "safeguarding" could be defined as "ensuring safety from harm". Furthermore, the Act defines a "child safeguarding statement" as "a written statement that specifies the service being provided and the principles and procedures to be observed in order to ensure, as far as is practicable, that a child availing of the services is safe from harm".¹⁶ The Department of Health has suggested that such a safeguarding statement could be adopted for adult safeguarding.¹⁷ An adult safeguarding statement could therefore be defined as "a written statement that specifies the service being provided and the principles and procedures to be observed in order to ensure, as far as is practicable, that an adult availing of the services is safe from harm". Drawing from the definition of a safeguarding statement, adult safeguarding could possibly be defined as "providing services and implementing principles and procedures to ensure, as far as is practicable, that an adult is safe from harm".
- [2.16] The *Adult Safeguarding Bill 2017* did not include a definition of "safeguarding".

¹² HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE, June 2019) at 12.

¹³ *Ibid.*

¹⁴ HIQA and MHC, *National Standards for Adult Safeguarding* (HIQA and MHC 2019) at 15.

¹⁵ Frances Spillane (Department of Health), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

¹⁶ *Children First Act 2015*, sections 2 and 11(1)(b).

¹⁷ Frances Spillane (Department of Health), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

- [2.17] The Northern Ireland policy on safeguarding defines “preventative safeguarding” as including “a range of actions and measures such as practical help, care, support and interventions designed to promote the safety, well-being and rights of adults which reduce the likelihood of, or opportunities for, harm to occur”.¹⁸ It defines “protective safeguarding” as being “targeted at adults who are in need of protection, that is, when harm from abuse, exploitation or neglect is suspected, has occurred, or is likely to occur.”¹⁹ The policy states that this broad interpretation of “safeguarding” is used to encompass both activity that prevents harm from occurring in the first place and activity that protects adults at risk where harm has occurred or is likely to occur without intervention.²⁰
- [2.18] In England, “safeguarding” is defined in the Guidance accompanying the *Care Act 2014* as:
- “protecting an adult’s right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience 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.”²¹
- [2.19] While “safeguarding” is not defined expressly in the *Adult Support and Protection (Scotland) Act 2007* or the *Social Services and Well-being (Wales) Act 2014*, measures that constitute safeguarding are outlined. The introductory text to the *Adult Support and Protection (Scotland) Act 2007* refers to the first aim of the legislation as “to make provision for the purposes of protecting adults from harm”. It could therefore possibly be inferred that “safeguarding” could be taken to mean “the provision of services for the purposes of protecting adults from harm” in the Scottish context.
- [2.20] The HIQA/MHC *National Standards for Adult Safeguarding*, the Northern Ireland policy on safeguarding and the *Care Act 2014* Guidance all refer to the promotion of well-being in defining “safeguarding” in relation to adults. The *Social Services and Well-being (Wales) Act 2014* places a duty on a person exercising functions under the Act to

¹⁸ Department of Health and Department of Justice (Northern Ireland), *Adult Safeguarding: Prevention and Protection in Partnership* (Department of Health and Department of Justice (Northern Ireland) 2015), at 5.

¹⁹ *Ibid*, at 6.

²⁰ *Ibid*, at 4.

²¹ Department of Health (England), *Care and Support Statutory Guidance* (Department of Health 2014) at 230, paragraph 14.7.

seek to promote the well-being of people who need care and support, and carers who need support.²² Well-being in relation to an adult is defined as well-being in relation to any of the following:

- (a) Physical and mental health and emotional well-being;
- (b) Protection from abuse and neglect;
- (c) Education, training and recreation;
- (d) Domestic, family and personal relationships;
- (e) Contribution made to society;
- (f) Securing rights and entitlements;
- (g) Social and economic well-being;
- (h) Suitability of living accommodation;
- (g) Control over day to day life;
- (h) Participation in work.²³

[2.21] In England, the *Care Act 2014* places a general duty on local authorities to promote an individual's well-being.²⁴ "Well-being", in relation to an individual, is defined as meaning an individual's well-being so far as it relates to any of the following:

- (a) Personal dignity (including treatment of the individual with respect);
- (b) Physical and mental health and emotional well-being;
- (c) Protection from abuse and neglect;
- (d) Control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
- (e) Participation in work, education, training or recreation;
- (f) Social and economic well-being;

²² *Social Services and Well-being (Wales) Act 2014*, section 5.

²³ *Social Services and Well-being (Wales) Act 2014*, section 2(2) and 2(4).

²⁴ *Care Act 2014*, section 1(1).

- (g) Domestic, family and personal relationships;
 - (h) Suitability of living accommodation;
 - (i) The individual's contribution to society.²⁵
- [2.22] Given the inclusion of well-being in a number of definitions of "adult safeguarding" and the focus on well-being in adult safeguarding legislation in other jurisdictions, the inclusion of "well-being" may be considered as an element of any definition of "safeguarding" in adult safeguarding legislation.
- [2.23] A number of the definitions of "safeguarding" refer to the promotion or protection of the rights of at risk adults. Given the relevant human rights obligations related to adult safeguarding, and that the principles underpinning safeguarding policy and legislation also refer to the protection of the human rights of at risk adults, it may be appropriate for any definition of "safeguarding" to expressly refer to the protection of human rights.

3. Abuse

- [2.24] "Abuse" and "harm" are often used interchangeably in adult safeguarding. The same term is often used to describe actions that cause negative impacts and the negative impacts themselves. However, some definitions distinguish between the two terms in defining "abuse" as an act or failure to act that has a negative impact on a person, and defining "harm" as the negative impacts suffered by a person possibly as a result of abuse but harm can also be caused by other means than abuse such as accidental injury. It may therefore be useful to define both "abuse" and "harm" separately and to add clarity for the purposes of proposed adult safeguarding legislation.
- [2.25] "Abuse" is defined in Section 2 of the *Adult Safeguarding Bill 2017* as meaning "an act, failure to act or neglect, which results in a breach of a person's constitutional or legal rights, physical and mental health, dignity or general wellbeing, and may include ill-treatment, intimidation, humiliation, overmedication, withholding necessary medication, censoring communications, invasion or denial of privacy, or denial of access to visitors".
- [2.26] "Ill-treatment" is also defined in Section 2 of the Bill as meaning, in relation to an adult at risk, "to cruelly treat the adult at risk, or to cause or procure or allow the adult at risk to be cruelly treated". As "ill-treatment" is included in the definition of "abuse" as a type of abusive behaviour, it is arguable that it could be considered as a form of abuse rather than being defined separately.

²⁵ *Care Act 2014*, section 1(2).

- [2.27] HIQA's National Standards for Residential Services for Children and Adults with Disabilities define abuse as:
- "any act, or failure to act, which results in a breach of a vulnerable person's human rights, civil liberties, physical and mental integrity, dignity or general well being, whether intended or through negligence, including sexual relationships or financial transactions to which the person does not or cannot validly consent, or which are deliberately exploitative. Abuse may take a variety of forms."²⁶
- [2.28] The HSE's 2014 national policy and procedures on safeguarding adopts the above definition.²⁷ HIQA and the MHC's *National Standards for Adult Safeguarding* define abuse as:
- "A single, or repeated act, or omission, which violates a person's human rights or causes harm or distress to a person."²⁸
- [2.29] The final draft version of the HSE's 2019 revised policy on adult safeguarding proposes to adopt a definition which coincides with that set out in HIQA and the MHC's *National Standards for Adult Safeguarding*.²⁹
- [2.30] In England, the Guidance accompanying the *Care Act 2014* explains "abuse" by outlining categories of abuse including physical abuse, domestic violence, sexual abuse, psychological abuse, financial or material abuse, modern slavery, discriminatory abuse, organisational abuse, neglects and actions of omissions, and self-neglect.³⁰ This is a particularly broad definition of "abuse" as, unlike the definition adopted by HIQA and the HSE, it includes self-neglect.
- [2.31] In British Columbia, the *Adult Guardianship Act 1996* defines "abuse" as "the deliberate mistreatment of an adult that causes the adult:
- (a) physical, mental or emotional harm, or
- (b) damage or loss in respect of the adult's financial affairs, and includes
intimidation, humiliation, physical assault, sexual assault, overmedication,

²⁶ HIQA, *The National Standards for Residential Services for Children and Adults with Disabilities* (HIQA 2013).

²⁷ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 8.

²⁸ HIQA and MHC, *National Standards for Adult Safeguarding* (HIQA and MHC 2019) at 15.

²⁹ HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE June 2019) at 10.

³⁰ Department of Health (England), *Care and Support Statutory Guidance* (Department of Health 2014) at 233-234, paragraph 14.17.

withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors;³¹

- [2.32] The World Health Organisation defines "elder abuse" as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person".³² "Elder abuse" may overlap with the abuse of other societal groups, such as people with a disability³³ or people who do not have full decision-making capacity. However, abuse can also be perpetrated by strangers or in relationships where there may not be an expectation of trust.

4. Harm

- [2.33] "Harm", in relation to an adult at risk, is defined in section 2 of the *Adult Safeguarding Bill 2017* as:

"(a) assault, ill-treatment or neglect of the adult at risk in a manner that seriously affects or is likely to seriously affect the adult at risk's health or welfare,

(b) sexual abuse of the adult at risk

(c) financial abuse of the adult at risk,

whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise".

- [2.34] In Scotland, the *Adult Support and Protection (Scotland) Act 2007* provides that "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.³⁴

- [2.35] These definitions of "harm" are based on the actions or conduct of a perpetrator, similar to the definitions of "abuse" above rather than being based on the negative

³¹ *Adult Guardianship Act 1996*, section 1.

³² World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2002).

³³ Croucher and MacKenzie, "Framing Law Reform to Address Elder Abuse" [2018] *Macquarie Law Journal* 18(1), at 8.

³⁴ *Adult Support and Protection (Scotland) Act 2007*, section 53(1).

impacts caused by the actions, conduct or abuse. These definitions highlight how the terms "abuse" and "harm" are often used interchangeably. However, a number of other definitions interpret "harm" in relation to the negative effects caused by actions, conduct or abuse.

- [2.36] The final draft version of the HSE's 2019 policy on adult safeguarding proposes to define "harm" as: "The impact of abuse, exploitation or neglect on the person."³⁵ It also states that harm "arises from any action, whether by a deliberate act or an omission that may cause impairment of physical, intellectual, emotional, or mental health and well being."³⁶
- [2.37] HIQA and the MHC's *National Standards for Adult Safeguarding* define "harm" as: "the impact of abuse, exploitation or neglect on the person. Harm arises from any action, whether by a deliberate act or an act of omission that may cause impairment of physical, intellectual, emotional, or mental health and wellbeing."³⁷
- [2.38] "Harm" is defined in section 1 of the *Non-Fatal Offences Against the Person Act 1997* as "harm to body or mind and includes pain and unconsciousness." "Serious harm" is defined under the Act as "injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."³⁸
- [2.39] In the context of child abuse, the Queensland Family and Child Commission defines abuse as an action or inaction that causes injury, death, emotional harm or risk of harm whereas it defines "harm" as the detrimental impact caused by the abuse.³⁹ These definitions could also be applied to adult safeguarding.
- [2.40] Given the variations in the definitions of "harm", it may be important to examine whether the definition to be adopted in adult safeguarding legislation should be defined as the negative impacts that result from abusive actions or conduct or omissions, or whether "harm" should be defined similarly to "abuse" i.e. as the actions or conduct themselves. Clarity on the definitions of "abuse" and "harm" is particularly needed as the definitions of these terms in the *Adult Safeguarding Bill 2017* are difficult to reconcile, as both definitions refer to "neglect" and "ill-treatment", which

³⁵ HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE June 2019) at 11.

³⁶ *Ibid.*

³⁷ HIQA and MHC, *National Standards for Adult Safeguarding* (HIQA and MHC 2019) at 15.

³⁸ *Non-Fatal Offences Against the Person Act 1997*, section 1.

³⁹ Queensland Family & Child Commission, *Information Kit on Child Protection for Professionals: About Child Abuse and Harms* (Queensland Government 2017) at 14.

suggests that there may be some overlap. This could potentially lead to some uncertainty in interpreting relevant provisions, and it is therefore important that clarity is achieved.

5. Neglect

[2.41] Existing definitions of neglect reflect that a person can be subject to neglect through intended actions such as being deprived of a necessity or through a failure to take action to meet the needs of the person.

[2.42] "Neglect" is defined in section 2 of the *Adult Safeguarding Bill 2017* as meaning "to deprive an adult of adequate food, warmth, clothing, hygiene, supervision, safety or medical care". This definition is in line with the definition of "neglect" in relation to children in the *Children First Act 2015*.⁴⁰

[2.43] The HSE's 2014 national policy and procedures on safeguarding define neglect and acts of omission as follows:

"Neglect and acts of omission include ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, the withholding of the necessities of life such as medication, adequate nutrition and heating."⁴¹

[2.44] The final draft version of the HSE's 2019 revised adult safeguarding policy proposes that the revised policy shall adopt the following definition of "neglect":

"Withholding, or failure to provide, appropriate and adequate care and support which is required to another person. This may occur through a lack of knowledge or awareness, or through a failure to take reasonable action given the information and facts available to them at the time".⁴²

[2.45] "Neglect" is defined in the British Columbia *Adult Guardianship Act 1996* 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".⁴³

⁴⁰ *Children First Act 2015*, section 2.

⁴¹ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 60.

⁴² HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy (2019)* (HSE June 2019) at 11.

⁴³ *Adult Guardianship Act 1996*, section 1.

- [2.46] Neglect is often not explicitly included in definitions of "abuse" and can be considered as a separate concept. However, the HSE's national policy and procedures on safeguarding includes "neglect and acts of omission" as a form of abuse.⁴⁴ For the purposes of adult safeguarding legislation and any potential relevant legislative guidance, it may be important to provide clarity as to whether neglect should be considered as a form of abuse, or considered separately to abuse.
- [2.47] There are various categories of neglect including self-neglect, physical neglect or deprivation of needs neglect, medical neglect, emotional neglect, and environmental neglect. Self-neglect is defined as "an inability or unwillingness to provide for oneself".⁴⁵ Self-neglect is often considered separately from neglect generally. The HSE's 2014 national policy and procedures and the final draft version of the HSE's 2019 policy on adult safeguarding exclude self-neglect from their definition of "abuse" and instead designate a separate policy to self-neglect.⁴⁶ It may therefore be important to consider whether any definition of neglect in adult safeguarding legislation should refer to categories of neglect such as self-neglect and whether it should specify types of neglect.

6. Capacity

- [2.48] In order to ensure clarity and certainty, it is important that there is consistency in the definitions set out in adult safeguarding legislation. The likelihood of adult safeguarding legislation having interrelated provisions with the *Assisted Decision-making (Capacity Act) 2015* also means that it is particularly important that there is consistency in the definition of "capacity" adopted in the adult safeguarding legislation.
- [2.49] Capacity is defined in section 2(1) of the *Assisted Decision-making (Capacity Act) 2015*. Section 2(1) defines it as "decision-making capacity", and states that it shall be construed in accordance with section 3 of the Act. Section 3 provides for the person's capacity to be construed functionally.
- [2.50] It provides for a person's capacity to be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that

⁴⁴ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 9.

⁴⁵ *Ibid*, at 8.

⁴⁶ *Ibid*, at 8; HSE National Safeguarding Office, *Final Draft HSE Adult Safeguarding Policy* (2019) (HSE June 2019) at 10.

time.⁴⁷ A person is defined as lacking the capacity to make a decision if he or she is unable:

- (a) to understand the information relevant to the decision,
- (b) to retain that information long enough to make a voluntary choice,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.⁴⁸

[2.51] It also provides that a person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (whether using clear language, visual aids or any other means).⁴⁹

[2.52] The Act also provides that a person is not prevented from being regarded as having the capacity to make decisions in a number of circumstances:

- The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make the decision.⁵⁰
- The fact that a person lacks capacity in respect of a decision on a particular matter at a particular time does not prevent him or her from being regarded as having capacity to make decisions on the same matter at another time.⁵¹
- The fact that a person lacks capacity in respect of a decision on a particular matter does not prevent him or her from being regarded as having capacity to make decisions on other matters.⁵²

[2.53] The Act also provides that information relevant to a decision shall be construed as including information about the reasonably foreseeable consequences of: (a) each of

⁴⁷ *Assisted Decision-Making (Capacity) Act 2015*, section 3(1).

⁴⁸ *Assisted Decision-Making (Capacity) Act 2015*, section 3(2).

⁴⁹ *Assisted Decision-Making (Capacity) Act 2015*, section 3(3).

⁵⁰ *Assisted Decision-Making (Capacity) Act 2015*, section 3(4).

⁵¹ *Assisted Decision-Making (Capacity) Act 2015*, section 3(5).

⁵² *Assisted Decision-Making (Capacity) Act 2015*, section 3(6).

the available choices at the time the decision is made, or (b) failing to make the decision.⁵³

Questions for Issue 2

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?

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".

⁵³ Assisted Decision-Making (Capacity) Act 2015, section 3(7).

ISSUE 3 PHYSICAL, SEXUAL, DISCRIMINATORY AND PSYCHOLOGICAL ABUSE, NEGLECT AND DEPRIVATION OF LIBERTY

1. Introduction

- [3.1] At risk adults can be victims of various forms of abuse including physical abuse, sexual abuse, discriminatory abuse, psychological abuse, neglect, deprivation of liberty and financial abuse. This issue will deal with all of the aforementioned categories except financial abuse, which will be discussed as a standalone issue.
- [3.2] Domestic violence often arises in the context of the abuse of adults. Domestic violence refers to the use of physical or emotional force or threat of physical force, including sexual violence, in close adult relationships. This includes violence perpetrated by a spouse, partner, son, daughter or any other person who has a close or blood relationship with the victim. The term "domestic violence" has been defined as going "beyond actual physical violence", as it "can also involve emotional abuse; the destruction of property; isolation from friends, family and other potential sources of support; threats to others including children; stalking; and control over access to money, personal items, food, transportation and the telephone".¹ While at risk adults may be victims of domestic violence, there are also many incidents of abuse of at risk adults that do not constitute domestic violence. At risk adults can be the victims of abuse perpetrated by individuals whose relationship or connection with the at risk adult does not fall within the scope of the relationships prescribed under the *Domestic Violence Act 2018*. As domestic violence can involve several of the forms of abuse considered in this issue, it is not discussed as a separate form of abuse below. However, provisions of the *Domestic Violence Act 2018* are considered, where relevant.
- [3.3] Different forms of abuse may also overlap in adult safeguarding situations as, for example, where financial abuse is perpetrated, psychological abuse is often occurring also. This issue will examine the various forms of abuse individually and the existing legal provisions to address abuse before seeking to establish whether any additional legal measures are required.

¹ Report of the National Task Force on Violence against Women (1997), as adopted by the HSE in the HSE's Policy on Domestic, Sexual and Gender Based Violence (HSE 2010) at 11.

2. Physical abuse

- [3.4] The HSE defines physical abuse as behaviour including: hitting, slapping, pushing, kicking, misuse of medication, restraint or inappropriate sanctions.² The effects or indicators of physical abuse include: bruising, burns, fractures, lacerations, abrasions, hair loss, dislocations, scratches, imprint injuries, unexplained or long absences at a regular placement, and avoidance of particular persons or asking not to be hurt.³ Of the concerns of abuse reported to the HSE in 2017, physical abuse was the most significant category of alleged abuse for persons aged under 65 at 45% (compared with 47% in 2016).⁴ Overall, it accounted for 37% of the total concerns of alleged abuse reported to the HSE across all age categories in 2017.⁵
- [3.5] The *Non-Fatal Offences Against the Person Act 1997* provides for offences relating to various forms of assault; offences relating to violence or threats of violence involving syringes and/or blood; offences relating to threats to kill or cause serious harm; offences relating to the offence of harassment; and the offence of coercion. Sections 2, 3 and 4 of the Act provide for offences relating to assault, assault causing harm and assault causing serious harm while section 5 provides for the offence of threatening to kill or cause serious harm.

3. Sexual abuse

- [3.6] Sexual abuse includes rape and sexual assault, or sexual acts to which the vulnerable or at risk person has not consented, or could not consent, or in relation to which the vulnerable or at risk person was compelled to consent.⁶ Examples include: intentional touching, fondling, molesting, sexual assault and rape, as well as inappropriate and sexually explicit comments, exposure of sexual organs, performance of sexual acts in the presence of an at risk adult and exposure to sexually explicit material.⁷ In 2017, concerns of alleged sexual abuse accounted for 9% of the concerns reported to the HSE with the rate highest among the 18-64 age category at 11%.⁸

² Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures – Frequently Asked Questions* (HSE Social Care Division 2014) at 4.

³ *Ibid.*, at 59; O'Loughlin and Duggan, *Abuse, Neglect and Mistreatment of Older People: An Exploratory Study* (National Council on Ageing and Older People 1998), at 14.

⁴ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

⁵ *Ibid.*, at 53.

⁶ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 59.

⁷ *Ibid.*

⁸ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

- [3.7] The offence of rape is set out in section 2 of the *Criminal Law (Rape) Act 1981* and section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. The offences of sexual assault and aggravated sexual assault are provided for under sections 2 and 3 of the *Criminal Law (Rape) (Amendment) Act 1990*.
- [3.8] Offences related to the performance of a sexual act with protected persons are provided for under the *Criminal Justice (Sexual Offences) Act 2017*.⁹ It provides that a person who engages in a sexual act with a protected person knowing that that person is a protected person or being reckless as to whether that person is a protected person shall be guilty of an offence.¹⁰ It further provides that a person who invites, induces, counsels or incites a protected person to engage in a sexual act knowing that that person is a protected person or being reckless as to whether that person is a protected person shall be guilty of an offence.¹¹
- [3.9] A person is defined as lacking the capacity to consent to a sexual act if he or she is, by reason of a mental or intellectual disability or a mental illness, incapable of:
- (a) understanding the nature, or the reasonably foreseeable consequences, of that act,
 - (b) evaluating relevant information for the purposes of deciding whether or not to engage in that act, or
 - (c) communicating his or her consent to that act by speech, sign language or otherwise.¹²
- [3.10] Section 22 provides for an offence by a person in authority who engages in a sexual act with a relevant person¹³ and by a person in authority who invites, induces, counsels or incites a relevant person to engage in a sexual act shall be guilty of an offence.¹⁴ A "person in authority", in relation to a relevant person against whom an offence is alleged to have been committed, is defined as any person who as part of a contract of service or a contract for services is, for the time being, responsible for the education, supervision, training, treatment, care or welfare of the relevant person.¹⁵ A "relevant person" is defined as a person who has: (a) a mental or intellectual disability, or (b) a

⁹ *Criminal Justice (Sexual Offences) Act 2017*, Part 3.

¹⁰ *Criminal Justice (Sexual Offences) Act 2017*, section 21(1).

¹¹ *Criminal Justice (Sexual Offences) Act 2017*, section 21(2).

¹² *Criminal Justice (Sexual Offences) Act 2017*, section 21(7).

¹³ *Criminal Justice (Sexual Offences) Act 2017*, section 22(1).

¹⁴ *Criminal Justice (Sexual Offences) Act 2017*, section 22(2).

¹⁵ *Criminal Justice (Sexual Offences) Act 2017*, section 22(8).

mental illness, which is of such a nature or degree as to severely restrict the ability of the person to guard himself or herself against serious exploitation.¹⁶

4. Discriminatory abuse

- [3.11] Discriminatory abuse is also an issue that may arise in the context of discussions regarding the forms of abuse that may be perpetrated against at risk adults. Discriminatory abuse may be defined as including ageism, racism, sexism, abuse based on a person's disability, and other forms of harassment, slurs or similar treatment.¹⁷ Such abuse can involve being shunned by individuals, family or society because of age, race or disability and the making of assumptions about a person's abilities or inabilities.¹⁸ In 2017, concerns of alleged discriminatory abuse reported to the HSE accounted for 1% of the total concerns reported.¹⁹ Although at risk adults are protected from discrimination in certain circumstances under equality and employment equality legislation, the discriminatory abuse of at risk people generally is not classed as a hate crime in Ireland. While disabled people are protected by the *Prohibition of Incitement to Hatred Act 1989*, older or other at risk people are not a "protected" community for the purposes of the Act. Reforms of the Act have been recommended including that it should protect a more inclusive range of groups.²⁰
- [3.12] In the Scottish context, an independent review of hate crime legislation has called for the introduction of a statutory aggravation based on age hostility.²¹ These calls have been supported by a number of civil society organisations and stakeholders. However, Police Scotland have instead argued for the introduction of a statutory aggravation based on the vulnerability or frailty of the victim.²²
- [3.13] In England, there has been growing concern regarding whether a sufficient range of characteristics is protected by hate crime legislation.²³ The Law Commission of England

¹⁶ *Criminal Justice (Sexual Offences) Act 2017*, section 22(8).

¹⁷ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 60.

¹⁸ *Ibid.*

¹⁹ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

²⁰ Haynes and Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) at 212.

²¹ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland* (Scottish Government 2018).

²² Police Scotland, *Prosecution of Elder Abuse – Justice Committee Submission from Police Scotland* (Police Scotland 2019) available at https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-PS.pdf

²³ Law Commission of England and Wales, *Review of hate crime*, available at <https://www.lawcom.gov.uk/project/hate-crime/>

and Wales is therefore carrying out a review of hate crime legislation to examine the adequacy and parity of protection offered by the law and to make recommendations for its reform. It will consider whether crimes motivated by, or demonstrating, hatred based on sex and gender characteristics, or hatred of older people or other potential protected characteristics should be hate crimes, with reference to underlying principles and the practical implications of changing the law.²⁴ It expects to publish a consultation paper in 2020.

- [3.14] A review of the *Prohibition of Incitement to Hatred Act 1989* is currently being undertaken by the Department of Justice of Equality in consultation with all of the relevant agencies. Considerable research has already been undertaken in this area by the Hate and Hostility Research Group based at the University of Limerick, and a report published by the Irish Council for Civil Liberties.²⁵ The Department of Justice and Equality is also conducting research into offences that are committed with a hate or bias motivation to learn from the approaches taken in other jurisdictions.²⁶ The Commission will therefore not examine this matter in the course of this Issues Paper.

5. Psychological abuse

- [3.15] Psychological or emotional abuse includes emotional abuse, threats of harm or abandonment, deprivation of contact, humiliation, blaming, controlling, intimidation, coercion, harassment, verbal abuse, isolation or withdrawal from services or supportive networks.²⁷ Psychological abuse is often difficult to detect particularly as it does not have to be verbally expressed and distress can be caused by non-communication, being ignored or being made to feel discounted.²⁸ The effects of psychological abuse include depression, helplessness, loss of sleep, tearfulness, loss of appetite and fear.²⁹ Of the concerns of alleged abuse reported to the HSE in 2017, psychological abuse was the most significant category of alleged abuse, with a person causing concern, for

²⁴ Law Commission of England and Wales, *Hate Crime: Background to our Review* (Law Commission of England and Wales 2019) available at <https://www.lawcom.gov.uk/project/hate-crime/>

²⁵ Haynes and Scheweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

²⁶ Minister Charles Flanagan (Minister for Justice and Equality), *Written answers (Question to Justice): Question 729 , Legislative Reviews – Dáil Éireann Debate, Tuesday – 23 July 2019* (23 July 2019) available at <https://www.oireachtas.ie/en/debates/question/2019-07-23/729/>

²⁷ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 59.

²⁸ O'Loughlin and Duggan, *Abuse, Neglect and Mistreatment of Older People: An Exploratory Study* (National Council on Ageing and Older People 1998) at 14.

²⁹ *Ibid.*

persons aged 65 and over at 31%.³⁰ When HSE data for 2016 and 2017 was combined, it showed that the prevalence of alleged psychological abuse is consistent across all age categories.³¹

- [3.16] Existing offences related to actions that could constitute psychological abuse are provided for under the *Non-Fatal Offences Against the Person Act 1997* and the *Domestic Violence Act 2018*.

(a) Coercion

- [3.17] An offence of coercion is provided for under section 9 of the *Non-Fatal Offences Against the Person Act 1997*. It provides that a person who, with a view to compel another to abstain from doing or to do any act which that other has a lawful right to do or to abstain from doing, wrongfully and without lawful authority:

- (a) uses violence to or intimidates that other person or a member of the family of the other, or
- (b) injures or damages the property of that other, or
- (c) persistently follows that other about from place to place, or
- (d) watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place, or
- (e) follows that other with one or more other persons in a disorderly manner in or through any public place, shall be guilty of an offence.³²

(b) Harassment

- [3.18] An offence of harassment is also provided under the *Non-Fatal Offences Against the Person Act 1997*. Section 10(1) provides that any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence. A person is defined as harassing another, for the purposes of the Act, where he or she (a) by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and (b) those acts are such that a reasonable person

³⁰ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

³¹ *Ibid*, at 54.

³² *Non-Fatal Offences Against the Person Act 1997*, section 9(1).

would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.³³

- [3.19] The Act also provides that where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.³⁴ A person who fails to comply with the terms of such an order shall be guilty of an offence.³⁵ If, on the evidence, the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make such an order upon an application to it on that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice.³⁶

(c) Coercive control

- [3.20] The *Domestic Violence Act 2018* enacted an offence of coercive control. The Act provides that the person commits an offence where he or she knowingly and persistently engages in behaviour that—
- (a) is controlling or coercive,
 - (b) has a serious effect on a relevant person, and
 - (c) a reasonable person would consider likely to have a serious effect on a relevant person.³⁷
- [3.21] A person's behaviour is defined as having a serious effect on a relevant person if the behaviour causes the relevant person: (a) to fear that violence will be used against him or her, or (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities.³⁸
- [3.22] A person is defined as a "relevant person" in respect of another person, for the purposes of section 39 of the Act, if he or she:
- (a) is the spouse or civil partner of that other person, or

³³ *Non-Fatal Offences Against the Person Act 1997*, section 10(2).

³⁴ *Non-Fatal Offences Against the Person Act 1997*, section 10(3).

³⁵ *Non-Fatal Offences Against the Person Act 1997*, section 10(4).

³⁶ *Non-Fatal Offences Against the Person Act 1997*, section 10(5).

³⁷ *Domestic Violence Act 2018*, section 39(1).

³⁸ *Domestic Violence Act 2018*, section 39(2).

(b) is not the spouse or civil partner of that other person and is not related to that other person within a prohibited degree of relationship but is or was in an intimate relationship with that other person.³⁹

- [3.23] As a result of the Act's definition of a "relevant person", the offence of coercive control applies to intimate relationships only. However, psychological abuse such as coercive control is not confined to intimate relationships and may be perpetrated by someone else in a proximate relationship to an at risk adult. Indeed, the HSE has identified that the main persons causing concern as possible perpetrators of abuse in the 65 and over age group are adult children at 29%.⁴⁰
- [3.24] In England and Wales, section 76 of the *Serious Crime Act 2015* provides for an offence of controlling or coercive behaviour in an intimate or family relationship. The need for such an offence was highlighted by case law indicating the difficulties in proving a pattern of behaviour constituting harassment within an intimate relationship.⁴¹ Section 76 provides that the two parties, A and B, are "personally connected" for the purposes of the offence if:
- they are in an intimate personal relationship; or
 - they live together and are either members of the same family; or
 - they live together have previously been in an intimate personal relationship with each other.
- [3.25] The applicability of the offence to abuse perpetrated by a member of the same family who is cohabiting with the victim means that, unlike the Irish offence of coercive control, the offence in England and Wales applies to family relationships as well as intimate relationships.

6. Neglect

- [3.26] Neglect may include acts of omission such as: ignoring medical or physical care needs, routinely depriving someone of essentials such as food and warmth and failing to provide access to appropriate health, social care or education services.⁴² It may also include failure to provide clothing, entitlements, hygiene, intellectual stimulation, supervision and safety, or attention.

³⁹ *Domestic Violence Act 2018*, section 39(4).

⁴⁰ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 52.

⁴¹ *R v Curtis* [2010] EWCA Crim 123; *R v Widdows* [2011] EWCA Crim 1500.

⁴² Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE Social Care Division 2014) at 60.

- [3.27] In 2017, of the 10,118 concerns of possible abuse received by the HSE, 430 related exclusively to self-neglect with no person causing concern.⁴³ Overall, self-neglect cases accounted for 5% of the total alleged abuse with more self-neglect cases presenting in the 65-79 age category.⁴⁴ Concerns of alleged neglect rose from 6% among the 18-64 age category to 15% in the 65-79 age category and 18% in the over 80 age category.⁴⁵
- [3.28] In cases of alleged neglect, staff were most commonly associated with cases for those aged 18-64 while an adult child was most linked with cases among those aged 65 and over.⁴⁶ A research study, which reanalysed responses to the 2012 consultation by the Department of Health in England on a safeguarding power of entry, found that one of the two most common types of cases in which a power of entry may need to be used is cases of neglect, or acts of omission, where longstanding family carers would not accept the need for the involvement of social care or health services and refused access.⁴⁷
- [3.29] In terms of existing civil law remedies for neglect of an at risk adult, contract law may provide remedies for neglect through breach of contract where there is a formal contract for an at risk adult's care. Under the law of tort, liability in negligence may be considered only if it can be established that the person had a duty of care to an at risk adult, which that person has breached and which has resulted in harm to the at risk adult.⁴⁸ There is no statutory or common law duty on adult children to care for their parents or other adult relatives.⁴⁹ In relation to professional carers, a duty of care may be more easily implied and action more easily taken.⁵⁰ In instances of professional negligence, vicarious liability means that an employer is responsible to an injured person for the actions of the employee.⁵¹

⁴³ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 53.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 54.

⁴⁷ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection*, Vol. 18, Issue: 5, at 263.

⁴⁸ National Centre for the Protection of Older People, *Elder Abuse and Legislation in Ireland* (NCPOP 2009) at 18.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ O'Loughlin and Duggan, *Abuse, Neglect and Mistreatment of Older People: An Exploratory Study* (NCAOP 1998) at 74.

7. Deprivation of Liberty

- [3.30] Legislative procedural safeguards to ensure that people in relevant facilities are not unlawfully deprived of their liberty will be provided through the introduction of proposed legislation. The Government approved the relevant draft Heads of Bill for public consultation in December 2017. The draft Heads of Bill set out procedural safeguards to ensure that people in relevant facilities who lack capacity are not unlawfully deprived of their liberty. The approach taken in the draft Heads of Bill makes use of the decision-making procedures, supports and safeguards that already exist under the *Assisted Decision-Making (Capacity) Act 2015* and also includes some additional safeguards specific to deprivation of liberty. The proposals build on the infrastructure of the Decision Support Service, which is provided for under the 2015 Act.⁵²
- [3.31] The Department of Health held a related consultation in 2018, and received in excess of 50 submissions. An Advisory Group comprised of key stakeholders has been formed to consider the findings of the public consultation, advise on appropriate amendments to the draft Heads of Bill and ensure that the approach taken integrates effectively with existing legislation.⁵³ The relevant Bill is currently being drafted by the Department of Health. The Bill was due to be published by the end of 2018 but the Commission understands that due to the volume of submissions received, it is now anticipated that the Bill will be published in 2020. The Commission notes the decision of the Supreme Court in *AC and Ors v Cork University Hospital and Ors*⁵⁴ and anticipates that the guidance provided, particularly in relation to the intervention of bodies such as the HSE in decisions regarding whether a patient will stay in or leave hospital, may be taken into consideration by the Department of Health in finalising the draft Bill.
- [3.32] As deprivation of liberty is an area which is being examined by the Department of Health in considerable detail, this issue will not be included within the scope of this project.

8. Possible legal reforms to tackle abuse of at risk adults

- [3.33] Existing legal provisions related to the various forms of abuse have been outlined above. In addition to these, the *Criminal Justice (Victims of Crime) Act 2017* sets out

⁵² Minister for Health, *Commencement of Legislation Dáil Éireann Debate, Tuesday - 18 September 2018, question 426* (18 September 2018) available at <https://www.oireachtas.ie/en/debates/question/2018-09-18/426/>

⁵³ *Ibid.*

⁵⁴ [2019] IESC 73, discussed in paragraph 12 of the Overview to the Issues Paper, above.

the right to be given information on victim support services and the right to have protection needs assessed and have measures put in place to stop further victimisation and intimidation. Such provisions are extremely important as it is vital that there are measures in place to protect at risk adults and prevent further abuse or harm. It is possible that a statutory duty to make inquiries in cases of suspected abuse, as outlined in the discussion in Issue 7, below, may also contribute to ensuring that signs or indicators of abuse are acted upon at the earliest possible stage to prevent the situation from escalating and further abuse being suffered.

(a) Specific offences relating to the abuse or neglect of at risk adults

- [3.34] Additional legal measures specifically relating to abuse or neglect have been introduced, or proposed, in other jurisdictions.
- [3.35] In the United Kingdom, an offence involving ill-treatment or wilful neglect by a person providing health care or social care was created under the *Criminal Justice and Courts Acts 2015* as well as a similar offence under the *Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016*. Section 20(1) of the *Criminal Justice and Courts Acts 2015* provides that it is an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully neglect that individual. An individual guilty of an offence under this section is liable:
 - (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both);
 - (b) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both).⁵⁵

- [3.36] "Care worker" is defined under the Act as an individual who, as paid work, provides: (a) health care for an adult or child, other than excluded health care, or (b) social care for an adult, including an individual who, as paid work, supervises or manages individuals providing such care or is a director or similar officer of an organisation which provides such care.⁵⁶

(b) A duty to safeguard at risk adults

- [3.37] A possible additional legal measure, which could be introduced to prevent abuse and neglect or prevent further abuse and neglect, is a duty to safeguard at risk adults. A duty to safeguard at risk adults would extend to safeguarding against all forms of abuse and neglect including the forms outlined in this issue and financial abuse, which is covered in the next issue. Such a duty exists in other jurisdictions and can take a

⁵⁵ *Criminal Justice and Courts Acts 2015* (UK), section 20(2).

⁵⁶ *Criminal Justice and Courts Acts 2015* (UK), section 20(3).

number of forms or be made up of a number of provisions including a duty to promote individual well-being; a duty to prevent needs for care and support; a duty to assess an adult's needs for care and support; and a duty to meet needs for care and support.

- [3.38] In England, a duty to promote individual well-being is set out in section 1 of the *Care Act 2014*. A duty to prevent or delay needs for care and support is also set out under the *Care Act 2014*. Section 2(1) provides that a local authority must provide or arrange for the provision of services, facilities or resources, or take other steps that it considers will, in relation to at risk adults, contribute towards preventing or delaying the development by adults in its area of needs for care and support and reduce the needs for care and support of adults in its area. A duty on local authorities to assess an adult's needs for care and support is outlined under section 9 of the Act while section 18 provides for a duty on local authorities to meet needs for care and support which meet the eligibility criteria set out in the Act. Section 24 of the Act sets out the steps that a local authority must take where it is required to meet needs under the Act, or decides to do so. These steps include preparing a care and support plan or a support plan for the adult concerned; informing the adult which (if any) of the needs that the local authority is going to meet may be met by direct payments; and helping the adult with deciding how to have the needs met.⁵⁷
- [3.39] In Wales, a duty to promote the well-being of people who need care and support, and carers who need support, is set out under section of the *Social Services and Well-being (Wales) Act 2014*. A duty to assess the needs of an adult for care and support is also set out in the *Social Services and Well-being (Wales) Act 2014*. Section 19(4) provides that in carrying out an assessment, a local authority must seek to identify the outcomes that the adult wishes to achieve in day to day life. It must also assess whether, and if so to what extent, the provision of care and support; preventative services; or information, advice or assistance, could contribute to the achievement of those outcomes or otherwise meet needs identified by the assessment. Finally, it is required to assess whether, and if so to what extent, other matters could contribute to the achievement of those outcomes or otherwise meet those needs. A duty to meet the care and support needs of an adult is set out under section 35 of the Act. It provides that a local authority must meet an adult's needs for care and support if it is satisfied that a number of conditions are met; including that the adult is resident in the local authority's area, meets the eligibility criteria or the local authority considers it necessary to meet the needs in order to protect the adult from abuse or neglect or a risk of abuse or neglect.

⁵⁷ *Care Act 2014*, section 24(1).

- [3.40] A duty to safeguard in terms of a duty to promote the individual well-being of an individual and to meet the care and support needs of an adult can therefore have a significant impact; as it can require authorities to place an emphasis on both prevention and protection. 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.⁵⁸ It was added that there must be a statutory requirement to identify needs, risk, the route to meet needs, the mechanism for intervening and the mechanism for review rather than authorities simply waiting until an urgent safeguarding issue arises before taking action.⁵⁹ 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.⁶⁰

(c) A duty to have a care plan in place

- [3.41] The introduction of a statutory duty to have a care plan in place for every adult in receipt of social care services may help to safeguard at risk adults, as it would provide a written plan for each individual's care with involvement from the at risk adult and all relevant multidisciplinary stakeholders. It would also set out measurable goals for an adult's care and a date for review of the plan, which would assist with planning and monitoring an adult's care.
- [3.42] A statutory requirement for persons residing in approved centres under the *Mental Health Act 2001* to have a care plan in place is provided under the *Mental Health Act 2001 (Approved Centres) Regulations 2006*.⁶¹ Regulation 15 provides that the registered proprietor of an approved centre shall ensure that each resident has an individual care plan.⁶² In relation to older people who are resident in designated centres, regulation 5(3) of the *Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013*⁶³ provides that a care plan must be prepared, based on

⁵⁸ Patricia Rickard-Clarke, (Chair, Safeguarding Ireland), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/

⁵⁹ *Ibid.*

⁶⁰ Frances Spillane (Department of Health), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

⁶¹ *Mental Health Act 2001 (Approved Centres) Regulations 2006* (S.I. No. 551 of 2006).

⁶² *Mental Health Act 2001 (Approved Centres) Regulations 2006* (S.I. No. 551 of 2006), regulation 15.

⁶³ *Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013* (S.I. No. 415 of 2013).

an assessment carried out under regulation 5(2), for a resident no later than 48 hours after that resident's admission to the designated centre concerned.

- [3.43] In relation to other at risk adults, HIQA's National Standards for Residential Care Settings for Older People in Ireland⁶⁴ and National Standards for Residential Services for Children and Adults with Disabilities⁶⁵ refer to the need for a care plan or personal plan to be drafted for each adult. Standard 2.1 of the National Standards for Residential Care Settings for Older People in Ireland sets out the expectation that each resident should have a care plan, based on an ongoing comprehensive assessment of their needs which is implemented, evaluated and reviewed, reflects their changing needs and outlines the supports required to maximise their quality of life in accordance with their wishes.⁶⁶ Similarly, standard 2.1 of the National Standards for Residential Services for Children and Adults with Disabilities provides that each adult should have a personal plan which details their needs and outlines the supports required to maximise their personal development and quality of life, in accordance with their wishes.⁶⁷
- [3.44] There is currently no statutory provision for a care plan where adults at risk are in receipt of safeguarding services in the community. As the provision of homecare services remains unregulated, there are also no statutory provisions or policy standards regarding the need for a care plan for adults in receipt of homecare services.
- [3.45] In relation to children in Ireland, the *Child Care (Placement of Children in Foster Care) Regulations 1995*⁶⁸ provide that before placing a child in foster care, a plan for the care and upbringing of the child must be prepared.⁶⁹ Regulation 11 provides that the care plan must, among other matters, set out: the support to be provided to the child, the foster parents and, where appropriate, the parents of the child by the health board; the arrangements for access to the child by a parent, relative or other named person, subject to any order as to access made by a court, and the arrangements for the

⁶⁴ HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016).

⁶⁵ HIQA, *National Standards for Residential Services for Children and Adults with Disabilities* (HIQA 2013).

⁶⁶ HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at 28-29.

⁶⁷ HIQA, *National Standards for Residential Services for Children and Adults with Disabilities* (HIQA 2013) at 72-73.

⁶⁸ *Child Care (Placement of Children in Foster Care) Regulations 1995* (S.I. No.260 of 1995).

⁶⁹ Regulation 23 of the *Child Care (Placement of Children in Residential Care) Regulations 1995* (S.I. No.259 of 1995) and Regulation 11 of the *Child Care (Placement of Children with Relatives) Regulations 1995* (S.I. No.261 of 1995) also provide that a care plan must be prepared before placing a child in residential care or in the care of relatives.

review of the plan. Regulation 11(3) also provides the child must be consulted, as far as is practicable, in the preparation of the care plan. A similar statutory duty could be introduced in relation to at risk adults in receipt of community or nursing home care services.

- [3.46] In England, section 24(1) of the *Care Act 2014* provides that where a local authority is required to meet the care and support needs of an at risk adult, or decides to do so, it must prepare a care and support plan or a support plan for the adult concerned. Section 10 of the *Care and Support Statutory Guidance* relates to care and support planning, and sets out: how to undertake care and support planning; the production of the plan; involving the person concerned in the production of the plan; authorising others to prepare the plan jointly with the local authority; and planning for people who lack capacity.⁷⁰ Section 13 of the Statutory Guidance also sets out guidance on the review of care and support plans.⁷¹
- [3.47] In Wales, section 54(1) of the *Social Services and Well-being (Wales) Act 2014* provides that where a local authority is required to meet the needs of a person under section 35 or 37 of the Act, it must prepare and maintain a care and support plan in relation to that person.
- [3.48] It is possible that the introduction of such a statutory duty in Ireland may help to ensure that care plans are in place in all cases, to improve the emphasis placed on care plans and to ensure greater protections for at risk adults.

⁷⁰ Department of Health (England), *Care and Support Statutory Guidance* (Department of Health 2014) at 173-186.

⁷¹ *Ibid*, at 221-228.

Questions for Issue 3

- 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?

ISSUE 4 FINANCIAL ABUSE

1. Financial abuse in Ireland

- [4.1] Financial or material abuse has been defined by the HSE as including: "theft, fraud, exploitation, pressure in connection with wills, property, inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits".¹ However, there are many definitions of financial abuse with indicators usually being theft, including burglary and robbery; fraud including telemarketing, lottery and homeowner scams; intentional misuse of assets by a fiduciary or caregiver and negligent use of assets or financial mismanagement.² Financial abuse of older adults has been characterised as being made up of the following six clusters: theft and scams, financial victimisation (breach of trust by a fiduciary), coercion, signs of possible financial exploitation (irregular financial activity, inability to pay bills, unmet physical needs) and money management difficulties.³
- [4.2] Research studies have identified high rates of financial abuse among older people in Ireland, as discussed earlier in this paper. In 2010, a national study found that financial abuse was the most common form of elder abuse experienced by older people.⁴ Subsequent reports produced by the National Centre for the Protection of Older People (NCPOP) have also highlighted the significance of financial abuse among older people in Ireland.⁵ Statistics published by the HSE show that financial abuse was the second most significant category of alleged abuse for persons aged over 65 in 2017, and that alleged financial abuse increases with age with the highest level of reporting in those over 80 years old.⁶ Research commissioned by Banking and Payments Federation Ireland (BPFI) in 2019 found that up to 20% of adults have experience of

¹ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE 2014).

² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 5.

³ Conrad et al., "Conceptual model and map of financial exploitation of older adults" (2011) *Journal of Elder Abuse & Neglect* 23(4), at 312.

⁴ Naughton et al., *Abuse and Neglect of Older People in Ireland: Report on the National Study of Elder Abuse and Neglect* (NCPOP 2010) at 44.

⁵ Fealy et al., *Financial Abuse of Older People: A Review* (NCPOP 2012); Phelan et al., *The older adult financial exploitation measure: A pilot study to test its appropriateness in an Irish context* (NCPOP 2014); Phelan et al., *The Elder abuse suspicion index: A pilot study to test its reliability in an Irish context* (NCPOP 2014).

⁶ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 5 and 53.

financial abuse.⁷ Following the publication of the HSE's safeguarding policy and procedures in 2014, and the recognition by the Central Bank of Ireland that financial institutions have a particular service responsibility to vulnerable customers,⁸ Banking and Payments Federation of Ireland (BPFI) agreed to fund a study by the NCPOP focussed on banking staff's experiences of financial abuse of vulnerable adults at risk.⁹ The results of this study were published in 2018, and also included additional context through the study's inclusion of five members of the National Safeguarding Committee (now Safeguarding Ireland). Findings from the study's survey data revealed that two thirds of the banking staff respondents (66.5%) had previously suspected a customer to be experiencing some form of financial abuse.¹⁰ In presenting to the Joint Oireachtas Committee on Health, representatives from the National Safeguarding Committee (now Safeguarding Ireland) highlighted financial abuse as an ongoing concern and referred to barriers in investigating such abuse.¹¹

2. Issues in the prevention and detection of financial abuse

- [4.3] Research has identified areas that require improvement in order to address the financial abuse of vulnerable or at risk adults in Ireland including issues within banks and within society. These issues include: a lack of understanding of financial decisions among vulnerable or at risk adults;¹² inadequate provision of training and professional development for banking staff;¹³ inadequate supports for banking staff;¹⁴ the absence of mandatory reporting of financial abuse;¹⁵ and an absence of inter-sectoral collaboration.¹⁶ Inadequate legislation and policy is also a key issue, which is addressed further on. There are many additional issues, including: a lack of public awareness of the abuse of at risk adults; financial abuse related to joint accounts;

⁷ Banking Payments Federation Ireland (BPFI), *20% of Irish adults have experience of financial abuse: Need for much greater awareness of risks of financial abuse* (BPFI, November 2019), <https://www.bpfi.ie/news/20-irish-adults-experience-financial-abuse/>

⁸ Central Bank of Ireland, *Consumer Protection Code 2012* (Central Bank of Ireland 2012).

⁹ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018).

¹⁰ *Ibid.*, at xiii.

¹¹ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 13.

¹² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 97-98.

¹³ *Ibid.*, at 98-99.

¹⁴ *Ibid.*, at 100.

¹⁵ *Ibid.*, at 100-101.

¹⁶ *Ibid.*, at 102.

financial abuse related to social welfare payments; and increasing rates of financial abuse with advancements in technology. This section outlines a number of the issues in preventing and detecting financial abuse in further detail.

(a) Public awareness of financial abuse

- [4.4] The National Safeguarding Committee (now Safeguarding Ireland) commissioned Red C to conduct a nationwide public opinion survey in December 2016 in order to understand perceptions around and treatment of at risk adults within Irish society. 81% of respondents stated that it was unclear what is considered financial abuse and that this needs to be clarified to educate those who care for at risk adults.¹⁷ A lack of clarity regarding the point of contact for reporting at risk adult maltreatment was recognised by 1 in 3 of the respondents, with those under 35 years of age significantly less likely to feel they knew the appropriate avenue.¹⁸ Almost two thirds of the respondents agreed that people suspecting risk of mistreatment are unlikely to report their concerns to an appropriate authority.¹⁹ Uncertainty around what constitutes psychological and financial abuse was also identified as an issue which needs to be addressed in order to further protect at risk adults in the State.²⁰
- [4.5] A more recent Irish research study also identified a lack of public understanding of what constituted financial abuse and a need to raise awareness of financial abuse and the consequences of financial decisions.²¹ Public awareness of financial abuse is vital as people may be empowered to report issues of financial abuse and take action to tackle abuse as a result of being equipped with the knowledge to identify financial abuse.

(b) Breach of fiduciary relationships

- [4.6] Research in the Irish context has found that financial abuse is generally perpetrated by a person in a position of trust, such as a carer or others with whom the victim would have had a fiduciary relationship.²² Analysis of NHS Digital and Court of Protection statistical data in England has shown that most victims of financial abuse know their

¹⁷ Red C, *Vulnerable Adults in Irish Society – Nationwide Public Opinion Survey* (National Safeguarding Committee December 2016), <https://www.safeguardingireland.org/wp-content/uploads/2018/10/Red-C-Survey-Vulnerable-Adults-in-Irish-Society-060417.pdf>

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 97.

²² *Ibid.*, at 6-7.

abusers, many of whom are close relatives.²³ A number of research studies in the United States have shown that in a large percentage of cases of financial abuse, the perpetrators are the adult offspring of the victim.²⁴ Of the over 10,000 concerns of alleged abuse reported to the HSE in 2017, alleged financial abuse by a son or daughter accounted for 40% of cases for those aged 65 and over with a further 24% being another relative.²⁵ Often where a victim has a close relationship with the perpetrator, the victim may be reluctant to report the abuse due to a fear of losing or harming the relationship.²⁶

(c) Undue influence

- [4.7] Financial abuse can be perpetrated through the application of undue influence, pressure or coercion on the victim to forfeit control of their finances or disclose pin numbers to their abuser. Financial abuse commonly occurs alongside psychological abuse where the perpetrator may be using psychological abuse such as coercive control to influence and exploit the victim. Research in the Irish context found that undue influence could translate to a perpetrator threatening to discontinue contact with the at risk adult if money is not forthcoming, or undue influence could be related to malicious threats that leave the victim in fear.²⁷ Bank managers and representatives of Safeguarding Ireland identified undue influence as an issue but highlighted the lack of offences of coercion, undue pressure or undue influence.²⁸ An offence of coercive control has since been introduced by the *Domestic Violence Act 2018*; but the offence only applies where a person who engages in controlling or coercive behaviour on a relevant person is the spouse or civil partner of that person, or where the person is not the spouse or civil partner of the relevant person and is not related to the relevant person within a prohibited degree of relationship but is or was in an intimate relationship with that other person.²⁹ As the scope of the offence excludes other relationships, for example controlling or coercive behaviour exercised by an adult child

²³ Dalley et al., "Researching the financial abuse of individuals lacking mental capacity" (2017) *The Journal of Adult Protection* 19(6), at 400.

²⁴ Metlife Mature Market Institute, *Broken trust: Elders, family, and finances: A study on elder financial abuse prevention* (Virginia Polytechnic Institute and State University 2009) at 13; Choi et al. (1999) "Financial exploitation of elders: Analysis of risk factors based on county adult protective services data" (1999) *Journal of Elder Abuse and Neglect* 10 (3–4), at 52 and 58.

²⁵ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 54.

²⁶ Allen-Devlin and Freyne, "Ms P: a case study in elder financial abuse (Ireland)" (2013) *The Journal of Adult Protection* 15(6), at 320.

²⁷ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 86.

²⁸ *Ibid*, at 101.

²⁹ *Domestic Violence Act 2018*, section 39(4).

in respect of a parent, many cases that involve financial abuse would not fall within the scope of the offence.

(d) Fraudulent activity

- [4.8] At risk adults are particularly vulnerable to fraudulent scams, and are therefore often targets of organised fraudulent activity. Unlike other forms of financial abuse, fraudulent scams do not require the existence of a trusting relationship between the victim and the perpetrator. Fraudulent scams are generally perpetrated by persons unknown to the victim, though the victim may place implicit trust in the perpetrators when fraudsters present themselves as legitimate professionals.³⁰ Fraudulent scams that are typically perpetrated on older people include lottery or prize-draw scams, bogus tradesmen, demanding payment upfront for goods or services that never materialise, doorstep crime and investment fraud.³¹ Fraudulent scams have been identified as the largest growth area in financial abuse of older people in recent years.³²

(e) Inadequate training and support for staff of financial institutions

- [4.9] Financial institutions have an important preventative role to play in tackling financial abuse of at risk adults.³³ Frontline banking staff are well placed to detect irregularities in an adult at risk's finances and are in a unique position to assist in protecting customers from exploitation.³⁴ However, a number of factors undermine the sector's ability to effectively address financial abuse of at risk adults including a lack of consistency in how financial abuse of at risk adults is defined, which can be challenging when training front line staff on how to recognise customers at risk of financial exploitation.³⁵ The importance of adequate training for staff of financial institutions is clear from the NCPOP's 2018 survey data as a majority of survey respondents (81%) indicated that their response to a suspicion of financial abuse would be to consult internally with a colleague, which highlights the importance of

³⁰ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 9.

³¹ Age UK, *Only the tip of the iceberg: Fraud against older people – Evidence Review* (Age UK 2015).

³² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 10.

³³ *Ibid.* at 20.

³⁴ BITS Fraud Reduction Steering Committee (USA Banking Policy Institute), *BITS fraud protection toolkit: Protecting the elderly and vulnerable from financial fraud and exploitation* (BITS 2006).

³⁵ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 20.

ensuring that banking staff are adequately trained in order to act as reliable sources of information or second opinions for colleagues.³⁶ Furthermore, 60% of the respondents cited training in financial abuse, at risk adults and fraud awareness as an important source of guidance when responding to suspicions of abuse.³⁷ A lack of formalised, standardised and regularly consolidated training, guidance and case studies was also identified by research participants.³⁸ Evidence from international studies suggests that, with appropriate training coupled with effective policy and supported by appropriate legislation, banks can be effective first responders to tackling financial abuse of at risk adults.³⁹

(f) Financial abuse arising from joint accounts

- [4.10] In a recent Irish study on the experience of bank staff of the financial abuse of at risk adults, the research participants recognised the inherent potential dangers in having a joint account or a third party account.⁴⁰ A joint account essentially means that the money then legitimately belongs to both named account holders. In many cases, trust in family members means that at risk adults would not have any concerns about financial abuse in advance of establishing a joint account to enable a family member to make transactions on their behalf as a matter of convenience.⁴¹ The Banking Payments Federation of Ireland, as part of an awareness campaign with Safeguarding Ireland, has recently warned of the legal implications of older people setting up joint accounts with their children.⁴² There appears to be a lack of awareness that a joint bank account survives the death of one account holder and the result is that the surviving account holder, rather than the beneficiaries of the vulnerable person's estate, may have a legitimate entitlement to any funds held in the account.⁴³

³⁶ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 41.

³⁷ *Ibid*, at 111.

³⁸ *Ibid*, at 98.

³⁹ *Ibid*, at 27.

⁴⁰ *Ibid*, at 87.

⁴¹ *Ibid*, at 87.

⁴² The Irish Independent, *Elderly warned of dangers of setting up joint accounts with their children* (16 October 2018), <https://www.independent.ie/business/personal-finance/latest-news/elderly-warned-of-dangers-of-setting-up-joint-accounts-with-their-children-37424610.html>

⁴³ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 87.

(g) Powers of Attorney

- [4.11] Powers of attorney can help to prevent financial abuse where the powers are executed honestly by the person who has been given the power to act on behalf of the donor of the power. However, the potential for financial abuse to occur through the abuse of powers of attorney is also an issue. A recent Irish study found that financial abuse could be perpetrated on at risk adults who had power of attorney orders in place.⁴⁴ Research participants reported cases where powers of attorney had been abused, including the sale of land and dubious financial transactions on a bank account.⁴⁵ The research also highlighted a lack of public understanding of the legislative responsibilities of powers of attorney.⁴⁶ A lack of understanding among Irish legal practitioners of the differences between a power of attorney and an enduring power of attorney has also been highlighted.⁴⁷ This lack of understanding could have particular implications on the accuracy of advice provided to customers and could leave at risk customers vulnerable to exploitation. A lack of understanding among legal practitioners could pose further issues if knowledge is not updated upon the commencement of Part 7 of the *Assisted Decision-Making (Capacity) Act 2015*, which will provide for new arrangements for those who wish to make an enduring power of attorney. When Part 7 of the 2015 Act is commenced, no new enduring power of attorneys will be created under the *Powers of Attorney Act 1996*, so it is vital that practitioners are adequately aware of the legislative reforms.

(h) “Financial misselling”: Misadvising of at risk customers or inappropriately selling financial products to at risk customers

- [4.12] There are financial abuse issues posed by the provision of inappropriate financial advice to at risk adults to encourage them to make investments that are not in their interests or that would be unsuitable for people at their stage of life. The scope of financial products that at risk customers could be misadvised about is very wide and includes, among other products, financial investment products, payment protection insurance, mortgages and mortgage protection policies, personal loan protection, credit card protection, and sickness and income protection policies. Complaints to the Financial Ombudsman in the United Kingdom have included cases where an older

⁴⁴ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 87.

⁴⁵ *Ibid*, at 87.

⁴⁶ *Ibid*, at 87 and 96.

⁴⁷ There was broad consensus on this lack of understanding among speakers and attendees during the questions and answers session of the Law Society of Ireland’s “Decision Making Capacity in Practice – Assisted Decision Making Act 2015 Symposium” (30 November 2018).

customer complained that she was wrongly advised to invest in a with-profits bond⁴⁸ and an older customer complaining about advice to invest her capital in an investment bond.⁴⁹ In Ireland, a Payment Protection Insurance (PPI) Review was conducted by the Central Bank of Ireland between 2012 and 2013 to identify if there were instances where the *Consumer Protection Code* was not complied with in respect of the sale of PPI by credit institutions and, where appropriate, to remediate consumers.⁵⁰ The Review was initiated following concerns arising from an inspection including concerns that firms were not gathering sufficient information to enable them to determine whether the product sold was suitable for the consumer and the failure to bring key information on policies explicitly to the attention of individual consumers.⁵¹ The Review found that credit institutions could not demonstrate compliance with the *Consumer Protection Code* in 22% of the sales subject to the Review and these sales, therefore, failed the Review.⁵² It resulted in refunds of €67.4 million, including interest of €4.9 million, being made to consumers in respect of approximately 77,000 policies.⁵³ Given the high levels of financial abuse and the increasing sales of financial products online, there may be concerns regarding the potential for further abuse of at risk customers through the provision of inadequate or inappropriate financial advice.

(i) Social welfare payments and financial abuse

- [4.13] Research indicates that there is a high level of financial abuse perpetrated against social welfare payment recipients. The National Study of Elder Abuse and Neglect carried out in 2010 identified that rates of mistreatment were highest among those whose only income is the minimum state pension.⁵⁴
- [4.14] The Department of Employment Affairs and Social Protection provides at risk adults with the facility to appoint an agent to act on their behalf for the purpose of collecting

⁴⁸ Financial Ombudsman Service (UK), *Case study 74/04 elderly customer complains she was wrongly advised to invest in a with-profits bond*, <https://www.financial-ombudsman.org.uk/publications/ombudsman-news/74/74-older-customers.html#cs4>

⁴⁹ Financial Ombudsman Service (UK), *Case study 74/05 consumer approaching retirement complains about advice to place her capital in an investment bond*, <https://www.financial-ombudsman.org.uk/publications/ombudsman-news/74/74-older-customers.html#cs5>

⁵⁰ Central Bank of Ireland, *Summary Report of the Payment Protection Insurance Review* (Central Bank 2014) at 2.

⁵¹ *Ibid*, at 3.

⁵² *Ibid*, at 5.

⁵³ *Ibid*, at 2 and 5.

⁵⁴ Naughton et al., *Abuse and Neglect of Older People in Ireland: Report on the National Study of Elder Abuse and Neglect* (NCPOP 2010) at 49.

social welfare payments. Currently, the following persons may be appointed as an agent:

- (a) a family member;
 - (b) a person who has been appointed to be a care representative of the social welfare payment recipient;
 - (c) where the social welfare payment recipient is resident in a care centre for a continuous period of four weeks or more, and where no other suitable person is available and willing to be appointed, a representative of the care centre may be appointed to act as agent; or
 - (d) (as a Type 2 Agent) a person, other than the medical practitioner who signed the required forms, who appears to the Department of Employment Affairs and Social Protection to have a good and sufficient interest in the welfare of the payment recipient.⁵⁵
- [4.15] A "Type 1" agent is an agent authorised by the social welfare payment recipient to collect and deliver a weekly payment where a social welfare payment recipient is unable to collect the payment at the post office, for example due to an illness or loss of mobility.⁵⁶ The recipient must complete a form and a notification is then sent to the recipient, and arrangements are made with the post office to facilitate the agent collecting the payment. When the payment is collected by the agent, the agent must give the recipient the full amount. The person nominated to act as agent must be over 18 years old. If the recipient is resident in a nursing home, the recipient may nominate the person in charge of the nursing home to collect the payment. The recipient may cancel or revoke an agent arrangement at any time and appoint another agent. Where a recipient is unable to manage his or her own financial affairs, a "Type 2" agent is appointed to collect the payment and act on behalf of the claimant or beneficiary.⁵⁷ It is recommended that a separate account be set up for this purpose and that the agent carefully maintain records and receipts of all discharges and transactions made on behalf of the pension/benefit recipient.⁵⁸
- [4.16] In all "Type 2" cases, a medical practitioner must certify that the recipient is unable for the time being to manage his or her own financial affairs for reasons which may include any of the following: inability to understand the basis of possible entitlements to benefit; inability to understand and complete the claim form; inability to understand

⁵⁵ Department of Social Protection, *Safeguarding Vulnerable Adults 2017* (Department of Social Protection June 2017) at 3.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, at 3-4.

and deal with correspondence and enquiries concerning the claim; inability to manage benefit payments received.⁵⁹

- [4.17] A “Type 2” agent is responsible for ensuring that:
- (a) the payment is used for the benefit of the social welfare payment recipient;
 - (b) monies are not spent on items or services that the payment recipient has an entitlement to and are available;
 - (c) the payment is lodged to an interest bearing account for the benefit of the payment recipient; and
 - (d) any changes in the recipient’s circumstances are reported to the Department.⁶⁰
- [4.18] The agent must also keep a record of all sums received and all transactions made in relation to the benefit payment and produce the records if requested to do so by the recipient, his or her nearest relative, or an officer of the Department.⁶¹ The Department may cancel an agent arrangement at any time where it has reason to believe that the arrangement is not working satisfactorily or that the payment is not being used for the benefit of the recipient. If this occurs, the agent must, where appropriate, return the payments on request.⁶²
- [4.19] In the case of a ward of court or a person appointed under an enduring power of attorney, the Department will make payments directly to the Committee of the Ward or to the Attorney by nominating the Committee or the Attorney as agent for the social welfare payment recipient.⁶³ All such payments will be made electronically to a nominated bank account.
- [4.20] Given that research has shown that rates of abuse are highest among those whose only income is the minimum state pension, it is possible that some of the financial mistreatment suffered is as a result of the abuse of trust of agents acting on behalf of at risk adults in collecting social welfare payments. The Department of Employment Affairs and Social Protection has established a Working Group on Agent Arrangements and the Protection of Vulnerable Adults to examine and make recommendations on the adequacy of the current procedures and processes in relation to:
- (a) Appointing “agents” for social welfare payments;

⁵⁹ Department of Social Protection, Safeguarding Vulnerable Adults 2017 (Department of Social Protection June 2017) at 4.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

- (b) Reviewing existing agent arrangements;
 - (c) Dealing with specific complaints regarding named agents when they arise (with the involvement of relevant external agencies as necessary); and
 - (d) Continuing to raise the awareness of staff on the safeguarding and protection of vulnerable adults, with a particular emphasis on financial abuse.⁶⁴
- [4.21] A large proportion of social welfare payments are also paid directly into bank accounts, which may present issues in terms of financial abuse being perpetrated through access to those bank accounts.

(j) Increased financial abuse of at risk adults as a result of technological advances

- [4.22] Research among social workers in England found that the use of new technologies and internet-banking services was mentioned as potentially creating greater, or at least new and unobserved, opportunities to commit financial abuse or coerce older people.⁶⁵ The increase in new banking technologies, recent shifts in banking services away from in-branch activities to online banking and the continued pattern of branch closures have been identified as factors that inhibit the financial capacity of older people and place them at increased risk of financial abuse as they place greater reliance on others to assist them with the management of their finances.⁶⁶ From workshops and surveys with older people, it has been reported that older people found online and telephone banking daunting and remembering pin numbers and log in details challenging.⁶⁷ This results in a decline in the capacity of at risk adults to access services independently and leaves them vulnerable to exploitation. Bank managers have reported concerns of at risk adults commonly disclosing a debit card PIN to another person, usually a family member, in order to have financial transactions completed on their behalf.⁶⁸ Recommendations to tackle the effects of the advances of online banking and branch closures include the use of mobile banking units, especially in more rural communities as well as training for staff to better identify and support those affected by financial abuse.⁶⁹

⁶⁴ Department of Social Protection, *Safeguarding Vulnerable Adults 2017* (Department of Social Protection June 2017) at 4.

⁶⁵ Norrie et al., "Gaining Access to Possibly Abuse or Neglected Adults in England: Practice Perspectives from Social Workers and Service-User Representatives" (2018) British Journal of Social Work 4, at 1078.

⁶⁶ Age UK, *Age-friendly banking: What it is and how you do it* (Age UK 2016).

⁶⁷ *Ibid.*

⁶⁸ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 82.

⁶⁹ Age UK, *Age-friendly banking: What it is and how you do it* (Age UK 2016).

- [4.23] Research has also highlighted advances in the methods of perpetrating financial abuse against at risk adults, which are becoming more sophisticated with the use of technology.⁷⁰ Social engineering via tricking a person to do something not in their interest⁷¹ is becoming particularly prevalent. Examples include phishing (where scammers attempt to obtain sensitive information usually by e-contact), vishing (contact made via telephone call) and smishing (Via SMS text).⁷²

(k) Reluctance about, or fear of, taking action on the part of financial institutions

- [4.24] A further issue is that there can be a reluctance about, or fear of, taking action to report suspected financial abuse among staff of financial institutions as they are unsure whether they may be in breach of the law by doing so. There is a fear that reporting of suspected abuse may lead to accusations of breaches of privacy laws. While education and training for staff of financial institutions may help in some cases, some form of statutory reporting requirement, discussed in Issue 8 below, and the provision of a form of protected disclosure regime (along the lines of the *Protected Disclosures Act 2014*), have been suggested as ways of overcoming the reluctance or fear of reporting. Recent Irish research has recommended the provision of a protected disclosure regime (or "safe harbour") for banks engaged in responses to suspected or actual financial abuse of at risk adults in good faith.⁷³

(l) Absence of inter-sectoral and multiagency collaboration

- [4.25] Research findings have highlighted an absence of inter-sectoral approaches to financial abuse of at risk adults in Ireland. In a recent study, only 18.5% of the respondents noted that they had consulted externally on suspecting a customer was experiencing financial abuse.⁷⁴ Participants recognised the importance of inter-sectoral collaboration and referred to seeking medical and legal advice regarding a customer's capacity to make financial decisions.⁷⁵ However, seeking advice was largely limited to within the bank itself, and inter-sectoral links with external safeguarding services were limited among the majority of bank managers who participated in the study with some

⁷⁰ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 107.

⁷¹ Interpol, *Social engineering fraud* (2018), <https://www.interpol.int/Crimeareas/Financial-crime/Social-engineering-fraud/Types-of-social-engineering-fraud>

⁷² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 107.

⁷³ *Ibid.* at 115.

⁷⁴ *Ibid.* at 112.

⁷⁵ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 102.

stating that they wouldn't have been aware of the safeguarding services in the HSE.⁷⁶ The need for reporting and notification procedures between stakeholders was highlighted.⁷⁷ Multiagency collaboration is discussed in Issue 11, below.

3. Current measures aimed at tackling financial abuse in the Irish context

- [4.26] Banking policy regarding vulnerable customers is informed by the Central Bank of Ireland's *Consumer Protection Code*⁷⁸ which sets out a duty of care approach for financial institutions in relation to at risk adults. It provides that where a regulated entity has identified that a personal consumer is a vulnerable consumer, the regulated entity must ensure that the vulnerable consumer is provided with such reasonable arrangements and/or assistance that may be necessary to facilitate him or her in his or her dealings with the regulated entity.⁷⁹ Some individual banks have their own policies and procedures for dealing with cases of suspected financial abuse of at risk adults.⁸⁰ The HSE's 2014 *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures*⁸¹ is the only policy at a national level aimed at the prevention of the abuse of at risk adults that includes financial abuse. However, as discussed earlier, this policy only applies to the safeguarding of at risk adults resident in HSE owned or funded facilities.
- [4.27] In terms of legislative provisions to address financial abuse of at risk adults, theft and fraud are legislated for under the *Criminal Justice (Theft and Fraud Offences) Act 2001*. At risk customers may be particularly vulnerable to financial mis-selling. Various statutory provisions for which the Central Bank and the Competition and Consumer Protection Commission are the respective regulatory bodies provide regulatory and legislative protection to customers: they include the *Central Banks Acts 1942 to 2013*,

⁷⁶ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 92.

⁷⁷ *Ibid*, at 102.

⁷⁸ Central Bank of Ireland, *Consumer Protection Code 2012* (Central Bank of Ireland 2012).

⁷⁹ *Ibid*, at 9. The *Consumer Protection Code 2012* (at 77) defines a "vulnerable customer" as "a natural person who: a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties)."

⁸⁰ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 102.

⁸¹ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse: National Policy and Procedures* (HSE 2014).

the *Investment Intermediaries Act 1995*, the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* and the *Competition and Consumer Protection Act 2014*. Individuals may also, under the *Financial Services and Pensions Ombudsman Act 2017*, submit complaints regarding the conduct of a financial institution to the Office of the Financial Services and Pensions Ombudsman. The *Assisted Decision Making (Capacity) Act 2015*, which is largely awaiting commencement at the time of writing (December 2019), has implications for at risk adults with regard to reducing the risk of financial abuse, and for agencies and organisations working with at risk adults with regard to assessing capacity. The 2015 Act defines capacity as the ability to understand the nature and the consequences of a decision at the time the decision is being made in consideration of the available choices at that time.⁸² For professional bodies such as institutions in the banking sector, changes to the Power of Attorney arrangements to be introduced under Part 7 of the Act, as well as the decision-making support options, are of particular note and financial institutions will need to incorporate these into their codes of practice. The *Adult Safeguarding Bill 2017* includes financial abuse in its definition of "harm" in relation to an at risk adult⁸³ and defines "financial abuse" as an offence under Part 3 or Part 4 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* or "exploitation or undue pressure in connections with wills, property, inheritance and other financial transactions"⁸⁴ but does not contain any specific proposed provisions for addressing financial abuse. However, the legislation has the potential to impact the prevention and detection of such abuse through its general provisions for the safeguarding of at risk adults.

- [4.28] Additional measures aimed at preventing and detecting financial abuse include campaigns and initiatives by organisations such as Safeguarding Ireland and the Banking and Payments Federation Ireland, which have aimed to raise awareness about financial abuse. Safeguarding Ireland has run an advertising campaign aimed at helping people to identify behaviour, which they may have viewed as acceptable such as a family member taking small amounts of money from an at risk adult to cover "expenses", as financial abuse. The Banking and Payments Federation Ireland, in conjunction with a number of their member banks, developed FraudSMART, a fraud awareness initiative, in 2017. FraudSMART aims to raise consumer and business awareness of the latest financial fraud activity and trends and provide simple and impartial advice on how best they can protect themselves and their resources.

⁸² *Assisted Decision-Making (Capacity) Act 2015*, sections 2(1), 3(1).

⁸³ *Adult Safeguarding Bill 2017*, section 2.

⁸⁴ *Adult Safeguarding Bill 2017*, section 2 and Schedule 2, paragraph 9.

4. Measures to prevent financial abuse in other jurisdictions

(a) United Kingdom

- [4.29] In response to the Financial Conduct Authority's 2015 *Occasional Paper No. 8: Consumer Vulnerability*,⁸⁵ UK Finance established a Financial Services Vulnerability Taskforce. The report of the Vulnerability Taskforce, published in 2016, set out nine high-level principles and a series of related recommendations.⁸⁶ The financial services industry agreed to implement the new set of recommendations and principles and has been utilising them as a framework for delivery. The nine principles are as follows:
1. Sensitive, flexible response
 2. Effective access to support
 3. One-stop notice
 4. Specialist help available
 5. Easy for family and friends to support
 6. Scam protection
 7. Customer-focused reviews
 8. Industry alignment
 9. Inclusive regulation.⁸⁷
- [4.30] In order to comply with principle 3, a Bereavement Principles and Death Notification Service⁸⁸ has been introduced, enabling the reporting of the death of an individual to several major financial services providers at the same time.⁸⁹ Principle 5 has resulted in the development of improved processes around the registration and use of legal instruments that can be used to enable third party access in England, Wales, Scotland and Northern Ireland such as a power of attorney, Court of Protection orders to

⁸⁵ Financial Conduct Authority, *Occasional Paper No. 8: Consumer Vulnerability* (2015), <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf>

⁸⁶ British Bankers' Association (UK), *Improving Outcomes for Customers in Vulnerable Circumstances* (BBA 2016) at 12-38.

⁸⁷ *Ibid.*

⁸⁸ The Death Notification Service, <https://www.deathnotificationservice.co.uk>

⁸⁹ Lending Standards Board, *Financial Services Vulnerability Taskforce – Principles and Recommendations: Review of Progress Towards Implementation (Summary Report)* (LSB 2018) at 11.

appointees and guardianship orders.⁹⁰ To further enable a person to assist with the management of a customer's accounts, UK Finance developed a minimum standard for a third-party mandate that could apply across current account providers in 2018, and developed a wider framework for supporting third party delegation for banking and savings products, including an outline for the mandate and the circumstances in which it could be applied.⁹¹

- [4.31] Principle 6 on scam protection has resulted in the development of a Banking Protocol and Financial Abuse Code of Practice.⁹²
- [4.32] The Banking Protocol is a rapid response scheme for financial abuse that was developed by UK Finance in partnership with National Trading Standards in 2016. It is a banking industry-wide initiative that has been fully operational in conjunction with all of the police forces across the United Kingdom since March 2018. Under the scheme, banking staff are trained to identify when someone is about to fall victim to a scam and to try and prevent the person from withdrawing cash to give to a fraudster. Staff can then invoke the Banking Protocol by requesting an immediate police response to the branch to investigate the suspected fraud and catch those responsible. The scheme also ensures that additional support is provided to those customers affected to help prevent them falling victim to similar scams in the future, including through referrals to social services, expert fraud prevention advice and additional checks on future transactions. It has been credited with preventing £38 million in fraud and enabling 231 arrests in 2018. The average age of a customer helped through the scheme was 71; highlighting that older people are particular targets for financial abuse.
- [4.33] The Financial Abuse Code of Practice⁹³ is a voluntary code that was published by UK Finance in 2018. It is aimed at helping institutions to build on their policies and to provide more consistent support to victims of financial or economic abuse. It consists

⁹⁰ Lending Standards Board, *Financial Services Vulnerability Taskforce – Principles and Recommendations: Review of Progress Towards Implementation* (Summary Report) (LSB 2018) at 11.

⁹¹ UK Finance, *Implementing the Vulnerability Taskforce Principles and Recommendations* (10 October 2018), <https://www.ukfinance.org.uk/blogs/implementing-vulnerability-taskforce-principles-and-recommendations>

⁹² Lending Standards Board, *Financial Services Vulnerability Taskforce – Principles and Recommendations: Review of Progress Towards Implementation* (Summary Report) (LSB 2018) at 13-14.

⁹³ UK Finance, *Financial Abuse Code of Practice* (UK Finance 2018), <https://www.ukfinance.org.uk/system/files/Financial-Abuse-Code-of-Practice.pdf>

of six principles with corresponding actions to be taken by institutions and staff members. The principles are follows:

1. Raising awareness and encouraging disclosure
2. Training of staff
3. Identification and appropriate response
4. Minimising the need to repeat one's story in the same organisation
5. Help to regain control of finances
6. Signposting and referrals⁹⁴

- [4.34] The Vulnerability Taskforce intended that further work would be carried out to establish the progress of financial institutions in implementing the recommendations and principles. UK Finance, its members and the UK Finance Consumer Advisory Group commissioned the Lending Standards Board (LSB) to conduct a review, which was published in October 2018.⁹⁵ It found that the financial institutions involved in the review had approached the adoption of the Vulnerability Taskforce recommendations in a positive manner and that overall compliance was good with all of the institutions having made progress ranging from "satisfactory" progress to "substantial" progress.⁹⁶ The review identified just one incidence of non-compliance with a recommendation stemming from principle 3, which is related to the ability of firms to share information across the organisation once they have been notified of a customer's circumstance.⁹⁷ It found that further work is required in the area of information sharing but noted that achieving developments in this area can be challenging due to institutions' legacy information systems.⁹⁸
- [4.35] The Financial Conduct Authority's *Approach to Consumers*,⁹⁹ which was published in 2018, has 3 strategic themes that include regulating for vulnerable and excluded customers, as well as regulating for the real world and regulating for the future.

⁹⁴ UK Finance, *Financial Abuse Code of Practice* (UK Finance 2018), <https://www.ukfinance.org.uk/system/files/Financial-Abuse-Code-of-Practice.pdf>

⁹⁵ Lending Standards Board, *Financial Services Vulnerability Taskforce – Principles and Recommendations: Review of Progress Towards Implementation* (Summary Report) (LSB 2018).

⁹⁶ *Ibid*, at 4.

⁹⁷ *Ibid*, at 4 and 10.

⁹⁸ *Ibid*, at 4 and 10.

⁹⁹ Financial Conduct Authority, FCA Mission: Approach to Consumers (FCA 2018), <https://www.fca.org.uk/publication/corporate/approach-to-consumers.pdf>

- [4.36] In response to its consultation on its *Approach to Consumers*, some stakeholders raised concerns that the Financial Conduct Authority's current regulatory framework does not provide adequate protection for consumers.¹⁰⁰ To provide clarity on its expectations of firms and ensure good outcomes for all consumers, particularly vulnerable consumers, the Financial Conduct Authority consulted in 2019 on draft guidance for firms on the identification and treatment of vulnerable consumers.¹⁰¹ This formed the first stage of its consultation on the draft guidance with the initial consultation period ending in October 2019. In light of the feedback received during the first stage of the consultation, the Financial Conduct Authority plans to publish a response and consult on revised draft guidance during the second stage of its consultation in 2020.¹⁰² The Financial Conduct Authority intends that this guidance will help to establish its expectations and help firms meet them.¹⁰³ It intends to use the guidance, once issued, to inform its supervisory and enforcement work and as a basis to monitor and assess how firms are supporting vulnerable consumers, and making practical changes to secure necessary improvements.¹⁰⁴

(b) Canada

- [4.37] The Investment Industry Regulatory Organization of Canada issued its *Guidance on Supervisory Issues when Dealing with Senior Clients* in 2016,¹⁰⁵ which sets out industry best practice standards for protecting vulnerable older investors. The Guidance includes: having an emergency or "trusted contact person" on file with the financial institution; providing training and education for staff of financial institutions on issues such as diminished capacity and financial exploitation; and having policies and procedures that are designed to detect and address potential financial exploitation and diminished capacity, including the use of temporary holds on transactions or accounts. However, the Canadian Foundation for Advancement of Investor Rights and the Canadian Centre for Elder Law have stated that while those recommendations are

¹⁰⁰ Financial Conduct Authority, *FCA Mission: Approach to Consumers* (FCA 2018), at 5.

¹⁰¹ Financial Conduct Authority, *Guidance Consultation: Guidance for Firms on the Fair Treatment of Vulnerable Customers* (GC19/3 2019).

¹⁰² Financial Conduct Authority, *GC19/3: Guidance for firms on the fair treatment of vulnerable customers* (updated 7 November 2019), <https://www.fca.org.uk/publications/guidance-consultations/gc19-3-guidance-firms-fair-treatment-vulnerable-customers>

¹⁰³ Financial Conduct Authority, *Guidance Consultation: Guidance for Firms on the Fair Treatment of Vulnerable Customers*, GC19/3 (FCA 2019), at 3.

¹⁰⁴ Financial Conduct Authority, *FCA Mission: Approach to Consumers* (FCA 2018), at 5.

¹⁰⁵ Investment Industry Regulatory Organization of Canada (IIROC), *Guidance on Supervisory Issues when Dealing with Senior Clients* (IIROC 2016), available at: <https://docs.iroc.ca/DisplayDocument.aspx?DocumentID=87C0E6D580544E889B569A079B8C35AA&Language=en>

sound, there is a need for securities regulators to implement specific legal measures and a tailored Conduct Protocol authorising supportive and protective action.¹⁰⁶ It stated that implementation of the recommendations set out in the Guidance had been spotty at best and that clarifying regulatory expectations beyond the published Guidance would bring greater clarity to financial institutions, representatives and to older investors.¹⁰⁷ In British Columbia, provincial public guardians and trustees work closely with health authorities and community organisations in the protection of older people. The provincial public guardians and trustees have the power under the *Public Guardian and Trustee Act* to intervene in circumstances of financial abuse by a power of attorney donee, guardian, trustee, or other substitute decision-maker and have the obligation to investigate reports of abuse.¹⁰⁸

5. Additional measures required to prevent financial abuse in Ireland

- [4.38] It is possible that additional measures could be introduced in the Irish context, which could help to prevent and detect cases of financial abuse. As well as non-legal measures such as education and training, measures could include a Banking Protocol or a Financial Abuse Code of Practice similar to those introduced in the United Kingdom. Reporting of cases of suspected financial abuse,¹⁰⁹ or the provision of a specific form of protected disclosure, along the lines of the *Protected Disclosures Act 2014*, for financial institutions that engage in responses to suspected abuse in good faith, are further possible options.
- [4.39] Irish research has identified the need to further address financial abuse of at risk or vulnerable adults in legislation and policy.¹¹⁰ A study carried out with "elder-abuse" caseworkers also identified the legal void in terms of authority to act effectively in safeguarding.¹¹¹ In a further study, research participants suggested having an alignment of comprehensive legislation and policy was considered essential to address

¹⁰⁶ Canadian Foundation for Advancement of Investor Rights and Canadian Centre for Elder Law, *Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity* (Canadian Foundation for Advancement of Investor Rights and Canadian Centre for Elder Law 2017) at 33.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Public Guardian and Trustee Act* [R.S.B.C. 1996] (British Columbia), section 17 (power to investigate and audit) and section 18 (production of accounts and records).

¹⁰⁹ Reporting is discussed in detail in Issue 8, below.

¹¹⁰ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 101.

¹¹¹ O'Donnell et al., *Managing Elder Abuse in Ireland: Senior Case Workers' Experiences* (NCPOP 2012).

current “silo approaches”, with agencies working independently rather than collaboratively.¹¹² While it was acknowledged that some guidance was given in relation to at risk adults and financial abuse by the Central Bank, it was found that there was a need to tighten up or add clarity to existing guidance.¹¹³ The need for safeguarding legislation to provide a framework on dealing with abuse, the reporting arrangements at various levels and external reporting procedures was also stressed.¹¹⁴ It was noted that individual banks have their own procedures but that the implementation of a robust code by the Central Bank would greatly improve matters.¹¹⁵

Questions for Issue 4

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.

¹¹² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 101.

¹¹³ *Ibid.* at 102 and 104.

¹¹⁴ *Ibid.* at 102 and 104.

¹¹⁵ *Ibid.* at 102.

ISSUE 5 WHAT BODY OR BODIES SHOULD HAVE RESPONSIBILITY FOR THE REGULATION OF ADULT SAFEGUARDING?

1. The establishment of a national adult safeguarding authority

- [5.1] There is currently no regulatory framework for adult safeguarding in Ireland. A key aspect of a regulatory framework is the assignment of responsibility for regulation and oversight to a body or bodies. A number of public bodies have responsibilities for various aspects of adult safeguarding in particular contexts, for example HIQA regulates health and social care services, inspects services and investigates allegations involving service providers. However, there is currently no body with responsibility for regulating adult safeguarding generally in terms of: receiving and investigating individual complaints of abuse; overseeing the investigation of complaints of abuse where a person is not in receipt of any care services; overseeing the investigation of complaints of various types of abuse including financial and social welfare abuse; oversight of critical incidents including deaths and matters of abuse and neglect relating to at risk adults; and carrying out statutory inspection powers. While Safeguarding Ireland has the responsibility for promoting the rights of at risk adults to be free from abuse, it has advocated for a dedicated statutory body that would have regulatory and investigatory functions as well as a rights promotion function.
- [5.2] Part 2 of the *Adult Safeguarding Bill 2017*, which, as noted in the Overview of this Issues Paper, is a Private Members' Bill introduced by Senator Colette Kelleher, proposes the establishment of a national adult safeguarding authority and stipulates that the authority would be independent in the exercise of its functions and powers. The Bill proposes that the objects of the proposed authority would be to promote the safeguarding of adults at risk, and to reduce the abuse and harm of adults at risk.
- [5.3] The functions of the authority proposed in the Bill would include: the undertaking of investigations where the authority believes on reasonable grounds that there is a risk of abuse or harm to an adult at risk; receiving reports from mandated persons under the legislation; promoting safety and quality standards and providing information to adults at risk; making recommendations for change of practices of service providers; and supervising compliance with duties imposed under the legislation.¹ The Bill also proposes measures to provide for: the provision of an independent advocate to an

¹ *Adult Safeguarding Bill 2017*, section 9.

adult at risk who is the subject of an investigation; the appointment of authorised persons to conduct investigations and receive reports; and the imposition of a mandatory reporting obligation on a broad list of mandated persons.²

- [5.4] The Institute of Public Administration (IPA) was commissioned by Senator Colette Kelleher, the Bill's sponsor, to prepare a report examining the institutional and governance options for the establishment of the proposed national adult safeguarding authority. In the Report, published in October 2017, the proposed authority is referred to by the name Cosáint.³
- [5.5] The report evaluated four options:
- A. Incorporation of the authority into the HSE
 - B. Establishing the authority as an executive office of the Department of Health
 - C. Setting up Cosáint as an independent agency under the auspices of a government department
 - D. Amalgamating Cosáint's functions with those of an existing agency, such as HIQA or the Mental Health Commission.
- [5.6] Representatives of the HSE stated, before the Joint Oireachtas Committee on Health, that responsibility for the new legislation would involve a number of government departments, including the Department of Health, the Department of Justice and Equality, the Department of Employment and Social Protection, and the Department of Finance.⁴ The Chair of Safeguarding Ireland (formerly termed the National Safeguarding Committee) has suggested the belief that the proposed authority would replace Safeguarding Ireland.⁵

2. Institutional or organisational models for the regulation of adult safeguarding

- [5.7] If additional legislative powers are to be created in the area of adult safeguarding, it is particularly important that the powers are vested in the most appropriate organisation

² *Adult Safeguarding Bill 2017*, section 9.

³ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA October 2017) at 2. The IPA has suggested this as the name for the proposed authority on the basis that it is the Irish word for protection.

⁴ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 11.

⁵ Patricia Rickard-Clarke (Chair, Safeguarding Ireland), Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017 (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/

or organisations, whether it be through the granting of powers to a new safeguarding authority or the granting of additional powers to an existing body or to multiple existing bodies. This section will discuss the four institutional models evaluated in the IPA's report, referred to above, as well as a fifth option of granting additional legislative powers to a number of existing bodies rather than establishing a new body or amalgamating safeguarding functions with those of a single existing body.

(a) Incorporation of the Authority into the HSE

- [5.8] The HSE has made a significant contribution to the development of adult safeguarding to date. However, the HSE's powers as regards safeguarding are largely restricted to HSE owned or funded institutions. The remit of the proposed authority would be much wider than the HSE's existing remit.⁶ The *Adult Safeguarding Bill 2017* was drafted to specifically ensure that the proposed authority would have the power and duty to investigate allegations in relation to any adult who may be vulnerable wherever the adult may reside and regardless of the adult's connection with statutory services.
- [5.9] The Institute of Public Administration has noted that while the proposed authority would need to work closely with the HSE to avoid overlap and ensure best use of resources and a sharing of learning and experience, the establishment of the proposed authority as a separate entity is essential to protecting all adults at risk and providing a statutory basis for safeguarding in Ireland.⁷
- [5.10] Furthermore, governance issues may arise where a body such as the HSE has conflicting roles. As Senator Colette Kelleher remarked in a Seanad debate on the *Adult Safeguarding Bill 2017*, the HSE often acts "as the commissioner, funder and provider of services as well as police and protector."⁸

(b) Establishing the authority as an executive office of the Department of Health

- [5.11] Executive offices are not legally separate from the civil service and operate without a governing board.⁹ The chief executive of the office reports to the minister through the

⁶ Minister Simon Harris, *Adult Safeguarding Bill: Second Stage, Seanad Éireann debate - Wednesday, 5 Apr 2017* (5 April 2017) Volume 251, Number 5, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

⁷ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 10.

⁸ Senator Colette Kelleher, *Adult Safeguarding Bill: Second Stage, Seanad Éireann debate - Wednesday, 5 Apr 2017* (5 April 2017) available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

⁹ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 8.

secretary general of the department. Such bodies are termed "departmental agencies" by the OECD.¹⁰

- [5.12] The key advantages of an executive office, for example Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-based Violence, an executive office of the Department of Justice and Equality, have been identified as management autonomy and the possibility of independent branding of the office,¹¹ which may assist with increasing its profile among the public.
- [5.13] The practices of other OECD countries have demonstrated a preference for executive offices in some cases¹² as they provide a degree of independence, particularly in respect of staffing, while maintaining clear lines of accountability from the director of the office to the secretary general of the parent department.¹³ The IPA has noted that the absence of a non-executive board further mitigates the risk of "mission creep" whereby agencies can become involved in activities beyond their remit.¹⁴
- [5.14] However, it has been acknowledged that it is questionable whether an executive office can have an independent legal personality.¹⁵ As the parent department would be the employer, would incorporate the expenditure of the office within its own budget and would hold legal responsibility for the actions of the office, there would be strong links between the proposed authority and its parent department. It is therefore possible that department officials might become involved in day-to-day decision making within the proposed authority, perhaps without the necessary knowledge and experience.¹⁶
- [5.15] While it is possible that an executive office could adequately fulfil certain functions of the proposed authority, other functions would require particular expertise and independence. It would therefore be important that the proposed authority would have the facility to recruit specialist staff who could act independently rather than be staffed by civil servants who are employed directly by a government department.

¹⁰ OECD, *Ireland – Towards an Integrated Public Service* (2008) at 300.

¹¹ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 8-9.

¹² OECD, *Ireland – Towards an Integrated Public Service* (2008) at 300.

¹³ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 8.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

(c) Establishing the authority as an independent agency

- [5.16] The *Adult Safeguarding Bill 2017* proposes the establishment of the proposed authority as an independent agency. The Bill has been described as providing for an independent, arm's length body.¹⁷
- [5.17] The primary advantage of establishing the proposed authority as a new standalone agency would be the autonomy afforded to an independent body. The work of the proposed authority would be specialised and regulatory in nature. Operating outside of the civil service would allow the proposed authority to have greater independence in defining its purpose, in focusing on clients' needs, in involving stakeholders and in ensuring service delivery coherence.¹⁸ It would also have more autonomy in recruitment which would enable it to identify candidates with competencies necessary to fulfil its specialist functions. Recruiting new staff rather than seconding or transferring a large number of general grade civil service staff from a government department or public body would also allow a new body to establish its own organisational culture rather than cultural norms of a government department or other public body transferring over with the staff members.
- [5.18] As a regulatory body with statutory obligations, being institutionally separate would afford the authority a degree of independence and remove any potential for a perception of conflict of interest which might apply with other institutional arrangements. The government's guiding principles on agency rationalisation and reform¹⁹ recognise the possibility of a separate agency being required to deliver a new service where there is a need for specialist skills and independence from government departments. Furthermore, Article 16 of the UNCRPD, which was ratified by the Irish State in 2018, requires that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.²⁰
- [5.19] Further advantages of an independent specialised body would be that its access to information, its ability to monitor and its expertise would be stronger in a specialist agency with a possible interagency board than at the level of central government.

¹⁷ Senator Colette Kelleher, *Adult Safeguarding Bill: Second Stage, Seanad Éireann debate - Wednesday, 5 Apr 2017* (5 April 2017) available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

¹⁸ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 6.

¹⁹ Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014).

²⁰ *UN Convention on the Rights of Persons with Disabilities*, Article 16.3.

- [5.20] The disadvantages of the establishment of the proposed authority as a separate agency are generally related to the higher cost implications. While it is possible that some staff currently working across the public service in the area of adult safeguarding would be invited to transfer to the new authority, there would be costs involved in the establishment of the authority as well as costs of possible additional staff to ensure that the authority's functions could be adequately fulfilled.²¹ However, much of these costs would be likely to apply regardless of the institutional model selected. It has been remarked that the acceptance of the cost is a political decision that has to be set against the benefits of the independence of the proposed authority and its work.²² It would require time to establish the proposed authority in any form; although setting up a new organisation might take longer due to potentially more significant resourcing, operational and staffing challenges. However, there is considerable learning available from the establishment or merger of other Irish agencies.²³
- [5.21] Further potential challenges with the establishment of the authority as a separate agency are the need for robust performance management arrangements to ensure good governance and accountability. Such arrangements have not always been in place in the management of Irish agencies and it would therefore be important that learning from past experiences and international best practices be applied.
- [5.22] The report of the Department of the Taoiseach's, *Bodies in Ireland with Regulatory Power*,²⁴ defined a regulatory body as one that has statutory recognition, has functions in at least two of three specified areas of activity and has the following characteristics:
- is an independent organisation, apart from any other body
 - has some capacity for independent decision making
 - has some expectation of continuity over time
 - has some personnel and financial resources.²⁵

²¹ Officials from the HSE have stated that if the proposed legislation is implemented, it would require additional staff in order to be able to implement the new legal powers. The Joint Oireachtas Committee on Health has recommended that the staffing resources are kept at a level that is adequate to meet the demands of any new legislative responsibilities. (Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 16).

²² IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 6.

²³ *Ibid*, at 7.

²⁴ Department of the Taoiseach, *Bodies in Ireland with Regulatory Powers* (Better Regulation Unit, Department of the Taoiseach, 2007).

²⁵ *Ibid*, at 3, paragraph 2.6.

- [5.23] This suggests that such a regulatory body must be independent. A recommendation was made to the Joint Oireachtas Committee on Health that any safeguarding service should be independent of service providers.²⁶ While the Joint Oireachtas Committee on Health recommended further analysis of the available options in establishing a national safeguarding authority, it also stressed its belief that the independence of the authority is crucial in ensuring high standards of governance and oversight.²⁷

(d) Amalgamating the authority with an existing agency

- [5.24] The fourth option for consideration is the amalgamation of the proposed authority with an existing agency. HIQA and the Mental Health Commission (MHC) are existing state agencies with regulatory responsibilities in the area of health and social care, and have been suggested as possible options. The Department of Health also suggested the Child and Family Agency, following the Department's consultations with other government departments.²⁸ HIQA regulates residential services for older people and those with a disability, while the MHC has similar powers in respect of mental health facilities. Unlike the powers of the proposed authority, both existing agencies only have a remit in respect of residential care providers. The Child and Family Agency is responsible for the provision of protective services to children and families, and is the dedicated State agency responsible for improving well-being and outcomes for children. Unlike HIQA and the MHC, it has powers to investigate cases concerning individuals.
- [5.25] The resources of any of these three bodies could be expanded in order to provide for the far broader remit of adult safeguarding. There are existing precedents to serve as reference points, as the government's report on the agency rationalisation process includes a list of bodies rationalised or absorbed into other bodies.²⁹ Guidelines in respect of the merger of public bodies emphasise the importance of synergies from a customer or service delivery perspective. It is suggested that where there are similar or complementary services or functions, or indeed overlap, a merger can be desirable.³⁰

²⁶ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 10.

²⁷ *Ibid*, at 7.

²⁸ Niall Redmond (Department of Health), *Joint Committee on Health debate - Wednesday, 11 Oct 2017 - Adult Safeguarding: Discussion (Resumed)* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

²⁹ Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014), Appendix 2, at 15-16.

³⁰ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 11.

- [5.26] However, public service mergers can also present a number of challenges. The development of legislation for mergers and the legislative process through parliament can take a considerable amount of time to complete and, in the interim, there is uncertainty for the restructuring agencies, which can prohibit activity.³¹ A further challenge is the resulting uncertainty as to what management structures should be put in place for new organisations resulting from mergers. In cases where merging agencies have existing governing boards or authorities, the additional capacity requirement and associated corporate governance requirements pose change management and resourcing challenges.³²
- [5.27] The government's guidelines on agency rationalisation indicate that merging and restructuring bodies should have a clear and demonstrable benefit in terms of delivering greater democratic control, improved service delivery and/or financial savings.³³ It could therefore be argued that there should be a strategic justification for a merger, rather than simply a desire to reduce agency numbers.
- [5.28] The Minister for Health has stated that the government would prefer, as a general rule, to see new functions allocated to existing bodies, to avoid the large cost or, at times, extensive delays associated with the creation of an entirely new organisation. However, the Minister has also accepted that this is a matter that would need to be teased out further in the context of whether it is better to have a new authority or whether there is an existing authority that could fulfil that function, and the pros and cons of this.³⁴ The options for amalgamating the proposed authority with an existing body are outlined in further detail below.

(i) *Mental Health Commission*

- [5.29] The principal functions of the Mental Health Commission (MHC), which was established by the *Mental Health Act 2001* (the 2001 Act), are to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres under the 2001 Act.³⁵ Since the

³¹ MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 7 and 19.

³² *Ibid.*

³³ Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014) at 14.

³⁴ Minister Simon Harris, *Adult Safeguarding Bill: Second Stage, Seanad Éireann debate - Wednesday, 5 Apr 2017* (5 April 2017) Volume 251, Number 5, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

³⁵ *Mental Health Act 2001*, section 33.

commencement of certain sections of the *Assisted Decision-Making (Capacity) Act 2015* (the 2015 Act), the MHC has additional functions in relation to the position of Director of the Decision Support Service (the Director) provided for in the Act of 2015. The Long Title to the 2015 Act indicates that it is to provide for the appointment and functions of the Director “in respect of persons who require or may shortly require assistance in exercising their decision-making capacity”. The 2015 Act provides that the MHC shall appoint the Director to perform the functions conferred on the Director by the 2015 Act.³⁶ It is further provided that the Director shall be a member of the staff of the MHC³⁷ and that a member of staff of the Director shall be a member of staff of the MHC.³⁸ There is also provision for reports by the Director to the MHC, which are to be passed on to the Minister for Health, but that provision has not yet been commenced.³⁹ The Director’s functions as set out in the 2015 Act include:

- to supervise, in accordance with the provisions of the Act, compliance by decision-making assistants, co-decision-makers, decision-making representatives and attorneys in the performance of their functions under Act;⁴⁰ and
- to make recommendations to the Minister for Health on any matter relating to the operation of the Act.⁴¹

[5.30] While there are parallels between the work of the Director and of a proposed national adult safeguarding authority, the IPA has stated that it is likely that the MHC will be challenged by the need to accommodate one major expansion of its functions without also taking on the area of adult safeguarding.⁴² Apart from that, if the functions of the MHC were to be extended to include the functions envisaged for a proposed national adult safeguarding authority, there would have to be legislation amending the 2001 Act to confer on it the type of function which it is envisaged in the *Adult Safeguarding Bill 2017* would be conferred on the National Adult Safeguarding Authority to promote the safeguarding of adults at risk and to reduce the abuse and harm of adults at risk. It would also probably be considered appropriate to change the name of the MHC to demonstrate that its functions not only cover the provision of mental health

³⁶ *Assisted Decision-Making (Capacity) Act 2015*, section 94.

³⁷ *Assisted Decision-Making (Capacity) Act 2015*, section 97(3).

³⁸ *Assisted Decision-Making (Capacity) Act 2015*, section 98.

³⁹ *Assisted Decision-Making (Capacity) Act 2015*, section 102.

⁴⁰ *Assisted Decision-Making (Capacity) Act 2015*, section 95(1)(e).

⁴¹ *Assisted Decision-Making (Capacity) Act 2015*, section 95(1)(k).

⁴² IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 11.

services but also the protection of adults at risk who do not require mental health services.

(ii) Health Information and Quality Authority

- [5.31] The Health Information and Quality Authority (HIQA) has more wide-ranging functions than the remit of the MHC. As well as the inspection of residential care services for children, older people and people with a disability, HIQA has a role in providing health information and in determining standards more generally in relation to health and social care services in Ireland. In its *Report on the Legal Aspects of Professional Homecare*,⁴³ the Commission recommended that HIQA be given additional regulatory and inspection powers to ensure that appropriate legal standards are in place for undertakings (public or private) providing professional homecare.
- [5.32] There are similarities in the remits of HIQA and the proposed authority in that both have statutory responsibilities in respect to the protection of vulnerable citizens and both also have a role in promoting standards and providing information.⁴⁴
- [5.33] However, HIQA's remit is in respect of health and social care services, and its regulatory functions relate to suppliers of these services, whereas the proposed authority will have a remit in respect of any at risk individual person and will need to develop appropriate systems to respond to reports related to concerns regarding individual persons. For this reason, some stakeholders may argue that HIQA would not be a suitable body for the proposed regulator. The capacity of HIQA to expand its functions and of its governing board to take on additional services would need to be assessed in greater detail.

(iii) Tusla, the Child and Family Agency

- [5.34] Tusla, the Child and Family Agency, was suggested as an organisation worth considering in terms of expanding its functions, given that it has investigative functions that HIQA, in terms of cases concerning individual persons, does not have.⁴⁵ However, conferring adult safeguarding functions on the Child and Family Agency would involve changes to the remit of the organisation from supporting and promoting the development, welfare and protection, and the effective functioning of

⁴³ Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at 1.55, 1.59 and 1.61.

⁴⁴ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 12.

⁴⁵ Niall Redmond (Department of Health), *Joint Committee on Health debate - Wednesday, 11 Oct 2017 - Adult Safeguarding: Discussion (Resumed)* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

families to also having responsibilities for adult safeguarding. Its remit, name and procedures would therefore have to change considerably, as it could no longer be simply the Child and Family Agency, given that many adult safeguarding cases may not meet the definition of a family case.

- [5.35] Furthermore, the reasoning for the establishment of the Child and Family Agency as a new body in 2014 was largely based on the need to deliver on the fresh start called for throughout the child and family services sector. It was believed that what was required was a new identity which captured a new sense of purpose shared by all those who together deliver children and family services.⁴⁶ Indeed, "Tusla" was selected as the corporate name for the Child and Family Agency, borrowing from the Irish words "tús" (meaning beginning) and "lá" (meaning day) reflecting a shared desire for a new beginning, a new identity.⁴⁷ If additional powers in an area outside of children and family services were to be conferred on the Child and Family Agency, this may serve to disrupt the work that has been done to create a new identity and fresh start for children and family services only a small number of years after the establishment of the organisation.

(e) Granting additional powers to an existing body or bodies

- [5.36] As an alternative to the options outlined above, additional powers could be conferred on multiple existing bodies such as the Central Bank of Ireland, Department of Employment Affairs and Social Protection and HIQA. This could also involve oversight from a statutory body, with a board similar in structure to Safeguarding Ireland.
- [5.37] Such additional powers or duties could include granting a power or duty to the Central Bank to develop a code of practice requiring regulated financial institutions to investigate cases of suspected financial abuse and to report to the Central Bank regarding the usage of such powers. Other additional powers could include requiring the Department of Employment Affairs and Social Protection to investigate cases of suspected social welfare abuse of at risk adults. It would also mean that the powers of the HSE and HIQA might need to be expanded to non-HSE owned or funded services, and to investigative functions in relation to cases concerning individuals. However, as earlier outlined, it may be inappropriate for such bodies to hold certain regulatory powers, particularly in the case of the HSE as it would then be a provider and regulator of services.

⁴⁶ Tusla – the Child and Family Agency, *Home/About Us – New beginnings*, available at <https://www.tusla.ie/about/>

⁴⁷ *Ibid.*

- [5.38] In its *Report on Regulatory Powers and Corporate Offences*,⁴⁸ the Commission recommended that financial and economic regulators should have at least the following 6 “core” regulatory powers:
- (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).⁴⁹
- [5.39] It is arguable that a number of these powers could be applied to adult safeguarding including the power to issue directions or notices and to obtain information; and the power to require persons to attend in person before the regulator, or an authorised officer, to give evidence and produce documents. A number of further powers or duties may be required to sufficiently address adult safeguarding regulatory requirements. Indeed, the Commission acknowledged in its *Report on Regulatory Powers and Corporate Offences* that different regulatory functions would necessarily require different “add on” powers that would not be appropriate for all regulators.⁵⁰
- [5.40] Conferring additional powers on existing bodies rather than establishing a new independent regulatory body would have a number of advantages. Firstly, it would be financially more cost efficient as resources would not be required to establish a new body in terms of staffing, premises and other organisational costs, and legal costs. Secondly, it would be more time efficient as establishing a new body would involve a period of planning and time to recruit staff, and implement processes and procedures.

⁴⁸ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119–2018) at 95.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at 46.

A further advantage is that granting additional powers to existing bodies would also allow bodies to use their existing institutional experience in exercising those powers.

- [5.41] A disadvantage of conferring additional regulatory powers on existing bodies rather than establishing a new institutionally separate organisation would be the lack of a dedicated regulatory body that would provide a single point of oversight for adult safeguarding. The existence of such a body would help to ensure a focused approach to adult safeguarding. The existence of such a body would also ensure independent oversight. An additional possible disadvantage of conferring additional powers on existing bodies is that it could result in a situation where a provider of services is also acting as a regulator of those services. A further disadvantage would be that granting additional powers to existing bodies could result in there being a temporary dedicated focus on adult safeguarding when the new powers are conferred and government or public attention is on the exercise of those powers; this is known as the Hawthorne effect in which organisations or individuals alter their behaviour due to their awareness of being observed.⁵¹ However, once the initial spotlight has shifted, existing functions of those bodies may begin to take priority over new regulatory functions particularly where there are competing needs for resources. A possible additional disadvantage would be that interagency cooperation may be less effective without a single oversight body that could benefit from interagency expertise, if the composition of its Board was to include representatives of relevant bodies, or, at the very least, without a mechanism to monitor coordination of the various powers between the existing organisations. This could lead to ineffective, fragmented efforts at addressing safeguarding rather than a whole-of-government approach.
- [5.42] If additional regulatory powers were to be granted to existing bodies, an option would be to make explicit provision for the coordination of those powers amongst the bodies through the use of formal interagency protocols or agreements. In its *Report on Regulatory Powers and Corporate Offences*, the Commission considered how financial and economic regulators can ensure suitable coordination of their actions, in particular where their statutory functions overlap.⁵² The Commission recommended that the best approach to coordination is the use of cooperation agreements concluded by mutual agreement between regulators, recorded in a Memorandum of Understanding.⁵³ The Commission also recommended that regulators should, where appropriate, implement a lead agency approach to the coordination of regulatory activities whereby one

⁵¹ Laking, *Agencies: Their benefits and Risks*, OECD Journal on Budgeting, vol. 4, no. 4 (OECD 2005) at 22.

⁵² Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018), chapter 6.

⁵³ *Ibid*, at 289.

agency is given the responsibility to direct the coordination of the activities of other agencies in a particular area of regulation.⁵⁴ Such an approach could be useful in adult safeguarding, for example in investigating suspected cases of financial abuse where cooperation may be required between several bodies.

- [5.43] A further option would be to establish a statutory oversight body to monitor the exercise of those powers and to ensure a whole-of-government approach to adult safeguarding. This could take the form of a sector specific common inspectorate for adult safeguarding, which could act as an effective method of pooling the expertise of existing bodies in coordinating the relevant actions of regulators with closely related functions.⁵⁵ Due to the possibly more limited functions of such a body than those proposed in the *Adult Safeguarding Bill 2017*, or in any of the models outlined above, it would likely require less resources to establish and operate. However, the limited powers of such a body, in comparison to the powers of the regulatory proposed in the *Adult Safeguarding Bill 2017*, might result in a less effective means of overseeing the regulation of adult safeguarding.

3. Governance arrangements for an adult safeguarding regulator

- [5.44] The establishment of any proposed adult safeguarding regulator would require the advance implementation of suitable governance arrangements to ensure that the arrangements are most appropriately matched with the mission and purpose of the organisation. Such governance arrangements may include ensuring that the values and culture are in line with the mission and purpose of the organisation; establishing organisational structures; strategic planning, decision-making and performance management; internal communications arrangements; engagement with external stakeholders; mechanisms for reviewing the governance arrangements; establishment of senior management roles and assignment of responsibilities; establishment of a governing board and other governance structures; and audit, assurance and compliance arrangements. Decisions regarding many of these may be more appropriately decided by those charged with the establishment of any proposed regulator. This section will briefly consider the issues of governing boards or authorities, and accountability.

(a) Governing boards or authorities

- [5.45] If the proposed adult safeguarding regulator was to be established as an independent agency, it would require a governance oversight structure in the form of a governing

⁵⁴ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018) at 294-295

⁵⁵ See Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018) at 298 for a discussion of common inspectorates.

board. Governing authorities in Ireland assume a variety of forms, including statutory boards of directors, commissioners, advisory committees and councils, as well as executive boards.⁵⁶ Agencies in Ireland are typically established with a non-executive governing board, which provides the agency with direction and advice and should also ensure good governance.⁵⁷

- [5.46] The non-executive board structure has a number of disadvantages including: the costs incurred in funding directors' expenses; the performance challenges that arise where a board doesn't have the requisite skills to provide adequate guidance to the agency; and the danger of "mission creep", whereby an agency and its board, if allowed to operate in something of a vacuum, can become diverted from the tasks it was set up to fulfil and instead become involved in other endeavours.⁵⁸ The legislative framework should set out firm parameters for the work of any proposed regulator and board to avoid such issues.
- [5.47] In relation to the mode of appointment to governing authorities, a variety of modes can be used from ministerial appointment to ex officio and elected positions.⁵⁹ A number of examples exist whereby governing boards of public agencies are composed of representatives or nominees of sectoral stakeholder organisations, for example the governing board of the Mental Health Commission is composed of members nominated by bodies including the Irish Advocacy Network; the Irish College of General Practitioners; the College of Psychiatrists of Ireland; the Irish Hospital Consultants Association; the Psychological Society of Ireland; the Irish Association of Social Workers; the HSE; and the Mental Health Nurse Managers of Ireland. While the members are nominated by stakeholder organisations, they are formally appointed by approval of the Minister of State for Mental Health and Older People. However, the nomination process eliminates the possibility of a board comprised of political appointments as well as ensuring that the organisation can benefit from the relevant sectoral experience of its governing board members. While multiagency representation on a governing board can have advantages, the OECD identified that it can result in tensions between a focus on agency performance and maximising

⁵⁶ MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 7 and 17.

⁵⁷ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 8.

⁵⁸ *Ibid.*

⁵⁹ MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 17.

stakeholder involvement through participation management.⁶⁰ However, it has been stated by the Chair of Safeguarding Ireland that having a wide representation of high levels from stakeholders on the board, similar to the membership of Safeguarding Ireland, would be important for the proposed regulator in order to have people around the table who can make decisions, and commit to those decisions.⁶¹

- [5.48] A further noteworthy point on the composition of boards is that the trend internationally has moved towards the position that staff of government departments should not serve on agency boards,⁶² which could also be important for ensuring the independence of an agency.
- [5.49] It is also noteworthy that the establishment of the stateboards.ie website portal in 2014, under the auspices of the Public Appointments Service, was aimed at ensuring independence, objectivity and greater efficiency in respect of state board appointments and to guarantee that members of boards had the appropriate skills, qualifications and experience to provide sufficient support and guidance to the relevant agencies.⁶³ For state agencies operating outside of departmental structures, the average size of a board or governing authority is 12 persons.⁶⁴ However, a review conducted in Australia found that best practice is boards of between six and nine members, although there are circumstances in which a larger board may be warranted.⁶⁵ With regard to term limits for boards, it is common for board members to serve a three year period with the potential to be reappointed for a second term, subject to satisfactory performance.⁶⁶

⁶⁰ MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 18.

⁶¹ Patricia Rickard-Clarke, Safeguarding Ireland, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

⁶² MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 8 and 23.

⁶³ IPA, *Discussion Paper – The establishment of Cosáint, the National Adult Safeguarding Authority* (IPA 2017) at 8.

⁶⁴ MacCarthaigh, *National Non-commercial State Agencies in Ireland*, Research Paper No. 1 (IPA 2010) at 7 and 17.

⁶⁵ *Ibid.* at 8 and 23.

⁶⁶ *Ibid.*

(b) Accountability

- [5.50] Accountability is often viewed as the “quid pro quo” for the holding of public power, whether by legislature, government, agencies or others.⁶⁷ Previous government consultations have resulted in accountability proposals; including means for promoting accountability to the public such as formal decision procedures, consultation requirements, publication of comments and decisions, codes of conduct and protection of confidentiality. Regular strategy statements and work programmes were put forward as means of accountability to the relevant government minister.⁶⁸
- [5.51] In light of the growth in number of public agencies in recent decades, measures were developed to increase scrutiny and extend the nature and scope of accountability mechanisms including increased scrutiny by Oireachtas select committees, increased judicial scrutiny, the extension of the powers of the Office of the Comptroller and Auditor General to include the conduct of a Value for Money audit⁶⁹ and the establishment of the Office of the Ombudsman and the Information Commissioner.⁷⁰ Widening of the applicability of freedom of information legislation by the *Freedom of Information Act 2014* to all public bodies, with the exception of those that receive a specific exemption or partial exemption, also increases accountability for the majority of agencies. The Government Statement on Economic Regulation, published in 2009, set out a number of initiatives designed to enhance the accountability of regulators and the capacity of departments and the Oireachtas to scrutinise their activity, including the production of strategy statements by regulators that must take account of the policy directions or weighting of priorities by the relevant Minister or the Government, and integrated annual reports that relate resources to achievements.⁷¹

⁶⁷ Brown and Scott, *Regulation in Ireland: History, Structure, Style and Reform* (University College Dublin 2010) at 25.

⁶⁸ See Department of Public Enterprise, *Governance and Accountability in the Regulatory Process: Policy Proposals* (Department of Public Enterprise 1999) in Brown and Scott, *Regulation in Ireland: History, Structure, Style and Reform* (University College Dublin 2010) at 25.

⁶⁹ Hardiman and Scott, *Ordering Things: Classifying agencies to understand the changing structures of the central state* (UCD Geary Institute Working Papers Series 2009) at 17; Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014) at 5; Hardiman and Scott, *Puzzles of agentification: an organizational analysis*, UCD Geary Institute Discussion Paper Series WP/30/2007 (UCD 2007) at 21.

⁷⁰ Hardiman and Scott, *Puzzles of agentification: an organizational analysis*, UCD Geary Institute Discussion Paper Series WP/30/2007 (UCD 2007) at 21.

⁷¹ Brown and Scott, *Regulation in Ireland: History, Structure, Style and Reform* (University College Dublin 2010) at 32

4. Comparative approaches to the regulatory structures of adult safeguarding

(a) Scotland

- [5.52] In Scotland, three organisations are responsible for regulating, monitoring and setting standards for health and social care services, similar to the roles of HIQA and the MHC in Ireland. However, local authorities (councils) hold the day-to-day responsibility for adult safeguarding. The *Adult Support and Protection (Scotland) Act 2007* provides that each council must establish an Adult Protection Committee. Adult Protection Committees have the following functions:
- to keep under review the procedures and practices of the public bodies and office-holders to which this section applies which relate to the safeguarding of adults at risk present in the council's area (including, in particular, any such procedures and practices which involve co-operation between the council and other public bodies or office-holders to which this section applies);
 - to give information or advice, or make proposals, to any public body and office-holder to which this section applies on the exercise of functions which relate to the safeguarding of adults at risk present in the council's area;
 - to make, or assist in or encourage the making of, arrangements for improving the skills and knowledge of officers or employees of the public bodies and office-holders to which this section applies who have responsibilities relating to the safeguarding of adults at risk present in the council's area; and
 - any other function relating to the safeguarding of adults at risk as the Scottish Ministers may by order specify.⁷²
- [5.53] The Act further provides that an Adult Protection Committee must have regard to the desirability of improving co-operation between each of the designated public bodies and office-holders for the purpose of assisting those bodies and office-holders to perform functions in order to safeguard adults at risk present in the council's area.⁷³ The Adult Protection Committees are appointed by the Council and have a multi-agency membership comprised of representatives of the designated public bodies and office-holders.⁷⁴ Each of the public bodies and office-holders specified in the Act must provide the Adult Protection Committee with any information which the Committee may reasonably require for the purposes of performing the Committee's functions.⁷⁵

⁷² *Adult Support and Protection (Scotland) Act 2007*, section 42(1).

⁷³ *Adult Support and Protection (Scotland) Act 2007*, section 42(2).

⁷⁴ *Adult Support and Protection (Scotland) Act 2007*, section 43.

⁷⁵ *Adult Support and Protection (Scotland) Act 2007*, section 45.

The Adult Protection Committee must biennially, upon the direction of the council, prepare a general report on the exercise of the Committee's functions during the 2 years ending on that date and make a copy of it available to the designated public bodies and office holders.⁷⁶ The statutory provision for Adult Protection Committees in Scotland provides a useful model for potentially placing the Irish Safeguarding and Protection Committees (Vulnerable Persons) or similar structures on a statutory footing to ensure regional oversight of adult safeguarding.

(b) Wales

- [5.54] In Wales, statutory provision was made for the establishment of the National Independent Safeguarding Board (NISB) under the *Social Services and Well-being (Wales) Act 2014*. Section 132 provides for the establishment of the NISB and for its duties, as follows:
 - (a) to provide support and advice to Safeguarding Boards with a view to ensuring that they are effective,
 - (b) to report on the adequacy and effectiveness of arrangements to safeguard children and adults in Wales, and
 - (c) to make recommendations to the Welsh Ministers as to how those arrangements could be improved.⁷⁷
- [5.55] It also makes provision for reporting mechanisms in stipulating that the NISB: (a) must make an annual report to the Welsh Ministers, (b) must make such other reports to the Welsh Ministers as they require, and (c) may make such other reports as it thinks fit.⁷⁸
- [5.56] The NISB provides a useful model for a national independent body that has monitoring and advisory responsibilities with regard to adult safeguarding. Such a model could be implemented in the Irish context although it is possible that a wider range of powers and duties may be conferred on a new independent body or on existing bodies.

5. Relationship between national framework and regional implementation

- [5.57] The implementation of a regulatory framework for adult safeguarding would need to be conducted throughout the country by all adult safeguarding services. This will likely need to involve coordination at a national level by a body such as the proposed

⁷⁶ *Adult Support and Protection (Scotland) Act 2007*, section 46.

⁷⁷ *Social Services and Well-being (Wales) Act 2014*, section 132(2).

⁷⁸ *Social Services and Well-being (Wales) Act 2014*, section 132(3).

national regulator for adult safeguarding. If the proposed authority is to conduct investigations into individual cases of abuse or suspected abuse, it will likely need to have investigating officers who are based across the country and who would be responsible for carrying out investigations at a regional level in conjunction with other relevant agencies. As such it will likely require a regional structure with regional offices reporting to the senior management of the organisation at a national level. These regional structures could be similar in structure to the Adult Protection Committees in Scotland, Safeguarding Adult Boards in England or adult safeguarding boards in Wales.

[5.58] In the Irish context, a Safeguarding and Protection Committee (Vulnerable Persons) has already been established by the HSE within each Community Healthcare Organisation.⁷⁹ These Committees were appointed by the Chief Officer of each Community Healthcare Organisation and are chaired by the Head of Social Care. The functions of the Committees are to:

- Represent relevant personnel and agencies;
- Support the development of a culture within the area and within services which promotes the welfare of vulnerable persons;
- Develop, approve and have oversight of the area plan to promote the welfare of vulnerable persons, consistent with Service Plan objectives;
- Support interagency communication and collaboration in respect of services and responses to the needs of vulnerable persons;
- Provide a support and advisory service to the Senior Manager and Safeguarding and Protection Team (Vulnerable Persons) in addressing the needs of vulnerable persons, including consideration of particularly complex cases and system issues;
- Contribute, as agreed, to relevant activities and initiatives.⁸⁰

[5.59] As one of the functions of the Committees is to represent personnel and agencies, it is already intended that the membership of the Committee account for multiagency representation. The Safeguarding and Protection Committees, with expanded powers and a broader remit that would apply to adult safeguarding generally rather than just HSE-owned or funded services, or similar structures with wider powers, could be placed on a statutory footing to ensure regional oversight of adult safeguarding and

⁷⁹ It was announced in July 2019 that the current Community Healthcare Organisation model will be replaced by the delivery of health and social care through six new HSE regions. See: Irish Times, *Health and social care to be delivered through six new regions* (Irish Times, 17 July 2019), <https://www.irishtimes.com/news/health/health-and-social-care-to-be-delivered-through-six-new-regions-1.3959284>

⁸⁰ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE Social Care Division 2014) at 52, paragraph 22.6.

the implementation of safeguarding regulatory powers on a regional level. Such regional structures could be overseen on a national level by a body similar to the Welsh National Independent Safeguarding Board although potentially with additional regulatory powers. Policies and procedures could be established on a national level, while reporting by the regional structures to the national body would enable: oversight of the use of regulatory powers to ensure proportionate and appropriate use; coordination of regulatory powers; the highlighting of any gaps in policy or resourcing; the identification of any national trends or needs that may need to be met; and the facilitation of adequate national data collection.

6. Conclusion

- [5.60] It is clear that concerns regarding the potential for a conflict of interest can arise where a department or agency acts as both a provider and a regulator of services. The government's guidelines on agency rationalisation⁸¹ recognise that at times an independent agency can be the preferred option where specialist skills may be needed, and where independence in the performance of functions requires functional separation from government departments. If an adult safeguarding authority were to be established, it therefore appears vital that the independence of the proposed authority from the HSE, the Department of Health and other relevant government departments would be ensured. This suggests that the most appropriate options for the proposed authority may be the establishment of an independent agency or to incorporate it as part of an existing agency. Both the Joint Oireachtas Committee on Health and the IPA advised that further assessment is required to examine the full cost of each option. The IPA has also stated that the establishment of the proposed authority will be a political decision.⁸²
- [5.61] If a national regulator for adult safeguarding is to be established, it will be important that the governance arrangements are clearly established in advance to ensure that they are most suited to the mission and purpose of the organisation. Arrangements for the establishment of a governing board or authority and the accountability of the organisation will be of particular significance.
- [5.62] Any regulatory framework for adult safeguarding will need to be implemented across all of the safeguarding services and safeguarding cases in the country. This may require the establishment of regional safeguarding structures to provide oversight for adult safeguarding at a regional level. Any such structures would need to have the

⁸¹ Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014).

⁸² Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 15.

appropriate membership composition, powers and resources to ensure that they could fulfil their remit effectively.

Questions for Issue 5

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?

ISSUE 6 POWERS OF ENTRY AND INSPECTION

1. The need for a power of entry or access in adult safeguarding

- [6.1] There may be cases of suspected abuse or neglect of an at risk adult (with or without decision-making capacity) in which safeguarding practitioners are unable to gain entry to the person's dwelling or to access the person in another private dwelling. Such a situation may occur because access to premises is denied by a third party on the premises (usually a family member, friend or other informal carer) or because access to the premises can be gained, but it is not possible to speak to the adult alone due to a third party's insistence on being present.¹ Such a situation may also arise because the adult at risk, whether or not unduly under the influence of a third party, is insisting that the third party be present. In such circumstances, if the person is known to have capacity, the issue of access in terms of the law would not arise.² In such cases, it would be necessary for professionals to have a legal power of entry in order to demand access, or forcefully gain access, to a private dwelling. Such powers could be known as a power of entry or a power of entry and inspection. Terms used in other jurisdictions include a power of access, an access order or an adult safeguarding access order.

2. General legislative powers and constitutional considerations

- [6.2] It is common in regulatory legislation to give powers to a regulator or its authorised officers to enter premises, to inspect documents, to require persons to provide information, and to interview persons.³ Regulatory legislation also commonly contains provisions that allow the regulator to apply for a search warrant. These are rarely used provisions that are typically included to cover cases that do not fall under authorised officers' rights of entry and inspection, such as where the information being sought is held in a dwelling rather than a business premises.⁴

¹ Social Care Institute for Excellence, *Gaining access to an adult suspected to be at risk of neglect or abuse: a guide for social workers and their managers in England* (Social Care Institute for Excellence 2014) at 3, available at <https://www.scie.org.uk/safeguarding/adults/practice/gaining-access>

² *Ibid.*

³ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018) at 2.13. See section 11 of the *Electricity Regulation Act 1999* and section 42 of the *Aviation Regulation Act 2001*, which are phrased in broadly similar terms but with differences as to the places that can be entered and searched, the types of documents or information that can be retrieved or the persons who can be interviewed.

⁴ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018) at 2.13. See, for example, section 39(5) of the *Communications Regulation Act 2002*. In its Report

- [6.3] Article 40.5 of the Constitution protects the inviolability of the dwelling. However, this protection is not absolute, as there may be occasions where it is justifiable to set this right aside.⁵ The courts have made it equally clear, however, that the constitutional right under Article 40.5 should not be set aside easily. This must be done in accordance with law so that the constitutional right is not breached and, furthermore, the invasion of the right must not go beyond what is necessary.⁶ A search warrant is, therefore, generally required in order to enter and inspect a private dwelling.
- [6.4] A number of decisions suggest that the protection of Article 40.5 extends to business premises. This is consistent with the recognition of the principle of inviolability of private property at common law, as extending to commercial premises rather than being limited to private dwellings. However, it remains to be seen whether Article 40.5 will be applied as strongly to forms of private property other than private dwellings.⁷ The Court of Criminal Appeal suggested in *The People (DPP) v Barnes*⁸ that dwellings receive higher levels of legal and constitutional protection than other forms of property.⁹ However, a search warrant is generally required in order to enter and inspect private property including business premises.
- [6.5] A large number of statutory powers exist that authorise An Garda Síochána, and officers of various regulatory authorities, such as the Competition and Consumer Protection Commission, the Environmental Protection Agency, the Food Safety Authority of Ireland and the Health and Safety Authority, to enter, search and inspect premises without a warrant.¹⁰ The majority of legislative provisions stipulate that the powers to enter and search without a warrant may not be exercised in respect of a private dwelling that is to be searched without the consent of the occupier.¹¹ However, it seems that in some circumstances, a statutory power allowing for the searching of a

on *Search Warrants and Bench Warrants* (LRC 115-2015), the Commission identified more than 300 statutory provisions creating similar but not identical procedures for obtaining and executing search warrants and recommended that these should be replaced by a single generally applicable Search Warrants Act.

⁵ Law Reform Commission, *Report on Search Warrants and Bench Warrants* (LRC 115-2015), chapter 1.

⁶ *Ibid*, at paragraph 1.24.

⁷ Kelly: *The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at 7.5.14.

⁸ [2006] IECCA 165.

⁹ [2006] IECCA 165, at 34.

¹⁰ Law Reform Commission, *Report on Search Warrants and Bench Warrants* (LRC 115-2015) at 2.04.

¹¹ See, for example, *Organisation of Working Time Act 1997*, section 8(4), *Food Safety Authority Act 1998*, section 50(2), *Control of Horses Act 1996*, section 34(3) and *Competition and Consumer Protection Act 2014*, section 37.

dwelling without a warrant may be constitutional.¹² Section 12 of the *Child Care Act 1991* provides for a warrantless power of entry to a private dwelling or other place, by force if necessary, by a member of An Garda Síochána in order to remove a child to safety where it would not be sufficient for the protection of the child from immediate and serious risk to await the making of an application for an emergency care order. An example of a legislative provision that confers on someone other than a member of An Garda Síochána a warrantless power to enter and inspect a private dwelling is section 23T(1) of the *Child Care Act 1991*, as inserted by section 16 of the *Children Act 2001*. This empowers an authorised officer of the Child and Family Agency to enter any premises (including a private dwelling) in which a child who is the subject of a private foster care arrangement resides.

- [6.6] Although the issuing of a search warrant does not involve the administration of justice and does not, therefore, have to be issued by a court, as search warrants can also be issued by Peace Commissioners or, in urgent cases, by Garda Superintendents, the Commission has previously acknowledged that it is generally preferable that a search warrant be issued by a court.¹³ The Commission has also endorsed the principle that there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search.¹⁴

3. Current legal powers of entry where an adult may be at risk

- [6.7] The Commission now turns to outline the existing legal powers of entry that can be acted upon in cases of suspected abuse or neglect of an at risk adult where it has not been possible to gain entry to the person in a private dwelling. The Commission also identifies situations where such powers are lacking.
- [6.8] HIQA is empowered to exercise certain powers of entry and inspection relevant to adult safeguarding. Section 73 of the *Health Act 2007* provides for the entry and inspection powers of persons acting for HIQA at any time to any premises owned or funded by the HSE or a service provider or used or proposed to be used, for any purpose connected with the provision of relevant services. It also provides that the chief inspector may enter and inspect at any time any premises: owned or controlled by the HSE; used, or proposed to be used, for any purpose connected with the provision of a service under sections 39 to 42 and 53 of the *Child Care Act 1991* or section 10 of the *Health (Nursing Homes) Act 1990* by the HSE or a service provider; or used or proposed to be used as a designated centre or special care unit. However,

¹² Kelly: *The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at 7.5.20.

¹³ Law Reform Commission, *Report on Search Warrants and Bench Warrants* (LRC 115-2015) at paragraph 1.45.

¹⁴ *Ibid*, at paragraph 1.45.

these powers do not extend to private dwellings in which services are being provided, as there is currently no regulation of professional home care services.

- [6.9] In its 2011 *Report on the Legal Aspects of Professional Home Care*¹⁵ the Commission recommended that the *Health Act 2007* should be amended to extend the functions of HIQA to include the regulation and monitoring of professional home care services. The *Health (Amendment) (Professional Home Care) Bill 2016*, which is currently before the Seanad having completed the second stage of the legislative process in October 2016, would provide for the amendment of the legislation to extend the functions of HIQA. However, the Commission understands that the Department of Health is currently working on a statutory homecare scheme that may include provisions for the powers of HIQA to be extended to homecare services. It is therefore possible that such a scheme could include powers of entry and inspection to private dwellings where homecare services are being provided and where it is believed that an adult, in receipt of those services, may be at risk.
- [6.10] Similarly, the HSE's national adult safeguarding policy¹⁶ only applies to HSE owned or funded services and there are no legal provisions that allow HSE protection teams the right of access into private dwellings or private nursing homes.¹⁷ The immediate extension of the powers of the HSE safeguarding protection teams in order that they can operate to the fullest degree possible within private care settings has been recommended.¹⁸ Dr Michael Harty, TD asked the Minister for Health in a Parliamentary Question in October 2017 whether he had engaged with the Department of Justice and Equality on introducing legislation to provide safeguarding officers with access to private settings in view of the reported levels of abuse of vulnerable adults. A response was provided referring to the ongoing review of the HSE's national safeguarding policy, which the Minister of State asserted was a complex undertaking and would take time, but he did not directly answer the question as regards powers of entry and inspection to private settings.¹⁹ It was also noted in the minutes of the first meeting of

¹⁵ Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at paragraphs 1.55, 1.59 and 1.61.

¹⁶ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE Social Care Division 2014).

¹⁷ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 17.

¹⁸ Mervyn Taylor, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/

¹⁹ *Parliamentary Question Number 141, Legislative Programme, Dáil Éireann Debate, Thursday - 19 October 2017* (19 October 2017) available at https://www.oireachtas.ie/en/debates/question/2017-10-19/141/#pq_141

the Department of Health's Steering Group on the development of a safeguarding policy for the health sector that the HSE Safeguarding and Protection Teams are experiencing challenges with regard to a lack of a right of entry or access.²⁰

- [6.11] Existing legal powers of entry that could be acted upon in certain limited circumstances in which an adult is suspected to be at risk of abuse or neglect include provisions of the *Mental Health Act 2001*, the *Domestic Violence Act 2018*, the *Criminal Law Act 1997*, the *Criminal Justice (Miscellaneous Provisions) Act 1997* as well as common law powers to issue a search warrant and the inherent jurisdiction of the High Court.

(a) Mental Health Act 2001

- [6.12] Section 12 of the *Mental Health Act 2001* provides for a power of entry that would apply in adult safeguarding situations if a member of An Garda Síochána has reasonable grounds for believing that an at risk adult or a person in the company of an at risk adult is suffering from a mental disorder and that, because of the disorder, there is a serious likelihood of the person causing immediate and serious harm to themselves or another person. In such circumstances, a member of An Garda Síochána may take the person into custody and if necessary, may use force to enter a private dwelling where the person is believed to be. A mental disorder is defined as mental illness, severe dementia or significant intellectual disability where:

- (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
- (b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
 - (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.²¹

- [6.13] Mental illness is defined as a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental

²⁰ Department of Health, *Steering Group to assist the Department of Health in its development of a national policy on adult safeguarding in the health sector: Minutes of Meeting* (Department of Health 2019), available at <https://health.gov.ie/wp-content/uploads/2019/07/2019-02-13-agreed-chairs-signature-minute-of-ASG-SG-meeting-1.pdf>

²¹ *Mental Health Act 2001*, section 3(1).

function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons.²² It may be difficult to use this power in some circumstances; especially where safeguarding professionals have been unable to gain access to an adult to establish sufficiently reasonable grounds for believing that the adult is suffering from a mental disorder.

(b) Domestic Violence Act 2018

- [6.14] Section 35 of the *Domestic Violence Act 2018* provides for a power of entry that would apply in adult safeguarding situations where a member of the Garda Síochána has reasonable cause for believing that an offence is being or has been committed under section 33 of the Act. An offence under section 33 of the Act refers to the contravention of a safety order, a barring order, an interim barring order, an emergency barring order or a protection order, or refusal, while an order is in force, to permit the applicant or a dependent person to enter in and remain in the place to which the order relates or does any act for the purpose of preventing the applicant or dependent person from so doing. Section 35 further provides that the purpose of arresting a respondent, a member of the Garda Síochána may enter, if need be by force, and search a place where the member, with reasonable cause, suspects the respondent to be.

(c) Criminal Law Act 1997

- [6.15] Section 6(1) of the *Criminal Law Act 1997* provides that a member of An Garda Síochána, seeking to arrest a person on foot of a warrant of arrest or order of committal, may enter (if necessary, by the use of reasonable force) and search any premises, including a dwelling, where that person is or where the member of An Garda Síochána reasonably suspects him or her to be. Subsection (2) provides for a power of entry and search for the purpose of arresting a person in connection with an arrestable offence. No warrant is required in such circumstances but a member of An Garda Síochána seeking to enter a dwelling must have the consent of the occupier or other person in charge of the dwelling or must be able to demonstrate that:

- (a) He or she or another member of An Garda Síochána has observed the person within or entering the dwelling, or
- (b) He or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or

²² *Mental Health Act 2001*, section 3(2). "Severe dementia" and "significant intellectual disability" are also defined under section 3(2) of the Act.

- (c) He or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will commit an arrestable offence, or
 - (d) The person ordinarily resides at that dwelling.
- [6.16] Subsection (3) provides that, without prejudice, to any express amendment or repeal made by the Act, section 6 shall not affect the operation of any enactment or rule of law relating to powers of search or powers of arrest. Section 6 would only provide a power of entry in adult safeguarding cases where a warrant of arrest or order of committal already existed for someone who may be abusing an at risk adult in the property or where a member of An Garda Síochána, with reasonable cause, is seeking to arrest someone in connection with an arrestable offence related to the abuse of an at risk adult.

(d) Criminal Justice (Miscellaneous Provisions) Act 1997

- [6.17] Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*, may provide for a power of entry in adult safeguarding cases in limited circumstances. Section 10 provides for the issuing of search warrants by a District Judge, who must be satisfied upon evidence from a member of An Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of or relating to the commission of an arrestable offence is to be found at the place to be searched. In order for this provision to apply in adult safeguarding cases, a District Judge must be satisfied that there are reasonable grounds for suspecting evidence of, or relating to, the commission of an arrestable offence against an at risk adult is to be found at the place to be searched.

(e) Common law powers

- [6.18] At common law, a search warrant can be issued by a judge of the District Court only where a member of An Garda Síochána states the belief that stolen goods are on the premises; otherwise the principle of *Entick v Carrington*²³ applies, so as to prevent the executive from claiming a "general warrant" to search private premises.²⁴ In *DPP v Delaney*, the Supreme Court held that where entry to a dwelling was gained in the absence of a warrant in an "extremely fraught situation" that entry was constitutional as the members of An Garda Síochána were fulfilling the requirements of the Constitution when they chose to act in defence of the life and limb of others and to subordinate the right of another to inviolability of the dwelling.²⁵ In the circumstances,

²³ *Entick v Carrington* (1765) 16 State Trials 1030, 2 Wils 275.

²⁴ Kelly: *The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at 7.5.15.

²⁵ [1997] 3 IR 453.

it was necessary for the Gardaí to balance these constitutional rights. Therefore, in circumstances where a member of An Garda Síochána believes that there was an immediate risk to the life and limb of an at risk adult, there would be justification for entering the dwelling without a warrant.

4. Powers of entry and inspection in other jurisdictions

- [6.19] A power of entry to private dwellings, where it is suspected that an adult may be at risk of abuse, exists in a number of jurisdictions even in circumstances where professional homecare services are not provided in the dwelling.

(a) Scotland

- [6.20] Scottish legislation provides for the power to enter any building for the purposes of conducting an enquiry. Section 7 of the *Adult Support and Protection (Scotland) Act 2007* provides that a council officer may enter any place for the purpose of enabling or assisting a council conducting inquiries to decide whether it needs to do anything in order to protect an adult at risk from harm. It further provides that a right to enter any place under subsection (1) includes a right to enter any adjacent place for the same purpose. Section 8 provides that a council officer, and any person accompanying the officer, may interview, in private, any adult found in a place being visited under section 7.
- [6.21] Guidance drafted by the Scottish government provides that the new powers can only be exercised by council officers, which it defines as social workers, occupational therapists and nurses, with at least 12 months' relevant experience.²⁶ Section 37 of the Act provides for a "warrant for entry" which authorises a council officer to visit any specified place under section 7 or 16 of the Act together with a constable, and authorises a constable who accompanies a council officer to do anything, using reasonable force where necessary, which the constable considers to be reasonably required in order to fulfil the object of the visit. Section 38 of the Act sets out the criteria for granting warrants for entry which include that a warrant may be granted only if the sheriff is satisfied, by evidence on oath (a) that a council officer has been, or reasonably expects to be (i) refused entry to, or (ii) otherwise unable to enter, the place concerned, or (b) that any attempt by a council officer to visit the place without such a warrant would defeat the object of the visit.

²⁶ Scottish Government, *Adult Support and Protection (Scotland) Act 2007, Code of Practice* (Scottish Government 2014), available at <https://www.gov.scot/publications/adult-support-and-protection-revised-code-of-practice/pages/1/>.

(b) England

- [6.22] In England, a power of entry is not provided for under the *Care Act 2014*. A consultation on a proposed safeguarding power of entry was carried out by the Department of Health in England in 2012.²⁷ Following the consultation, the Care Bill was not amended to include a power of entry as a result of opposition from members of the public, and on the basis of a finding that there was “no conclusive proof that this power would not cause more harm than good overall, even though in a very few individual cases it may be beneficial”.²⁸

(c) Wales

- [6.23] The *Social Services and Well-being (Wales) Act 2014* provides Welsh local authorities with a power of entry for the purpose of carrying out a confidential interview with a person suspected of being at risk of abuse, assessing the person’s capacity to make decisions freely and assessing whether the person is an adult at risk and deciding on any action to be taken. Section 127(1) of the Act provides that an authorised officer can apply to a justice of the peace for an Adult Protection and Support Order (APSO) which provides powers of entry to “premises” where an adult at risk is believed to be living. Section 127(2) provides that the purposes of an adult protection and support order are—
- (a) to enable the authorised officer and any other person accompanying the officer to speak in private with a person suspected of being an adult at risk,
 - (b) to enable the authorised officer to ascertain whether that person is making decisions freely, and
 - (c) to enable the authorised officer properly to assess whether the person is an adult at risk and to make a decision as required by section 126(2) on what, if any, action should be taken.

- [6.24] An authorised officer is defined as a person who has completed appropriate training and is an officer of the authorising authority (the relevant local authority) subject to minor exceptions.²⁹ The Guidance, which accompanied the legislation, states that it is essential that an authorised officer has a degree of autonomy from his or her employer and is able to perform the duties independently of the day-to-day

²⁷ Department of Health (England), *Consultation on New Safeguarding Power* (2012), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/222648/Consultation-on-New-Safeguarding-Power.pdf

²⁸ Department of Health (England), *Government Response to the Safeguarding Power of Entry Consultation* (2013), at 12.

²⁹ *The Adult Protection and Support Orders (Authorised Officer) (Wales) Regulations 2015*, regulation 3.

management of the particular case.³⁰ The Guidance defines "premises" as including domestic premises, residential care homes, nursing homes, hospitals or "any other building, structure, mobile home or caravan in which the person is living".³¹

(d) Canada (British Columbia)

- [6.25] Section 49 of the British Columbia *Adult Guardianship Act 1996* provides that a designated agency that is conducting a prescribed investigation may apply to the court for an order if someone from the designated agency:
- (a) believes it is necessary to enter any premises in order to interview the adult, and
 - (b) is denied entry to the premises by anyone, including the adult.
- [6.26] On application, the court may make an order authorising either or both of the following:
- (a) someone from the designated agency to enter the premises and interview the adult;
 - (b) a health care provider, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*, to enter the premises to examine the adult to determine whether health care should be provided.

- [6.27] The legislation further provides that if an application for a court order will result in a delay that could result in harm to the adult, a justice of the peace may issue a warrant authorising someone from the designated agency to enter the premises and interview the adult. Section 49 specifies that a court may only make an order, and a justice of the peace may only issue a warrant, if there is reason to believe that the adult is abused or neglected, and is, for any of the reasons mentioned in section 44 of the Act, unable to seek support and assistance.

(e) Canada (Nova Scotia)

- [6.28] In Nova Scotia, section 8(2) of the *Adult Protection Act 1986* provides that where the adult who is being assessed refuses to consent to the assessment (or where a member of the family of the adult or any person having care or control of the adult interferes with or obstructs the assessment in any way), the Minister may apply to the court for

³⁰ Welsh Government, *Social Services and Well-being (Wales) Act 2014: working together to safeguarding people – volume 4 adult protection and support orders* (2016) at paragraph 1.8, available at <https://socialcare.wales/research-and-data/research-on-care-finder/working-together-to-safeguard-people-volume-4-adult-protection-and-support-orders-social-services-and-well-being-wales-act-2014>

³¹ *Ibid*, at paragraph 1.14.

an order authorising the entry into any building or place by a peace officer, the Minister, a qualified medical practitioner or any person named in the order for the purpose of making the assessment. Where the Minister has given at least four days' notice of the hearing to the adult (or to the person having care or control of the adult), or where the Minister has applied *ex parte* and the court is satisfied there are reasonable and probable grounds to believe that the person who is being assessed is in danger, the court may grant the order after making due inquiry and being satisfied that there are reasonable and probable grounds to believe that the person who is being assessed is an adult in need of protection.

5. The provision of a new power of entry and inspection

- [6.29] The Commission now turns to discuss whether a power of entry to private dwellings is needed in the Irish adult safeguarding context.
- [6.30] Section 14 of the *Adult Safeguarding Bill 2017* proposes a right of entry and inspection by an authorised person, where it is considered necessary or expedient for carrying out his or her function, in respect of premises that do not constitute a dwelling by virtue of any part of that premises being occupied as a private residence. Section 15 proposes that an authorised person, in the performance of functions under section 14, may not enter a dwelling other than with the consent of the occupier or in accordance with a warrant from the District Court issued under section 16. Section 16 proposes the obtaining of a warrant by an authorised person where the premises constitute a dwelling, or where an authorised person is prevented or has reasonable cause to believe there is a likelihood that he or she will be prevented from entering the premises. Section 17 further proposes that the authorised person may be accompanied by a member of An Garda Síochána where the authorised person has reasonable cause to expect any serious obstruction in the performance of functions under the Act and is in possession of a warrant. Given that Section 15 of the Bill proposes that powers of entry and inspection may only be exercised by an authorised person in respect of a private dwelling on foot of consent by the occupier or a warrant issued by the District Court, it appears that this provision is consistent with the constitutional protection of the dwelling.
- [6.31] There appears to be a lack of research or published evidence in the Irish context regarding the need for a statutory power of entry to private dwellings for the purposes of adult safeguarding. Experiences and perspectives of social workers, HSE Safeguarding and Protection Team members and members of An Garda Síochána would be particularly useful in establishing the need for such a power. As a result of the lack of relevant research in the Irish context, all of the sources referred to in the following subsections originate from research or government consultations in the United Kingdom.

6. Arguments for and against the provision of a new power of entry to private dwellings

(a) Justifications for a new power of entry

(i) Gaining access where a third party is refusing entry

- [6.32] Hindering is a term that has been used by academics in England to refer to a situation where access to an adult at risk living in the community for the purposes of a safeguarding enquiry is obstructed by a third party, whether completely, intermittently, or through not allowing an interview to take place in private.³² A third party may impose undue pressure on the at risk adult to refuse consent to enter the dwelling. The Code of Practice, accompanying the *Adult Support and Protection (Scotland) Act 2007*, provides an example of what may be considered undue pressure to refuse consent under section 35(4) of the Act. It sets out that undue pressure may be being applied where it appears that:

“[...] harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust; and that the adult at risk would consent if the adult did not have confidence and trust in that person.”³³

- [6.33] The Code of Practice makes it clear that it is also possible to be unduly pressurised, for the purposes of the Act, “by a person that the adult is afraid of or who is threatening them and that the adult does not trust”.³⁴
- [6.34] As part of a research study carried out among safeguarding practitioners in England, social workers provided case studies and in the context of one of those examples, stated that a new power of entry would enable professionals to see an at risk adult on their own, without it having to be the at risk adult’s idea that the person preventing

³² Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King’s College London, 2017) at i.

³³ Scottish Government, *Adult Support and Protection (Scotland) Act 2007 (2014), Code of Practice* (Scottish Government 2014) at 57, available at <https://www.gov.scot/publications/adult-support-and-protection-revised-code-of-practice/pages/1/>

³⁴ Stevens et al., “Social workers’ power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection” (2017) *The Journal of Adult Protection* 19(6), at 315; Scottish Government, *Adult Support and Protection (Scotland) Act 2007 (2014), Code of Practice* (Scottish Government 2014) at 58, available at <https://www.gov.scot/publications/adult-support-and-protection-revised-code-of-practice/pages/1/>

access has to leave, which could leave the adult at higher risk once the professional has left.³⁵

(ii) Gaining access where an adult does not have capacity to consent to entry

- [6.35] Research in England was conducted to investigate the prevalence and circumstances of situations where access to an adult at risk is denied or difficult, and to investigate the measures or methods that help practitioners to gain access. A study was undertaken of the factors that hinder or help access to adults at risk who are living in the community and who have decision-making capacity.³⁶
- [6.36] In England, the Equality and Human Rights Commission (EHRC) recommended that there should be an additional power of entry for local authority representatives, where a third party is refusing access to a person who may be at risk of abuse and neglect.³⁷ The EHRC also proposed that the relevant professionals provided with a power of entry should be experienced in adult safeguarding and should appropriately use independent advocates to establish contact with the at risk adult before using legal powers of entry, if possible. It stated that checks could ensure that such powers were used proportionately.
- [6.37] Under the *Adult Support and Protection (Scotland) Act 2007*, adults with capacity can decline to take part in a safeguarding interview, however, protection orders can be granted without the consent of the adult at risk if evidence can be shown that he or she lacks capacity or that the refusal was a result of undue pressure to consent, but only if a protection order is the only means of beneficially intervening.³⁸

(iii) Prevent abusive situations from escalating

- [6.38] A further argument in favour of a power of entry is that it may enable intervention before a situation escalates, and before serious or more harmful abuse is suffered. In 2013, an amendment to the English Care Bill was introduced into the House of Lords that would have allowed an "authorised officer" to apply to court for an adult safeguarding access order if there was a suspicion of abuse or neglect and a third

³⁵ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 260.

³⁶ Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 319.

³⁷ *House of Lords and House of Commons Joint Committee on the Draft Care and Support Bill* (2013), paragraph 156.

³⁸ *Adult Support and Protection (Scotland) Act 2007*, section 35; Preston- Shoot and Cornish, "Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) *The Journal of Adult Protection* 16(1), at 7.

party was preventing the officer from seeing and talking to the adult concerned. In outlining support for the amendment, Lord Rix stressed how sparingly the power would be used and stressed that the types of cases in which it would be used are awful cases, with people suffering "truly horrendous abuse".³⁹

- [6.39] Research, which re-analysed responses to the consultation of the Department of Health in England on a safeguarding power of entry, found that there appeared to be a belief among safeguarding practitioners that having a power of entry could be used to prevent situations escalating by intervening before situations develop into "life or limb" crises.⁴⁰ Some respondents argued that a power of entry could short-circuit the need for labour intensive social work skills approaches, and that such skilled approaches may result in someone remaining at risk of harm over a long period of time.⁴¹

(iv) Lack of effective alternate legal powers

- [6.40] In debates surrounding the proposed insertion of a safeguarding power of entry into the English Care Bill, the Rt Hon Paul Burstow MP queried what would be lawful if adult safeguarding professionals were stopped from making enquiries into an adult safeguarding concern by a third party, a family member or a close friend and where a person at risk is too frightened to speak up, is under duress or is effectively a prisoner in their own home. He stated that the answer given is generally that the High Court has jurisdiction to act and that is where the buck stops but he emphasised that this is a rarely used power of inherent jurisdiction, which he and the Joint Committee do not believe is sufficient. He argued that there was limited use of current legislative powers and there were questions regarding their efficacy.⁴²
- [6.41] Research conducted by Action on Elder Abuse in England found that practitioners were denied access to vulnerable or at risk adults suspected of being abused 29 times in a one year period because a third party was blocking access.⁴³ Access was never

³⁹ Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 319.

⁴⁰ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 261.

⁴¹ *Ibid*, at 262.

⁴² Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 323.

⁴³ Community Care, *Social workers blocked from combating abuse behind closed doors by lack of powers, suggests research* (2014), 10 March 2014, available at <https://www.communitycare.co.uk/2014/03/10/social-workers-blocked-combating-abuse-behind-closed-doors-lack-powers-suggests-research/>

gained in 21 of those cases, and in none of the 29 incidents was the failure to gain access a result of social workers' failure to use existing powers to gain access to the person.⁴⁴ A survey carried out among 365 members of the Action on Elder Abuse's network, including safeguarding specialists from local authorities and the NHS found that 82.2% indicated support for a power of entry. A little over half of the respondents (55.3%) stated that they do not think that failures to gain access were due to a lack of knowledge of the current legislative powers, although 44.7% suggested that a lack of knowledge may be an issue. However, Action on Elder Abuse, in highlighting that the law needed strengthening, stated "While there may be a need to improve understanding of the law, this is not what is preventing access to adults in such vulnerable situations."⁴⁵

(v) Social workers fear taking action in case of unlawfulness

- [6.42] In parliamentary debates regarding the proposed insertion of a safeguarding power of entry into the English Care Bill, Liz Kendall MP acknowledged views that the issue of gaining access to an at risk adult should instead be dealt with in guidance, policy and practice, but stated that leaving such a measure to policy and guidance may not be enough, as staff will be less likely to attempt to gain access if they are concerned that they would be breaking the law by doing so. She concluded that as long as the relevant clauses are tightly defined, it is essential that a power of access is provided.

(vi) Opportunity to offer timely information and advice

- [6.43] In its consultation on a proposed safeguarding power of entry, the Department of Health and Social Care (England) stated its awareness of a strong feeling from some that a specific power of entry in the circumstances set out in the consultation could give an opportunity to offer timely information and advice, and ensure that people who are unable or unwilling to ask for help can have their voices heard.⁴⁶

(vii) Existence of power may prevent offending

- [6.44] Some English safeguarding practitioners suggested that there was potential for the introduction of such a power to be a deterrent; countering the potential for increased

⁴⁴ Community Care, *Social workers blocked from combating abuse behind closed doors by lack of powers, suggests research* (2014), 10 March 2014, available at <https://www.communitycare.co.uk/2014/03/10/social-workers-blocked-combating-abuse-behind-closed-doors-lack-powers-suggests-research/>

⁴⁵ *Ibid.*

⁴⁶ Department of Health (England), *Consultation on a new adult safeguarding power - Consultation description* (Department of Health (England) 2013), available at <https://www.gov.uk/government/consultations/consultation-on-a-new-adult-safeguarding-power>

risk identified in some other responses.⁴⁷ It was the view of some practitioners that in many cases, the introduction of such a power, together with the ability to exclude third parties from living with the adult at risk for longer periods, may be sufficient in itself to gain their cooperation without the necessity to use the power of entry.⁴⁸

- [6.45] In the parliamentary debates in England regarding the proposed inclusion of a safeguarding power of entry in the Care Bill, Sarah Wollaston MP, in supporting the Clause, gave evidence from her experience as a General Practitioner in stating that where individuals who abuse at risk adults know that there are no powers of entry, they can act with impunity whereas with such a power in place, these people will know that there is a final backstop.⁴⁹ In the Welsh context, it was stated that the exercise of the power of entry under section 127 of the *Social Services and Well-being (Wales) Act 2014* would inform perpetrators that the local authority and police are involved, which may lead the perpetrator of the abuse to co-operate, to cease their behaviour and to avail of the supports offered.⁵⁰
- [6.46] A response to the consultation of the Department of Health in England on a safeguarding power of entry stated that a mere threat of using the statutory power gives the social workers "teeth" with which to investigate allegations of abuse.⁵¹

(viii) Lack of a power of entry proves costly

- [6.47] Cases in which access to an at risk adult is denied can be time-consuming and labour intensive for social workers and expensive in terms of resources for their employers.⁵² Research among safeguarding practitioners in England found that while there was a view that problems in gaining access were often an integral part of social work practice, many social workers and managers felt that these were a very costly element

⁴⁷ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 262.

⁴⁸ *Ibid.*

⁴⁹ Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 323.

⁵⁰ Williams, "Adult Safeguarding in Wales: one step in the right direction?" (2017) *The Journal of Adult Protection* 19(4), at 182.

⁵¹ Department of Health (England), *Government response to the Safeguarding Power of Entry consultation* (Department of Health (England) 2013) at 11.

⁵² Norrie et al., "Gaining Access to Possibly Abuse or Neglected Adults in England: Practice Perspectives from Social Workers and Service-User Representatives" (2018) *British Journal of Social Work* 4, at 1072.

of their work in terms of hours spent or advice obtained.⁵³ It found that problems in gaining access could mean that individual cases necessitated substantial professional involvement, with multiple professionals, including doctors where mental health problems were involved, and much communication and debate.⁵⁴

- [6.48] Some of the research participants also described how such cases impact on their other work despite the infrequency of the cases. Staff time was not the only source of increased cost identified; several participants stated that it had been necessary to commission extra services in some cases to secure contact with an adult at risk.⁵⁵

(b) Arguments against a new power of entry

(i) No conclusive proof that it would not cause more harm than good

- [6.49] The Department of Health in England stated that its consultation on a proposed safeguarding power of entry showed that, as the Department expected, it was a very sensitive and complex issue that divided opinion. It noted the strength of feeling from members of the public who were against a power of entry, and the risk of unintended consequences highlighted by some respondents. The consultation found that there was no conclusive proof that such a power would not cause more harm than good overall despite the possibility for it to be beneficial in a very few individual cases. The government therefore concluded that the responses to the consultation did not provide a compelling case to legislate for a new power of entry and it therefore did not add a power of entry to the Care and Support Bill.⁵⁶

(ii) Need for greater focus on community engagement, cooperation and a preventative approach – trust in professionals may be compromised

- [6.50] Lord Howe, in opposing the amendment to English Care Bill that would have allowed for a safeguarding power of entry, cited a consultation response in stating 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 that could be truly

⁵³ Manthorpe et al., "Safeguarding practice in England where access to an adult at risk is obstructed by a third party: findings from a survey" (2017) *The Journal of Adult Protection* 19(6), at 329.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Secretary of State for Health (England), *The Care Bill explained including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill* (Secretary of State for Health (England) 2013) at 67; Department of Health (England), *Government response to the Safeguarding Power of Entry consultation* (Department of Health (England) 2013) at 10.

empowering to the people involved.⁵⁷ He stated his belief that it would have an impact on mental health service and professional relationships with service users, as even if access was granted without force, trust would have been compromised and options limited.⁵⁸

(iii) *Availability of existing legal powers of entry*

- [6.51] A further argument against the introduction of a safeguarding power of entry is the availability of existing legal powers of entry. In the parliamentary debates in England regarding the proposed safeguarding power of entry, Lord Howe stated that there was no legislative vacuum preventing care or other professionals accessing those in urgent need of assistance and referred to the existing legislative provisions. He referred to the "lack of legal literacy" within the social care and other safeguarding professions and stated that greater knowledge of existing legal options is required, rather than additional legal provisions. He stated that with greater knowledge, professionals would be fully equipped to support people to be safe. He further argued that the core role of an adult social worker is to support people and that a specific legislative provision for a power of access would undermine this approach, sending the message that legal intervention takes primacy over negotiations and consensus.⁵⁹
- [6.52] In the English context, powers including section 17 the *Police and Criminal Evidence Act 1984*, section 135 the *Mental Health Act 1983*, the seeking of an order from the Court of Protection and the inherent jurisdiction of the High Court were cited as existing legal powers that could be used to gain access to an at risk adult.⁶⁰

(iv) *Increased risk for at risk adults*

- [6.53] Another argument against the introduction of a safeguarding power of entry is that the use of a power of entry would leave at risk adults in greater danger of abuse, or in danger as a result of retribution from their abuser. It has been argued that the perpetrator of the abuse may become so enraged by any intervention that he or she

⁵⁷ Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 322.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Stevens et al., "Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection" (2017) *The Journal of Adult Protection* 19(6), at 312-322; Community Care, *Social workers blocked from combating abuse behind closed doors by lack of powers, suggests research* (2014), 10 March 2014, available at <https://www.communitycare.co.uk/2014/03/10/social-workers-blocked-combating-abuse-behind-closed-doors-lack-powers-suggests-research/>

escalates their behaviour and frustrates any actions plan or further visits, or their abusive behaviour worsens resulting in the victim being at greater risk.⁶¹

- [6.54] A number of responses to the consultation of the Department of Health in England on a safeguarding power of entry also suggested that a power of entry could exacerbate risk of harm.⁶² In the parliamentary debates in England concerning the second attempt to introduce a power of entry into the Care Bill, a government minister queried whether a power of entry might put someone at further risk and result in retribution. Paul Burstow MP responded that new legal safeguards were contained in the clause and that usage of the High Court's inherent jurisdiction was unsatisfactory.⁶³

(v) *Potential for disproportionate interference with the rights of adults*

- [6.55] An additional argument against the introduction of a safeguarding power of entry is the potential for the power to result in disproportionate interference with the rights of at risk adults. In the parliamentary debates in England concerning the proposed introduction of a safeguarding power of entry, the importance of not disproportionately interfering with the rights of adults was emphasised.⁶⁴ A number of members of the public, who replied to the consultation of the Department of Health and Social Care in England on whether there was a need for a new power of entry for social workers, submitted that a power of entry would provide unnecessary intrusion into private life and unjustifiably extend the powers of the state.⁶⁵
- [6.56] Many respondents to the consultation of the Department of Health in England on a safeguarding power of entry identified the potential usefulness of such a power but noted that the positives would have to be weighed against the risks of its inappropriate or excessive use and the potential for it to be used as a "shortcut" by social workers.⁶⁶ This point relates to debates about the human rights of adults at risk

⁶¹ Williams, "Adult Safeguarding in Wales: one step in the right direction?" (2017) *The Journal of Adult Protection* 19(4), at 182.

⁶² Department of Health (England), *Government response to the Safeguarding Power of Entry consultation* (Department of Health (England) 2013) at 10.

⁶³ Manthorpe et al., "Parliamentary arguments on powers of access – the Care Bill debates" (2016) *The Journal of Adult Protection* 16(6), at 323.

⁶⁴ *Ibid*, at 324.

⁶⁵ Stevens et al., "Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection" (2017) *The Journal of Adult Protection* 19(6), at 313.

⁶⁶ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 263.

including the rights to privacy and autonomy.⁶⁷ Most of the respondents to the consultation of the Department of Health in England on a safeguarding power of entry believed that such a power would be used rarely, if at all. This applied both to those in favour and those against. However, the opposing minority view was that the very small number of cases where such a power would be helpful would be outnumbered by cases where it could be misused.⁶⁸

(vi) *Social work skills should be able to overcome access difficulties*

- [6.57] A further argument against the introduction of a safeguarding power of entry is that social work skills should be used to overcome barriers to gaining access. Research conducted in England into the approaches used by social workers to gain access in such cases found that negotiation was the most common approach reported in the survey. Negotiation may range from "soft" styles aiming to develop rapport to a more assertive approach, which may involve explicit reference to legal routes.⁶⁹
- [6.58] In a research study carried out among safeguarding practitioners in England, many participants stated that overcoming a reluctance to engage is a core social work skill and that there are many cases in which gaining access is not immediate, although many stressed the heavy demands placed on resources from a small number of cases where access problems were prolonged and concerns about serious abuse remained.⁷⁰ In a study re-analysing responses to a question that formed part of the 2012 consultation of the Department of Health in England on a proposed safeguarding power of entry, it was found that some submissions had warned that a power of entry could disrupt established relationships between social workers and adults at risk.⁷¹ One response stressed the importance of perseverance and creativity in social work

⁶⁷ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 263; Stevens et al., "Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection" (2017) *The Journal of Adult Protection* 19(6), at 312; Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at 5 and 52.

⁶⁸ Department of Health (England), *Government response to the Safeguarding Power of Entry consultation* (Department of Health (England) 2013) at 9.

⁶⁹ Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at iv.

⁷⁰ Manthorpe et al., "Safeguarding practice in England where access to an adult at risk is obstructed by a third party: findings from a survey" (2017) *The Journal of Adult Protection* 19(6), at 329.

⁷¹ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection*, 18(5), at 262.

practice and highlighted concerns that a power of entry might discourage social work approaches to relationship building.⁷²

(vii) *A multi-agency approach can be used to secure access*

- [6.59] A final argument against the introduction of a safeguarding power of entry is that a multi-agency approach should be sufficient to secure access. Research found that social workers identified good multiagency working as an essential approach to securing access. Police, health, fire ambulance and housing services' involvement was highlighted to a significant extent by research participants.⁷³ Multi-agency information sharing was also identified as something that would assist in resolving issues with gaining access as well as more explicit powers or responsibilities for multi-agency partners.⁷⁴ Further research in England identified multi-agency procedures and working with GPs and/or health visitors as good initial strategies, although sometimes court orders were required if such approaches were ineffective.⁷⁵ Research participants also mentioned working with housing officials and gas supply representatives, who possess powers of entry for reasons of public nuisance or safety, as well as working with the police.⁷⁶
- [6.60] Some of the responses to the consultation of the Department of Health in England on a safeguarding power of entry also referred to examples where, although having a power of entry might have resolved the situation more quickly, the situation was ultimately addressed through other means (e.g. a GP gained access, social workers spoke to the person in the day centre they visited, a district nurse was allowed to speak to the person).⁷⁷ Multi-agency collaboration in the context of adult safeguarding is discussed in Issue 11, below.

⁷² Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection*, 18(5), at 262.

⁷³ Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at iv.

⁷⁴ *Ibid.*

⁷⁵ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 261.

⁷⁶ *Ibid.*

⁷⁷ Department of Health (England), *Government response to the Safeguarding Power of Entry Consultation* (Department of Health (England) 2013) at 8.

Questions for Issue 6

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?

ISSUE 7 SAFEGUARDING INVESTIGATIVE POWERS

- [7.1] In addition to a safeguarding power of entry or access, there are a number of investigative powers that could be introduced to safeguard at risk adults. Such powers include a power of assessment, a power of removal, safety orders, barring orders and protection orders.

1. Existing safeguarding powers in the Irish context

- [7.2] In the Irish context, there are legislative provisions for safety orders, barring orders, protection orders and a power of removal in limited circumstances.

(a) Safety orders, barring orders and protection orders

- [7.3] The *Domestic Violence Act 2018* provides for barring orders and safety orders in domestic violence situations in certain categories of relationships. However, safeguarding concerns could exist in situations in which those powers do not apply, such as relationships between a formal carer and an at risk adult, or relationships between an adult sibling and an at risk adult who do not reside together.

(i) Safety orders

- [7.4] Section 6(2) of the *Domestic Violence Act 2018* provides that the court may grant a safety order where the court, on application to it, is of the opinion that there are reasonable grounds for believing that the safety or welfare of an applicant or a dependent person so requires, it shall, subject to section 12, by order (a "safety order") prohibit the respondent to the application from doing one or more of the following:

- (a) using or threatening to use violence against, molesting or putting in fear, the applicant or the dependent person;
- (b) if he or she is residing at a place other than the place where the applicant or that dependent person resides, watching or besetting a place where the applicant or the dependent person resides;
- (c) following or communicating (including by electronic means) with the applicant or the dependent person.

- [7.5] Section 6(1) sets out the categories of relationship in which a person can be prohibited for the above conduct by a safety order. It provides that a safety order can be issued where the applicant (the person whom the order is seeking to protect):

- (i) is the spouse of the respondent,
- (ii) is the civil partner of the respondent,

- (iii) is not the spouse or civil partner of the respondent and is not related to the respondent within a prohibited degree of relationship, but was in an intimate relationship with the respondent prior to the application for the safety order,
- (iv) is a parent of the respondent and the respondent is of full age and is not, in relation to the parent, a dependent person,
- (v) being of full age, resides with the respondent in a relationship the basis of which is not primarily contractual, or
- (vi) is a parent of a child whose other parent is the respondent.

(ii) Barring orders

- [7.6] Section 7(2) (a) of the *Domestic Violence Act 2018* provides for a barring order where the court, on application to it, is of the opinion, that there are reasonable grounds for believing that the safety or welfare of the applicant or a dependent person so requires. It provides that court shall, subject to section 12, by order (a "barring order"):
- (i) direct the respondent, if residing at a place where the applicant or the dependent person resides, to leave the place, and
 - (ii) whether the respondent is or is not residing at a place where the applicant or the dependent person resides, prohibit the respondent from entering the place until further order of the court or until such other time as the court shall specify.
- [7.7] Section 7(3) of the Act provides that a barring order may, if the court thinks fit, prohibit the respondent from doing one or more of the following:
- (a) using or threatening to use violence against, molesting or putting in fear, the applicant or a dependent person;
 - (b) attending at or in the vicinity of, or watching or besetting, a place where the applicant or a dependent person resides;
 - (c) following or communicating (including by electronic means) with the applicant or a dependent person.
- [7.8] Section 7(1) of the Act sets out the categories of relationship between the applicant, whom the order is intended to protect, and the respondent, on whom the barring order is applied. It provides that a barring order may be issued where the applicant:
- (a) is the spouse of the respondent,
 - (b) is the civil partner of the respondent,

- (c) is not the spouse or civil partner of the respondent and is not related to the respondent within a prohibited degree of relationship but lived with the respondent in an intimate relationship prior to the application for the barring order, or
 - (d) is a parent of the respondent and the respondent is a person of full age who is not, in relation to the parent, a dependent person.
- [7.9] Section 8(1) of the Act provides for the making of an interim barring order where the court, on application to it for a barring order or between the making of that application and its determination, is of the opinion that there are reasonable grounds for believing (a) there is an immediate risk of significant harm to the applicant or a dependent person, and (b) the making of a protection order would not be sufficient to protect the applicant or a dependent person. Section 9 provides for the making of an emergency barring order in specific circumstances.

(iii) Protection orders

- [7.10] Section 10(1) of the *Domestic Violence 2018 Act* provides for the making of a protection order where the court, on application to it for a safety order or a barring order or between the making of that application and its determination, is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant for the order concerned or of a dependent person so requires. It provides that the court shall by order (a "protection order") prohibit the respondent to the application from doing one or more of the following:
- (a) using or threatening to use violence against, molesting or putting in fear, the applicant or the dependent person;
 - (b) if he or she is residing at a place other than the place where the applicant or the dependent person resides, watching or besetting the place where the applicant or the dependent person resides;
 - (c) following or communicating (including by electronic means) with the applicant or that dependent person.

(b) Power of removal and assessment

- [7.11] The *Mental Health Act 2001* provides for a power of removal where a member of the Garda Síochána has reasonable grounds for believing that a person is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons.¹ Section 12(1)(a) further provides that the member may, either alone or with

¹ *Mental Health Act 2001*, section 12(1).

any other members of the Garda Síochána, take the person into custody. Provisions are also made under the Act for an application to a registered medical practitioner for a recommendation² and for the removal of a person to an approved centre specified in a medical practitioner's recommendation.³ The Act further provides for the conducting of an examination by a consultant psychiatrist and for the making of an admission order for the reception, detention and treatment of a person, if deemed necessary.⁴ However, the provisions only apply in the specified limited circumstances and there is no general power of adult in adult safeguarding situation where the person does not have a mental health issue.

(c) Order under the Non-Fatal Offences Against the Person Act 1997

- [7.12] Section 10(3) of the *Non-Fatal Offences Against the Person Act 1997* provides that where a person is guilty of an offence of harassment under section 10(1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.⁵ A person who fails to comply with the terms of such an order shall be guilty of an offence.⁶ If, on the evidence, the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make such an order upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.⁷

2. Safeguarding powers in other jurisdictions

(a) Scotland

- [7.13] The *Adult Support and Protection (Scotland) Act 2007* provides for a duty to make inquiries as well as assessment, removal, banning and protection orders. Where a local authority is uncertain whether an adult is at risk, it has the duty to make inquiries under section 4 of the Act. It provides that a council must make inquiries about a person's well-being, property or financial affairs if it knows or believes— (a) that the

² *Mental Health Act 2001*, section 12(2).

³ *Mental Health Act 2001*, section 13.

⁴ *Mental Health Act 2001*, section 14.

⁵ *Non-Fatal Offences Against the Person Act 1997*, section 10(3).

⁶ *Non-Fatal Offences Against the Person Act 1997*, section 10(4).

⁷ *Non-Fatal Offences Against the Person Act 1997*, section 10(5).

person is an adult at risk, and (b) that it might need to intervene in order to protect the person's well-being, property or financial affairs.

- [7.14] A power of interview is also provided under the Act. Section 8(1) of the Act provides that a council officer, and any person accompanying the officer, may interview, in private, any adult found in a place being visited under section 7. Section 8(2) provides that an adult being interviewed is not required to answer any question, and the adult must be informed of that fact before the interview starts.
- [7.15] A power to conduct a medical examination is also provided for under Section 9. Section 9(1) provides that where (a) a council officer finds a person whom the officer knows or believes to be an adult at risk in a place being visited under section 7, and (b) the officer, or any person accompanying the officer, is a health professional, that health professional may conduct a private medical examination of the person. A person must be informed of the right to refuse to be examined before a medical examination is carried out (whether under section 9 or in pursuance of an assessment order).⁸
- [7.16] Assessment orders are provided for under section 11 of the Act. Section 11(1) provides that a council may apply to the sheriff for an order ("an assessment order") which authorises a council officer to take a specified person from a place being visited under section 7 in order to allow—
 - (a) a council officer, or any council nominee, to interview the specified person in private, and
 - (b) a health professional nominated by the council to conduct a private medical examination of the specified person.
- [7.17] A power of assessment is provided for the purpose of enabling or assisting the council to decide (a) whether the person is an adult at risk, and (b) if it decides that the person is an adult at risk, whether it needs to do anything (by performing functions under this Part or otherwise) in order to protect the person from harm.⁹
- [7.18] The criteria for granting assessment order are also set out under the Act.¹⁰ Section 12(1) provides that the sheriff may grant an assessment order only if satisfied—

⁸ *Adult Support and Protection (Scotland) Act 2007*, section 9(2).

⁹ *Adult Support and Protection (Scotland) Act 2007*, section 11(2).

¹⁰ *Adult Support and Protection (Scotland) Act 2007*, section 12.

- (a) that the council has reasonable cause to suspect that the person in respect of whom the order is sought is an adult at risk who is being, or is likely to be, seriously harmed,
 - (b) that the assessment order is required in order to establish whether the person is an adult at risk who is being, or is likely to be, seriously harmed, and
 - (c) as to the availability and suitability of the place at which the person is to be interviewed and examined.
- [7.19] A restriction on the power of removal under an assessment order is provided for under the Act in that a person may be taken from a place in pursuance of an assessment order only if it is not practicable (due to a lack of privacy or otherwise) to (a) interview the person under section 8, or (b) conduct a medical examination of the person under section 9, during a visit under section 7.¹¹
- [7.20] Removal orders are also provided for separately under the Act. Section 14(1) provides that council may apply to the sheriff for an order ("a removal order") which authorises a council officer, or any council nominee, to move a specified person to a specified place within 72 hours of the order being made, and authorises the council to take such reasonable steps as it thinks fit for the purpose of protecting the moved person from harm. A removal order expires 7 days (or such shorter period as may be specified in the order) after the day on which the specified person is moved in pursuance of the order.¹² A sheriff may grant a removal order only if satisfied that the person in respect of whom the order is sought is an adult at risk who is likely to be seriously harmed if not moved to another place, and only if satisfied as to the availability and suitability of the place to which the adult at risk is to be moved.¹³
- [7.21] Banning orders are also provided for under the *Adult Support and Protection (Scotland) Act 2007*. A banning order is an order granted by the sheriff which bans the subject of the order ("the subject") from being in a specified place.¹⁴ A banning order may also:
- (a) ban the subject from being in a specified area in the vicinity of the specified place,
 - (b) authorise the summary ejection of the subject from the specified place and the specified area,

¹¹ *Adult Support and Protection (Scotland) Act 2007*, section 13.

¹² *Adult Support and Protection (Scotland) Act 2007*, section 14(2).

¹³ *Adult Support and Protection (Scotland) Act 2007*, section 15.

¹⁴ *Adult Support and Protection (Scotland) Act 2007*, section 19(1).

- (c) prohibit the subject from moving any specified thing from the specified place,
- (d) direct any specified person to take specified measures to preserve any moveable property owned or controlled by the subject which remains in the specified place while the order has effect,
- (e) be made subject to any specified conditions,
- (f) require or authorise any person to do, or to refrain from doing, anything else which the sheriff thinks necessary for the proper enforcement of the order.¹⁵

[7.22] A sheriff may grant a banning order only if satisfied:

- (a) that an adult at risk is being, or is likely to be, seriously harmed by another person,
- (b) that the adult at risk's well-being or property would be better safeguarded by banning that other person from a place occupied by the adult than it would be by moving the adult from that place, and
- (c) that either—
 - (i)the adult at risk is entitled, or permitted by a third party, or
 - (ii)neither the adult at risk nor the subject is entitled, or permitted by a third party, to occupy the place from which the subject is to be banned.¹⁶

[7.23] Temporary banning orders are provided for under section 21 of the Act. Section 22 sets out the parties who have the right to apply for a banning order and the circumstances in which a council must apply for a banning order. Section 25 provides that the sheriff may attach a power of arrest to any banning order or temporary banning order. A power of arrest for breach of a banning order is also provided for where a constable reasonably suspects the subject to be breaching, or to have breached, the order, and considers that there would, if the subject were not arrested, be a risk of the subject breaching the order again.¹⁷ Following the breach of a banning order, if the sheriff is satisfied that there is a substantial risk that the detained person will breach the order again, the sheriff may by order authorise the continuation of the

¹⁵ *Adult Support and Protection (Scotland) Act 2007*, section 19(2).

¹⁶ *Adult Support and Protection (Scotland) Act 2007*, section 20.

¹⁷ *Adult Support and Protection (Scotland) Act 2007*, section 28A.

detention for a period of not more than 2 days (not counting days which are not court days).¹⁸

(b) Wales

- [7.24] Powers of interview and assessment are provided under the *Social Services and Well-being (Wales Act) 2014*. Section 127 of the Act provides for adult protection and support orders. It provides that an authorised officer may apply to a justice of the peace for an order ("an adult protection and support order") in relation to a person living in any premises within a local authority's area.¹⁹ The purposes of an adult protection and support order are:
- (a) to enable the authorised officer and any other person accompanying the officer to speak in private with a person suspected of being an adult at risk,
 - (b) to enable the authorised officer to ascertain whether that person is making decisions freely, and
 - (c) to enable the authorised officer properly to assess whether the person is an adult at risk and to make a decision as required by section 126(2) on what, if any, action should be taken.

(c) England

- [7.25] In England, there is a legislative duty to make inquiries where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there) has needs for care and support (whether or not the authority is meeting any of those needs), is experiencing, or is at risk of, abuse or neglect, and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.²⁰ Section 42(2) of the *Care Act 2014* provides that the local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case and, if so, what and by whom.

3. The requirement for additional safeguarding powers in the Irish context

- [7.26] There are a number of arguments for and against the inclusion of such investigative powers in adult safeguarding legislation.

¹⁸ *Adult Support and Protection (Scotland) Act 2007*, section 34(1).

¹⁹ *Social Services and Well-being (Wales Act) 2014*, section 127(1).

²⁰ *Care Act 2014*, section 42(1).

(a) Arguments for the introduction of additional safeguarding investigative powers

- [7.27] The primary argument in favour of the introduction of investigative powers is the impact of such powers on the safeguarding of adults. Research with adult safeguarding practitioners in Scotland found that most of the outcomes that the powers under the *Adult Support and Protection (Scotland) Act 2007* had generated had been positive. It found that the legislative provisions had provided remedies in cases of financial and/or physical abuse, preventing further exploitation or harm, and enabling service users to become more self-confident and self-sufficient.²¹ A report from a local authority recorded that, of those adults who had been subject to protection orders, the overwhelming majority had commented that they felt safer.²² Case studies have also highlighted the positive financial and physical effects of banning orders on the at risk adults concerned.²³
- [7.28] A further argument in favour of such powers is that a power of entry to gain access to a person is not effective without additional safeguarding powers. Responses from participants in the 2012 consultation by the Department of Health in England on a safeguarding power of entry raised the question as to whether additional powers may be needed to minimise the possibility of increasing risk.²⁴ A case study was outlined of an at risk adult who had been "befriended" by two males who consistently refused to agree for the service user to be assessed alone. The service user was prompted regarding what to say but it was difficult to provide evidence of coercion or abuse. In this case, it was concluded that a right of entry would have been effective in enabling a comprehensive risk assessment but that it was unlikely that the outcome would have been effective in reducing risk to the service user without powers to remove the individual from the potential abuser in the home.²⁵
- [7.29] An additional argument in favour of investigative powers is that such powers are used rarely and proportionately in the Scottish context. Although the data on the usage of the powers under the *Adult Support and Protection (Scotland) Act 2007* is incomplete, a survey of Adult Protection Committee reports that was conducted in early 2017

²¹ Preston-Shoot and Cornish, "Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) *The Journal of Adult Protection* 16(1), at 9.

²² *Ibid.*, at 8-9.

²³ *Ibid.*, at 13.

²⁴ Norrie et al., "The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation" (2016) *The Journal of Adult Protection* 18(5), at 263.

²⁵ *Ibid.*

indicated that approximately 100 had been used in the period from 2012-2014.²⁶ Nearly all of the powers used were banning orders, which prohibit someone from entering a property or area for a certain period of time.²⁷ Low usage rates indicate that the powers are relied on as a last resort when all other options available to resolve a situation have been exhausted. Indeed, a study of Scottish Adult Protection Committee biennial reports concluded that protection orders were only used when other options had been considered and ruled as unlikely to bring the necessary benefits for the adult at risk.²⁸

- [7.30] For the reasons outlined in the case study above, a further argument in favour of such powers is the need for a power of interview, assessment or removal to ensure that potentially at risk adults can be interviewed alone particularly in situations where they may be being unduly influenced by a third party.
- [7.31] If such powers were to be introduced in the Irish context, it would have to be decided as to which parties could make an application for such orders. It could be argued that the right to apply for an order could apply to the same parties on whom similar powers are conferred under the *Domestic Violence Act 2018*. However, it could be argued that the HSE or the proposed national safeguarding authority should be able to apply to court for an order in adult safeguarding situations. The *Domestic Violence Act 2018* provides that "the Agency" may apply to court for an order under the Act. The Agency for the purposes of the Act is the Child and Family Agency. However, it is arguable that it would be more appropriate for the HSE or the proposed national safeguarding authority to have such a role in relation to adult safeguarding.

(b) Arguments against the introduction of additional safeguarding investigative powers

- [7.32] The arguments against such additional investigative powers are similar to a number of the arguments against the introduction of a power of entry and inspection, as outlined in Issue 6, above. One argument is that there is potential for such powers to result in disproportionate interference with the rights of adults, and to be used inappropriately. Although research with Scottish adult safeguarding practitioners found there to be mostly positively responses to the introduction of the powers under the *Adult Support and Protection (Scotland) Act 2007*, practitioners also commented that the Act could

²⁶ Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at ii.

²⁷ *Ibid.*

²⁸ Preston-Shoot and Cornish, "Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) *The Journal of Adult Protection* 16(1), at 8.

over-formalise procedures too quickly and should in fact only be applied once less formal inquiries had shown there to be an evident need.²⁹ This is linked to a further argument against the introduction of a power of assessment, which is that alternative means such as social work skills should be used to gain access to an adult for the purposes of an assessment.

Questions for Issue 7

- 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*?

²⁹ Preston-Shoot and Cornish, "Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) *The Journal of Adult Protection* 16(1), at 10.

ISSUE 8 REPORTING

1. Background to the proposed introduction of mandatory reporting

- [8.1] The term "mandatory reporting" is understood to refer to the introduction of legislation to make obligatory or mandate the reporting of specific incidents such as abuse situations, or the reporting of reasonable suspicions that such situations may have occurred. In systems of mandatory reporting, a report must be made if a specified public body or office holder knows or suspects that a specified type of incident or behaviour has occurred.
- [8.2] A system of mandatory reporting is in place in Ireland for the reporting of child abuse. Mandatory reporting of child abuse was first recommended by the Commission in 1990 in its *Report on Child Sexual Abuse*.¹ It was also recommended in the Kilkenny incest case report in 1993.² This was followed by the publication of a discussion document on mandatory reporting of child abuse in 1996.³ The *Children First National Guidelines for the Protection and Welfare of Children*⁴ were issued in 1999, providing detailed guidance on definitions of abuse and reporting arrangements. The guidelines effectively provided for administrative mandatory reporting, so that all health professionals, for example, were under an obligation to report any cases of child abuse that they came across in their work. This extended across the health services, including in respect of people in hospitals and all other areas. The guidelines were in place for over 11 years, and were then revised by the Department of Children and Youth Affairs in July 2011.⁵ The Heads of the *Children First Bill* were then published in April 2012. The *Children First Bill* was published in April 2014 and enacted as the *Children First Act 2015* in November 2015. The Act provides for mandatory reporting of child abuse, and the relevant provisions were commenced in December 2017. In a presentation to the

¹ Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990), Chapter 1.

² Minister for Health, *Kilkenny Incest Case Report: Motion, Dáil Éireann debate -*

*Tuesday, 25 May 1993, Vol. 431 No. 3 (25 May 1993) available at
<https://www.oireachtas.ie/en/debates/debate/dail/1993-05-25/>*

³ Department of Health and Children, *Putting Children First* (Department of Health and Children 1996).

⁴ Department of Health and Children, *Children First National Guidelines for the Protection and Welfare of Children* (Department of Health and Children 1999),
https://www.dcyd.gov.ie/documents/publications/Children_First_A4.pdf

⁵ Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (DCYA 2011),
<https://www.dcyd.gov.ie/documents/Publications/ChildrenFirst.pdf>

Joint Oireachtas Committee on Health, a representative of the Department of Health thought it important to highlight the timeline leading to the introduction of mandatory reporting for children and particularly the fact that approximately 27 years had passed between the first recommendation in relation to mandatory reporting for children and its introduction, as this has influenced the thinking of the Department with regard to the introduction of mandatory reporting for at risk adults.⁶ The representative added that the question of mandatory reporting is still "quite controversial".⁷

- [8.3] The Joint Oireachtas Committee on Health recommended in its *Report on Adult Safeguarding* that further consideration be given to the benefits of mandatory reporting for adult safeguarding.⁸ A member of the Joint Oireachtas Committee also accepted that mandatory reporting is an issue that needs to be "teased out" and that mandatory reporting is neither good nor bad but that it is an outstanding issue that needs to be looked at further.⁹ International research has identified differing outcomes and impacts of mandatory reporting.¹⁰ The advantages and disadvantages of mandatory reporting are discussed in the following sections.

2. Current reporting regime in Ireland

- [8.4] Ireland currently has a permissive reporting model for adult safeguarding. Permissive reporting, in relation to adult abuse or neglect, refers to a system whereby the law does not require or mandate individuals to report adult abuse or neglect. Instead, individuals use their personal or professional judgment and duty of care to determine whether or not to make a report about suspected or abuse or neglect. Permissive reporting systems are often supported by mandated duties or response processes; such processes include a duty to "make enquiries" or to "investigate" cases of suspected abuse or neglect. While Ireland currently has a permissive reporting system,

⁶ Frances Spillane, *Department of Health, Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

⁷ *Ibid.*

⁸ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 8.

⁹ Senator Colette Kelleher, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/

¹⁰ Pat Healy, National Director of the Social Care Division (HSE), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/

it lacks statutory mandated duties or responses. The question as to whether to introduce statutory mandated responses or duties is discussed in Issue 7, above.

- [8.5] Although Ireland has a permissive reporting regime regarding suspicions of adult abuse or neglect generally, the law requires the reporting of abuse in circumstances where a person knows or believes that certain offences have been committed against a vulnerable person. Section 3(1) of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* provides that a person shall be guilty of an offence if (a) he or she knows or believes that an offence, that is a Schedule 2 offence, has been committed by another person against a vulnerable person¹¹, and (b) he or she has information, which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána. The relevant offences set out under Schedule 2 include, inter alia, the common law offence of false imprisonment, rape, sexual assault and the offence of adult causing harm under section 3 of the *Non-Fatal Offences against the Person Act 1997*. Certain acts of abuse or neglect that could be covered by the introduction of a mandatory reporting regime or a reportable incidents model including acts of omission or neglect, psychological abuse and financial abuse are not covered under the 2012 Act.

3. Reporting models in other jurisdictions

- [8.6] Models for reporting suspected or actual abuse or neglect of at risk adults in other jurisdictions vary widely from permissive reporting to universal mandatory reporting, mandatory reporting and a hybrid or reportable incidents type model.
- (a) **Scotland**
- [8.7] A system of mandatory reporting of concerns regarding abuse or suspected abuse of at risk adults exists in Scotland. Section 5(3) of the *Adult Support and Protection (Scotland) Act 2007* provides for a duty of mandatory reporting where a public body or

¹¹"Vulnerable person" is defined in section 1 of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* as "a person (including, insofar as the offences specified at paragraph 8 of Schedule 2 are concerned, a child aged 17 years old)—(a) who—(i) is suffering from a disorder of the mind, whether as a result of mental illness or dementia, or (ii) has an intellectual disability, which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or (b) who is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána or both."

office-holder, to which the section applies, knows or believes (a) that a person is an adult at risk, and (b) that action needs to be taken in order to protect that person from harm. The applicable public bodies and office holders are set out under section 5(1). The accompanying Code of Practice provides that, even where the public body or office-holder is in doubt, the referral should be made and should be counted as a referral by the receiving authority.¹² The receiving authority then has a duty to make inquiries and may take such investigative measures as deemed necessary to assess whether the adult is an adult at risk of harm and to determine what action should be taken to protect the adult.¹³

(b) Wales

- [8.8] A system of mandatory reporting is also in place in Wales. Section 128 of the *Social Services and Well-being (Wales) Act 2014* provides for a mandatory duty to report if a relevant partner has reasonable cause to suspect that a person is an adult at risk. Bodies or officer holders that constitute relevant partners for the purposes of section 128 are those set out in section 162(4).

(c) England

- [8.9] A system of permissive reporting exists in England. Where a report is made regarding suspicions of abuse, local authorities have a duty to make inquiries to determine whether an adult is at risk under section 42 of the *Care Act 2014*.

(d) Northern Ireland

- [8.10] A system of permissive reporting is also in place in Northern Ireland. However, one of the aims of the Northern Irish adult safeguarding policy, *Adult Safeguarding: Prevention and Protection in Partnership*, is to "establish clear guidance for reporting concerns that an adult is, or may be, at risk of being harmed or in need of protection and how these will be responded to".¹⁴ The policy also discusses the under-reporting of adult abuse and encourages organisations to ensure a culture of zero-tolerance of harm to adults and to have education programmes in place to encourage a zero-tolerance culture and the reporting of concerns to the relevant named authorities.¹⁵ It states that those providing services to adults who may be at risk should ensure organisational procedures are in place to guide staff when concerns are identified, and

¹² The Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (The Scottish Government 2014) at paragraph 14.

¹³ *Ibid.*

¹⁴ Department of Health, Social Services and Public Safety and Department of Justice (NI), *Adult Safeguarding: Prevention and Protection in Partnership* (DHSSPS and DoJ 2015).

¹⁵ *Ibid.* at 19 and 21.

that all those working to provide services to the community generally have a responsibility to refer concerns to their local relevant authority.¹⁶ It sets out that, at a minimum, service providers will be expected to safeguard adults who may be at risk by, inter alia, knowing how and when to report safeguarding concerns to Health and Social Care (HSC) Trusts or the Police Service of Northern Ireland (PSNI).¹⁷ The policy provides that if there is a clear and immediate risk of harm or a crime is alleged or suspected, the matter should be referred directly to the PSNI or HSC Trust Adult Protection Gateway Service.¹⁸ It also sets out a referral pathway for safeguarding concerns, and a process for determining whether the thresholds for referral to the Adult Protection Gateway Service have been met.¹⁹

(e) Australia

- [8.11] A hybrid model of mandatory and permissive reporting exists in Australia, as the law provides for mandatory reporting in residential care settings but reporting of allegations of abuse outside of residential care settings is permissive. The *Aged Care Act 1997* provides for mandatory reporting in residential care settings following an amendment by the *Aged Care Amendment (Security and Protection) Act 2007*. A reportable assaults model is set out under the Act as it provides that physical or sexual assaults by staff, residents or others must be reported to the relevant authorities. Allegations or suspicions of unlawful sexual contact with a resident or unreasonable use of force with a resident must be reported to the police and the Department of Health and Ageing within 24 hours. The Act allows for discretion as regards the reporting of alleged assaults perpetrated by residents who have been assessed as lacking mental capacity. The police investigate any allegations of criminal activity while the Department of Health and Ageing investigates the compliance of the residential care provider with the *Aged Care Act 1997*.²⁰ The existing reportable assaults scheme only applies to residential care facilities and is limited to physical and sexual assault.
- [8.12] In 2017, the Australian Law Reform Commission (ALRC) recommended that the existing law be replaced by a reportable incidents type model or "serious incident response scheme", which would require approved providers to notify to an independent oversight body: (a) an allegation or a suspicion on reasonable grounds of

¹⁶ Department of Health, Social Services and Public Safety and Department of Justice (NI), *Adult Safeguarding: Prevention and Protection in Partnership* (DHSSPS and DoJ 2015) at 23.

¹⁷ *Ibid*, at 24.

¹⁸ *Ibid*, at 32.

¹⁹ Department of Health, Social Services and Public Safety and Department of Justice (NI), *Adult Safeguarding: Prevention and Protection in Partnership* (DHSSPS and DoJ 2015) at 32 to 35.

²⁰ Sadler, *Elder Abuse: One Report too Many? Results of the ACSA Online Survey on Compulsory Reporting of Assaults* (Aged and Community Services Australia 2009) at 1.

a serious incident; and (b) the outcome of an investigation into a serious incident, including findings and action taken.²¹ A proposed definition of "serious incident" extends the range of reportable incidents from those required to be reported under the current model to include: physical, sexual or financial abuse; seriously inappropriate, improper, inhumane or cruel treatment; unexplained serious injury; and neglect.²² The ALRC also recommended that the serious incident response scheme should be extended to home care where the alleged perpetrator is a staff member of an approved provider and where the alleged abuse is physical, sexual or financial abuse.²³

(f) Canada

- [8.13] In Canada, responsibility for adult safeguarding is held at a provincial level rather than at a federal level, and the reporting requirements vary widely from province to province.
- [8.14] Similarly to Ireland, British Columbia has a voluntary or permissive reporting system, meaning that it is possible but not obligatory to report concerns that an adult is being abused, neglected or self-neglected to the regional health authority or Community Living British Columbia.²⁴ Unlike Ireland, this permissive reporting model is provided for on a legislative basis. Section 46 of the British Columbia *Adult Guardianship Act 2000* specifically provides that anyone who has information indicating that an adult is abused or neglected, and is being restrained from, or is unable, due to lacking the physical or mental capacity, to report the circumstances to a designated agency.²⁵ Section 46 also provides for measures to protect the identity of a person who makes a report as well as other protective measures including that no actions for damages may be brought against a person for making a relevant report unless the person made the report falsely and maliciously.²⁶ In providing such protections, the Act encourages reports of abuse in good faith.

²¹ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131, 2017) at paragraph 4.41.

²² *Ibid*, at paragraph 4.82.

²³ *Ibid*, at paragraphs 4.82 and 4.95.

²⁴ National Initiative for the Care of the Elderly (Canada), *Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada* (NICE 2012) at 114.

²⁵ *Adult Guardianship Act 2000*, section 46(1).

²⁶ *Adult Guardianship Act 2000*, section 46(2)-(4).

- [8.15] A hybrid reporting system is in place in Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan as mandatory reporting applies to residential care settings only.²⁷ A model of universal mandatory reporting applicable to all settings is in place in Nova Scotia as all persons rather than designated categories of persons are required to report suspicions of abuse. In Nova Scotia, section 5(1) of the *Adult Protection Act* 1989 provides that every person who has information, whether or not it is confidential or privileged, indicating that an adult is in need of protection shall report that information to the Minister.²⁸

4. A proposed mandatory reporting regime for Ireland

- [8.16] A system of mandatory reporting is proposed in the *Adult Safeguarding Bill 2017*. Mandatory reporting in relation to adult safeguarding requires designated categories of people to report suspicions of the abuse or neglect of at risk adults. In jurisdictions where there is mandatory reporting of the abuse or neglect of an at risk adult, a report must usually be made if a specified public body or office holder knows or suspects that an adult is at risk and that action is required to protect the adult at risk from harm. In systems of mandatory reporting, these specified persons or officeholders are generally referred to as "mandated persons" or "mandated reporters".²⁹ Failure of a mandated person to report reasonably held concerns usually results in criminal sanctions.
- [8.17] Section 21(1) of the *Adult Safeguarding Bill 2017* proposes that where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that an adult at risk: (a) has suffered abuse or harm, (b) is suffering abuse or harm, (c) is at risk of suffering abuse or harm, he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the proposed national adult safeguarding authority.³⁰ A list of mandated persons is set out in Schedule 1 of the Bill. In terms of the mandatory reporting of the abuse of at risk adults, the setting up of a specific adult protection type service to investigate reports, similar to the national adult

²⁷ National Initiative for the Care of the Elderly (Canada), *Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada* (NICE 2012) at 114-118.

²⁸ The definitions in section 3 of the *Adult Protection Act* 1989 indicate that financial abuse is not covered under the Act. However, physical abuse, sexual abuse, mental cruelty or a combination thereof are covered and therefore are subject to mandatory reporting.

²⁹ See, for example, section 14 of the *Children First Act 2015*.

³⁰ The establishment of a national adult safeguarding authority is proposed in Part 2 of the *Adult Safeguarding Bill 2017*. This is discussed in Issue 5, above.

safeguarding authority proposed in the *Adult Safeguarding Bill 2017*, is generally an integral feature of the mandatory reporting model.³¹

- [8.18] The key advantages and disadvantages of such a mandatory reporting model are outlined below.

5. Arguments in favour of mandatory reporting

- [8.19] Although the Joint Oireachtas Committee on Health has agreed that further analysis is required on the benefits of mandatory reporting, one member of the Oireachtas, in the course of a Seanad Éireann debate on the *Adult Safeguarding Bill 2017*, made the following statement in favour of providing for a legislative obligation to report: "There is a very strong case for, first, enshrining in law an obligation on mandated people to do something about any information in their possession relating to an adult at risk in order to safeguard them from harm and, second, setting up a mechanism for something to be done about any information that they impart on foot of their mandated duty, and for steps to be taken to protect adults at risk."³² This section will outline a number of the key arguments made in favour of a system of mandatory reporting.

(a) Increased detection of abuse

- [8.20] Supporters of mandatory reporting assert that a system of mandatory reporting may result in a greater number of cases being referred to adult safeguarding or protection services, or law enforcement officers, leading to improved responses for at risk adults. It is further argued that increased referrals would lead to greater understanding of the prevalence and incidence of abuse, which would also lead to improved services for at risk adults.³³

(b) Increased safety for at risk adults

- [8.21] Proponents of mandatory reporting argue that a system of mandatory reporting leads to increased safety for at risk adults, as many at risk adults may not realise that they are being abused, are unaware of services to assist them or may be too ashamed or

³¹ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 4.

³² Senator Michael McDowell, *Adult Safeguarding Bill: Second Stage, Seanad Éireann debate - Wednesday, 5 Apr 2017* (5 April 2017) Volume 251, Number 5, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>?

³³ Hyman, *Mandatory Reporting of Domestic Violence by Health Care Providers: A Policy Paper* (Family Violence Prevention Fund 1997), https://www.futureswithoutviolence.org/userfiles/file/HealthCare/mandatory_policypaper.pdf

physically unable to seek help without assistance.³⁴ It is maintained that mandatory reporting may enhance the safety of at risk adults by linking them with services that will provide information and referrals to improve their living situations, and that holding perpetrators of abuse accountable may also enhance victim safety.³⁵

(c) Greater awareness and understanding of abuse

- [8.22] Advocates for mandatory reporting also argue that professionals who interact most frequently with at risk adults generally receive training on mandatory reporting, thereby enhancing service providers' understanding of the indicators of abuse and helping them to provide a higher standard of services.³⁶

6. Arguments against mandatory reporting

- [8.23] While research on the impact of existing mandatory reporting does not appear to, as yet, provide a conclusive answer on its success, it has been argued that the indications are that whether a case is reported or not has less to do with legal requirements than with other organisational, ethical, cultural and professional factors.³⁷ A number of arguments against mandatory reporting are outlined below.

(a) Duty of care rather than legislation

- [8.24] It has been argued that reporting of abuse of people without decision-making capacity should be compulsory, but does not warrant the introduction of specific legislation. It has been asserted that the obligation for a worker to report abuse of an individual with impaired capacity is sufficiently clear under duty of care requirements.³⁸

³⁴ Victim Rights Law Center and National Clearinghouse on Abuse in Later Life (USA), *Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms* (Victim Rights Law Center and National Clearinghouse on Abuse in Later Life 2011) at 1,
<https://www.victimrights.org/sites/default/files/Elder%20Abuse%20Fact%20Sheet%202%20-%20Exploring%20the%20Benefits%20and%20Harms.pdf>

³⁵ Hyman, *Mandatory Reporting of Domestic Violence by Health Care Providers: A Policy Paper* (Family Violence Prevention Fund 1997),
https://www.futureswithoutviolence.org/userfiles/file/HealthCare/mandatory_policypaper.pdf

³⁶ Victim Rights Law Center and National Clearinghouse on Abuse in Later Life (USA), *Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms* (Victim Rights Law Center and National Clearinghouse on Abuse in Later Life 2011) at 1,
<https://www.victimrights.org/sites/default/files/Elder%20Abuse%20Fact%20Sheet%202%20-%20Exploring%20the%20Benefits%20and%20Harms.pdf>

³⁷ World Health Organisation, *World Report on Violence and Health* (WHO 2002) at 138.

³⁸ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 4.

(b) Existing reporting systems and legislation negate the need for mandatory reporting

- [8.25] One argument against the introduction of mandatory reporting is that the abuse of at risk adults is already covered by existing reporting systems and legislation. It has been argued that service providers already operate under a plethora of legislation, as well as their own agency protocols, policies, procedures, standards and guidelines.³⁹ In Ireland, an offence is committed under the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* where a person knows or believes that a certain offence has been committed by another person against a vulnerable person and he or she fails to disclose information, without reasonable excuse, which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence to a member of the Garda Síochána.⁴⁰ Professional bodies also impose codes of practice and position statements on their members. It is contended that the issue is not a lack of legislation providing for mandatory reporting but a lack of understanding by some service providers of their obligations under existing legislation and under their duty of care to report abuse and how to report it.⁴¹
- [8.26] In a presentation to the Joint Oireachtas Committee on Health, a representative of the Department of Health stated that an alternative option to mandatory reporting would be to have very clear guidelines and to try to explain to service providers about when to report.⁴² Safeguarding Ireland has also emphasised the need for overarching standards or guidance to prevent abuse rather than mandatory reporting.⁴³ Safeguarding Ireland has highlighted that the outcomes in other jurisdictions show that mandatory reporting does not work. It would favour adequate prevention and an internal system in organisations such as that being put in place by the HSE and external panels to manage complaints. It has also emphasised the need to identify the threshold for reporting to the proposed adult safeguarding authority, as envisaged in

³⁹ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 5.

⁴⁰ Section 3(1) of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*.

⁴¹ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 5.

⁴² Frances Spillane, Department of Health, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

⁴³ Patricia Rickard-Clarke, Safeguarding Ireland, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

the *Adult Safeguarding Bill 2017*, with minor complaints being dealt with internally and serious issues being referred to the authority.⁴⁴

(c) Existing policies and procedures of service providers and professionals

- [8.27] A further argument regarding the lack of need for mandatory reporting is that organisations and professionals can be sued for breach of a duty of care or negligence.⁴⁵ Residential centres owe a duty of care to at risk residents to provide them with a safe environment, to meet their needs and to prevent potential harm. Duty of care also places an onus on individual staff to act in a manner which does not harm an at risk adult, and does not place them in a position that can pose foreseeable risk to their safety.⁴⁶
- [8.28] Individual service providers, residential and respite care facilities have their own organisational policies and procedures in place and should therefore ensure there is an adequate number of staff on duty and that staff members are trained appropriately and understand their rights and responsibilities.⁴⁷ Staff are not only bound by their employer's policies and procedures, but also by their professional governing body's codes of practice and ethical guidelines. Adherence to these standards is monitored by professional associations and regulators, such as the Medical Council and CORU⁴⁸.

(d) Mandatory reporting does not increase detection of abuse

- [8.29] Identifying that abuse is occurring is logically the first critical step in an effective response to the abuse of at risk adults. Abuse of at risk adults covers a wide range of harmful behaviours including physical, psychological and financial abuse and can be difficult to detect if a person is not adequately informed or trained. It has been argued that detection is therefore not dependent on a system of mandatory reporting but on the commitment of service providers to provide training to generate an awareness of the indicators of abuse.⁴⁹ A further argument made against the effectiveness of

⁴⁴ Patricia Rickard-Clarke, *Safeguarding Ireland, Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

⁴⁵ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 6.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ CORU is the Irish Health and Social Care Professionals Council tasked with regulating health and social care professionals under the *Health and Social Care Professionals Act 2005*.

⁴⁹ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 7.

mandatory reporting is that at risk adults who are socially isolated remain vulnerable to abuse without detection.⁵⁰

(e) Mandatory reporting would direct resources away from addressing abuse

- [8.30] The importance of coming up with a pragmatic reporting arrangement for at risk adults has been identified as it has been noted that people can become very caught up in administration, reporting, filling in of forms and all of the necessary requirements to be fulfilled under a system of mandatory reporting such that the initiation of investigations can be delayed.⁵¹ Opponents of mandatory reporting argue that the establishment of a system of mandatory reporting would require considerable resources that could be better used in preventing and addressing cases of abuse.⁵² It has also been argued that measures such as providing at risk adults with greater access to independent advocacy services could have a greater effect on addressing abuse.⁵³
- [8.31] It is clear that there are significant resource implications required for establishing and maintaining an efficient and effective mandatory reporting system. Research from other jurisdictions has identified that although resources have been allocated for mandatory reporting, there is often a lack of funding for providing intervention once an at risk person has been removed from the abusive situation.⁵⁴

(f) Lack of evidence of improved outcomes for at risk adults

- [8.32] A further argument against mandatory reporting is that studies of mandatory reporting systems focus on reporting levels, substantiated cases and prosecutions but very little evidence can be found on the actual safety outcomes or impacts of mandatory reporting systems for at risk adults.⁵⁵ The Working Group on Elder abuse did not recommend the mandatory reporting of abuse in relation to older people due

⁵⁰ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 7.

⁵¹ Frances Spillane, *Department of Health, Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

⁵² Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 7.

⁵³ *Ibid.*

⁵⁴ Skabronski, "Elder Abuse: Washington's Response to a Growing Epidemic" (1995) Gonzaga Law Review 31, at 639; Hyman et al., "Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being" (1995) JAMA 1995, at 1781.

⁵⁵ Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 9.

to a lack of “persuasive evidence that it leads to successful outcomes for older people suffering abuse” and because it may even prevent people seeking help due to the legal and cultural consequences for the victim of the abuse and the perpetrator.⁵⁶ It has also been highlighted that mandatory reporting may actually have a negative effect on at risk adult victims of abuse for the following reasons:

- Mandatory reporting may deprive people with the capacity to make rational decisions of the right to make informed choices regarding their lifestyle and action regarding their future. This would serve to undermine victim autonomy.
- Older people would be less inclined to seek professional assistance if they believed that their conversations with professionals were no longer confidential or that a report may be made regardless of their wishes.
- Ageist perspectives would reinforce the stereotype that older people are weak and incapable of making well educated and rational decisions.⁵⁷

(g) Potential to reinforce stereotypes and perceptions of at risk adults as unable to make rational decisions

[8.33] It has been argued that mandatory reporting has the potential to reinforce stereotypes as it places an onus on professionals or others to report suspicions of abuse regardless of the at risk adult’s personal desire to report or their ability to report themselves, reinforcing the stereotype or perception that at risk adults are incapable of independent decision making.⁵⁸ It has also been stated that mandatory reporting would deprive at risk adults of their right to decide who receives personal information, as well as undermining confidentiality and trust in professional services.⁵⁹ The HSE has

⁵⁶ Working Group on Elder Abuse, *Protecting Our Future: Report of the Working Group on Elder Abuse* (Department of Health and Children 2002) at 23.

⁵⁷ Victim Rights Law Center and National Clearinghouse on Abuse in Later Life (USA), *Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms* (Victim Rights Law Center and National Clearinghouse on Abuse in Later Life 2011) at 1,
<https://www.victimrights.org/sites/default/files/Elder%20Abuse%20Fact%20Sheet%202%20-%20Exploring%20the%20Benefits%20and%20Harms.pdf>;

Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 9.

⁵⁸ *Ibid*, at 9-10.

⁵⁹ Victim Rights Law Center and National Clearinghouse on Abuse in Later Life (USA), *Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms* (Victim Rights Law Center and National Clearinghouse on Abuse in Later Life 2011) at 1,
<https://www.victimrights.org/sites/default/files/Elder%20Abuse%20Fact%20Sheet%202%20-%20Exploring%20the%20Benefits%20and%20Harms.pdf>;

Elder Abuse Prevention Unit (Brisbane), *Position Statement on Mandatory Reporting of Elder Abuse* (EAPU 2006) at 10.

stressed that any such legislation providing powers of intervention in the lives of vulnerable or at risk adults should give due regard to the person's capacity to keep themselves safe and to the appropriate application of consent.⁶⁰

7. Need for legislative provision for reporting of abuse or neglect

- [8.34] As the comparative research indicates, there are four possible reporting models for suspicions or incidents of adult abuse or neglect: permissive reporting, universal mandatory reporting; mandatory reporting; and a hybrid or reportable incidents type model. If a reporting model were to be placed on a legislative basis, the four options would be as follows:
- (i) To place permissive reporting on a legislative basis, as in British Columbia. Such legislation could also provide for protections for reporters to encourage reporting of suspected abuse.
 - (ii) To introduce a legislative requirement that all persons, both in residential settings and in the community, must report suspected abuse or neglect; this would provide for a system of universal mandatory reporting.
 - (iii) To introduce legislation providing for a system of mandatory reporting thereby requiring designated categories of persons or officeholders to report suspected abuse or neglect.
 - (iv) To legislate for a hybrid or reportable incidents type model, where would require certain types of incidents of abuse or neglect to be reported but a system of permissive reporting would continue to apply for all non-reportable incidents.
- [8.35] As earlier discussed, a mandatory reporting model has been the subject of the most debate as a proposed model for reporting of suspected abuse in the Irish adult safeguarding context. It has been widely stated that further research is required on the advantages and disadvantages of mandatory reporting. The HSE referred to the need for balance and to the pros and cons of mandatory reporting. It was suggested that learning should be taken from an international perspective and that more work would need to be done to settle on a position for the Irish context.⁶¹

⁶⁰ Pat Healy, National Director of the Social Care Division (HSE), *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 4 Oct 2017* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

⁶¹ *Ibid.*

- [8.36] In a recent Irish study on the experience of banking staff of the financial abuse of vulnerable or at risk adults, it was suggested that mandatory reporting supported by legislation could address the banks' concerns of intervening and issues of data protection and this would be reflected in higher rates of reporting in other activities banks that are obliged to report, such as fraud and money laundering.⁶² However, the support for mandatory reporting was not unanimous, with one participant instead proposing a clear reporting policy underpinned by a legislative mandate to report to a regulatory body, which would investigate, if required. The participant suggested that there is a need for very clear legislation setting out that every organisation has a responsibility to have a proper system of complaints and internal reporting.⁶³ It was further suggested that there should be a system of reporting like there is, for example, to HIQA or the Mental Health Commission in some respects so that they can carry out inspections, if required. However, it was stressed that, at the first instance, there should be an internal system with a standardised approach to how reasonable suspicions of abuse are dealt with internally with awareness among staff of the escalation procedure.⁶⁴
- [8.37] The view expressed on behalf of the Department of Health is that the data in relation to the experience of mandatory reporting in child care services should be awaited before introducing any such requirement for reporting in regard to vulnerable or at risk adults.⁶⁵ As mentioned earlier, the provisions of the *Children First Act 2015* in relation to mandatory reporting were commenced in December 2017. Figures released in December 2018 show that during the nine and a half month period between commencement of the legislation in December 2017 and the end of September 2018, the Child and Family Agency received almost 9,500 mandated reports of children who may have been harmed or may be at risk of harm.⁶⁶ Further figures released in 2019 show that in the 20 months from the commencement of the legislation, almost 20,000

⁶² Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018) at 100 and 112.

⁶³ *Ibid*, at 101.

⁶⁴ *Ibid*, at 101.

⁶⁵ Frances Spillane, Department of Health, *Adult Safeguarding: Discussion, Joint Committee on Health debate - Wednesday, 11 Oct 2017* (11 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-11/3/

⁶⁶ Department of Children and Youth Affairs, *Minister for Children and Youth Affairs welcomes first anniversary of full commencement of the Children First Act 2015* (11 December 2018), <https://www.dcyd.gov.ie/docs/EN/11-12-2018-Minister-welcomes-first-anniversary-of-full-commencement-of-the-Children-First-Act-2015/5070.htm>

mandated reports were received by the Child and Family Agency.⁶⁷ This compares with over 19,000 referrals to the Child and Family Agency for various forms of suspected abuse against children in 2016⁶⁸ and over 18,000 in 2015.⁶⁹ A press release issued by the Department of Children and Youth Affairs to mark the first anniversary of the full commencement of the legislation was very positive about the effects of the legislation, citing the "significant impact" that the Act has had as well as referring to the fact that almost 177,000 people have completed relevant e-learning training, and that the Child and Family Agency has been able to provide supports to children that need help.⁷⁰ However, further analysis of the impact of the mandatory reporting legislation would be required before any conclusions could be drawn on its success, or before any learnings could be drawn for application to the reporting of the abuse of at risk adults.

- [8.38] The model to be adopted for the reporting of concerns regarding the abuse of at risk adults must be rooted in respect for human rights, and must ensure that the prevention of abuse and safeguarding of at risk adults is appropriately balanced with the rights of individuals to autonomy and dignity. This Issues Paper is inviting views on the model of reporting that would be most appropriate for adult safeguarding in the Irish context.

⁶⁷ Irish Examiner, *Over 4,500 suspected child abuse concerns reported by teachers* (Irish Examiner, 19 November 2019), <https://www.irishexaminer.com/breakingnews/ireland/over-4500-suspected-child-abuse-concerns-reported-by-teachers-965104.html>

⁶⁸ Thejournal.ie, *Nearly 20,000 reports of suspected child abuse were made to Tusla last year* (19 October 2017), <https://www.thejournal.ie/tusla-received-52-child-protection-referrals-every-day-last-year-3654883-Oct2017/>

⁶⁹ Thejournal.ie, *There were 56,000 reports of child abuse in three years* (9 March 2017), <https://www.thejournal.ie/child-abuse-reports-3276951-Mar2017/>

⁷⁰ Department of Children and Youth Affairs, *Minister for Children and Youth Affairs welcomes first anniversary of full commencement of the Children First Act 2015* (11 December 2018), <https://www.dcyd.gov.ie/docs/EN/11-12-2018-Minister-welcomes-first-anniversary-of-full-commencement-of-the-Children-First-Act-2015/5070.htm>

Questions for Issue 8

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?

ISSUE 9 INDEPENDENT ADVOCACY

1. Definition and rationale

- [9.1] An advocate can be described as someone who, on behalf of another individual, represents views or wishes, can request information and can make complaints.¹ Advocacy can make a significant contribution to the prevention of abuse of at risk adults. It can do this through enabling adults at risk to become more aware of their rights and enabling them express their concerns.² It is argued that a safeguarding system that empowers individuals should include access to an independent advocate for those that have been abused or those who are likely to be abused, to support them in reporting an incident and to ensure that it is handled through the appropriate channels.³ Independent advocacy can be defined as advocacy support provided by an organisation that is structurally and financially autonomous and independent from the services that deliver health and social care, as well as from the family of the person to whom the advocacy service is being provided.⁴ Given that at risk adults may experience barriers in having their voice heard by professionals (and also by family members), it has been argued that it is vital for people to have access to an independent advocacy service to support them and enable them to speak for themselves, or, where appropriate, to speak on their behalf.⁵

2. Current provision of advocacy services

- [9.2] The current provision of advocacy services in Ireland varies in terms of funding and responsibilities. The National Advocacy Service for People with Disabilities is funded by the Department of Employment and Social Protection through the Citizens Information Board to provide advocacy services for people with disabilities, while statutory funding for other independent advocacy services for at risk adults at national

¹ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 18.

² Faulkner, "Prevention of abuse: a brief review of the literature" (2012) *The Journal of Adult Protection* 14(1), at 36.

³ Whitelock, "Safeguarding in mental health: towards a rights-based approach" (2009) *The Journal of Adult Protection* 11(4), at 37; Rees, "Protecting my mother" (2011) *The Journal of Adult Protection* 13(1), at 51.

⁴ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 2.

⁵ *Ibid.* at 14.

and local levels is provided by the HSE.⁶ The Patient Advocacy Service, launched in November 2019, is funded following the award of a tender to the National Advocacy Service for People with Disabilities by the Department of Health, and is independent of the HSE.⁷ It has been stated that the absence to date of a legislative remit for independent advocacy other than under the *Mental Health Act 2001* results in an advocacy environment that is somewhat unclear and within which there are multiple understandings of advocacy.⁸ While the *Citizens Information Act 2007* provides for the establishment by the Citizens Information Board of a Personal Advocacy Service (PAS), the service has not been established as the relevant section of the Act has not been commenced.⁹ The National Advocacy Service for People with Disabilities (NAS) has been established by the Citizens Information Board on a non-statutory basis. There are also a number of references in HIQA standards to the role of advocacy and the need for people to have access to independent advocates.¹⁰

3. Legislative provision for independent advocacy

- [9.3] Provisions of the *Assisted Decision-Making (Capacity) Act 2015* and proposals of the *Adult Safeguarding Bill 2017* give context to the provision of independent advocacy. The *Assisted Decision-Making (Capacity) Act 2015* makes provision for the Director of the Decision Support Service to prepare and publish a code of practice for the guidance of persons acting as advocates on behalf of relevant persons.
- [9.4] The *Adult Safeguarding Bill 2017* proposes that the National Adult Safeguarding Authority could, under section 12, arrange for a person who is independent (an

⁶ National Advocacy Service for People with Disabilities, *Annual Report 2017* (NAS 2018) at 2; Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 2-3.

⁷ Department of Health, *Minister for Health launches new independent Patient Advocacy Service* (Department of Health 2019), <https://www.gov.ie/en/news/ba7ff3-minister-for-health-launches-new-independent-patient-advocacy-service/>

⁸ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 3. It should be noted that legal advocacy in the context of the *Mental Health Act 2001* does not include independent advocacy in the more general way which people frequently require. See Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 26.

⁹ *Citizens Information Act 2007*, section 5.

¹⁰ See: Health Information and Quality Authority, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at 12, 19 and 25-27. Standards 1.6, 1.1.5, 1.5.2 and 1.7.3 refer to access to an advocate; Health Information and Quality Authority, *National Standards for Residential Services for Children and Adults with Disabilities* (HIQA 2013) at 60, 64, 69-71, 77 and 80-81. Standards 1.6, 1.1.7, 1.5.5, 1.6.5, 1.7.3, 2.3.9, 3.1.2 and 3.1.19 of the Standards for Adults with Disabilities refer to access to an advocate; Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 26.

"independent advocate") to be available to represent and support an individual who is the subject of an investigation by the Authority. This proposal relies on the *Assisted Decision-Making (Capacity) Act 2015* as it proposes that an independent advocate may be selected from a panel established under section 101 of the 2015 Act.

4. Independent advocacy in other jurisdictions

(a) England

- [9.5] In England, section 67 of the *Care Act 2014* applies where a local authority is required by a relevant provision of the Act to involve an individual in its exercise of a function. It provides that where one of a number of conditions applies, the local authority must arrange for a person who is independent of the authority (an "independent advocate") to be available to represent and support the individual for the purpose of facilitating the individual's involvement. The conditions, as specified under section 67(4), are that the local authority considers that, were an independent advocate not to be available, the individual would experience substantial difficulty in doing one or more of the following:
- (a) understanding relevant information;
 - (b) retaining that information;
 - (c) using or weighing that information as part of the process of being involved;
 - (d) communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means).

- [9.6] The duty does not apply if the local authority is satisfied that there is a person (a) who would be an appropriate person to represent and support the individual for the purpose of facilitating the individual's involvement, and (b) who is not engaged in providing care or treatment for the individual in a professional capacity or for remuneration.¹¹ Section 68 of the Act also provides for independent advocacy, applying the same conditions, where a safeguarding enquiry or review is to be conducted. Therefore, under sections 67 and 68, if an adult at risk has substantial difficulty in being involved, and where there is no one appropriate to support them, the local authority must arrange for an independent advocate to represent them for the purpose of facilitating their involvement.¹²

¹¹ See *Care Act 2014* (England), section 67(5).

¹² Social Care Institute for Excellence, *Gaining access to an adult suspected to be at risk of neglect or abuse: a guide for social workers and their managers in England* (Social Care Institute for Excellence 2014) at 2, available at <https://www.scie.org.uk/safeguarding/adults/practice/gaining-access>

(b) Scotland

- [9.7] Local authorities have a "duty to consider" advocacy provision under section 6 of the *Adult Support and Protection (Scotland) Act 2007*, as the legislation is based on the principle of service user and carer involvement, both directly and via independent advocacy.

(c) Wales

- [9.8] In Wales, Section 181 of the *Social Services and Well-being (Wales) Act 2014* provides that regulations may require a local authority to arrange for advocacy services to be made available to people with needs for care and support (whether or not those needs are being met by a local authority), subject to a number of restrictions set out in section 182, which are generally that it may not be required that advocacy services be made available to a person in circumstances in which it is already required to provide assistance to the person under other legal provisions. A statutory code of practice on the exercise of social services functions in relation to advocacy under Part 10 of the Act has been published.¹³ It states that local authorities, when exercising their social services functions, must act in accordance with the requirements contained in the code of practice.¹⁴ The code sets out the requirements for local authorities to:
- (a) ensure that access to advocacy services and support is available to enable individuals to engage and participate when local authorities are exercising statutory duties in relation to them, and
 - (b) to arrange an independent professional advocate to facilitate the involvement of individuals in certain circumstances.¹⁵

- [9.9] The code of practice further provides that local authorities:

"**must** arrange for the provision of an independent professional advocate when a person can only overcome the barrier(s) to **participate fully in the assessment, care and support planning, review and safeguarding processes** with assistance from an appropriate individual, but there is no appropriate individual available" [emphasis in original].¹⁶

¹³ Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (Welsh Government 2015).

¹⁴ *Ibid*, at paragraph 3.

¹⁵ *Ibid*, at paragraph 7.

¹⁶ *Ibid*, at paragraph 47.

5. Need for statutory framework for independent advocacy

- [9.10] Safeguarding Ireland has stated that the issue of legal recognition in Ireland for independent advocacy needs to be addressed with some urgency.¹⁷ A number of other agencies working with at risk adults have called for independent advocacy to be put on a statutory footing, including HIQA and several NGOs, particularly in the context of supported decision-making and the right to liberty enshrined in both the ECHR and the UNCRPD. The Joint Oireachtas Committee on Health, in its *Report on Adult Safeguarding*, recognised that advocacy has an important role to play in adult safeguarding, and recommended that any legislation should ensure that adults at risk are provided with access to an independent advocate.¹⁸ In its 2016 report on the role of advocacy in health and social care services, the Oireachtas Committee on Health and Children acknowledged that the lack of statutory powers for advocacy are considered a barrier that can prevent advocacy services from accessing or acting on behalf of people with disabilities.¹⁹
- [9.11] Despite the creation of new legislative rights to services, including advocacy, it has been identified that many at risk adults remain unaware of their entitlements or how to access them.²⁰ It has been argued that in the case of the most at risk individuals, it is clear that legislative provision for independent advocacy is essential in order to adhere to the principle of state responsibility for advocacy provision and to overcome current blockages arising from the absence of a legal remit for independent advocacy.²¹
- [9.12] Reports have indicated that despite the *HIQA National Standards for Residential Care Settings in Ireland* making numerous references to access to independent advocates, some nursing homes were still not facilitating access to an independent advocate.²² Anecdotal evidence from advocacy personnel indicates that sometimes nursing home staff may side with relatives to exclude an independent advocate on the basis that "the

¹⁷ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 2.

¹⁸ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 7 and 18.

¹⁹ Joint Oireachtas Committee on Health and Children, *Report on the Role of Advocacy in Health and Social Care Services in Ireland* (Houses of the Oireachtas 2016) at 10 and 21.

²⁰ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 40.

²¹ *Ibid.*

²² Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 20; Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 33.

family are the best advocates.”²³ Further anecdotal evidence indicates that an at risk adult’s General Practitioner will often side with family members or not speak out as other family members are also patients of their clinic, and that this is particularly an issue in rural areas where there may only be one GP in a surgery or town.²⁴ Additional research has shown that where family members are involved in representing adults at risk, there can be potential issues, for example, conflict between family members or family members representing their own views and wishes, rather than those of the at risk adult.²⁵

- [9.13] This highlights the importance of ensuring that at risk adults have access to an advocacy service that is independent of both service providers and family members. However, this is difficult, if not impossible, to fully achieve if the provider of the advocacy service is funded by, dependent on, commissioned by or regulated by the same agencies that are delivering, for example, social or healthcare services that are not meeting the needs of an at risk adult.²⁶ It has been suggested that structures and protocols are therefore required to maximise and protect the independence of the advocacy provider.²⁷ It has been argued that the legal recognition of advocates and the right of access to advocates would assist in many of the current issues regarding advocates.²⁸
- [9.14] The *Assisted Decision-Making (Capacity) Act 2015* provides for supported decision-making to assist vulnerable people with limited capacity and sets out key guiding principles.²⁹ An underlying principle of the 2015 Act is that everyone should be presumed to have capacity to make decisions. Decision-making capacity can be defined as the ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made in the context of the available choices at that time.³⁰

²³ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 33.

²⁴ *Ibid.*

²⁵ Lonbay and Brandon, “Renegotiating power in adult safeguarding: the role of advocacy” (2017) *The Journal of Adult Protection* 19(2), at 83 and 85.

²⁶ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 16.

²⁷ *Ibid.*

²⁸ Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 20.

²⁹ *Assisted Decision-making (Capacity) Act 2015*, section 8.

³⁰ *Assisted Decision-Making (Capacity) Act 2015*, section 3(1).

- [9.15] Three levels of decision-making support are set out in the Act:
1. Assisted decision-making: situations in which a person has the ability to make decisions with only minimal support, e.g. easy to read information.
 2. Co-decision-making situations in which a person is supported by a trusted person to make a decision.
 3. Decision-making by a representative: situations in which the person's will and preferences are not known. In such a situation, a representative determines what the person would want, based on information known about the person and their wishes.
- [9.16] It has been acknowledged that independent advocacy has an important role to play in supported decision-making. Independent advocates can act as a safety net for at risk adults in relation to capacity assessments; advocates could challenge a process if they believed that decisions were made that an individual could have made themselves or where postponing a decision slightly may mean that the person may then have the capacity to make the decision themselves.³¹ Independent advocacy can therefore ensure that at risk adults are provided with sufficient support but that it is also the least restrictive option in terms of realising their right to autonomy, as recognised by the *Assisted Decision-making (Capacity) Act 2015* principles of the presumption of decision-making capacity and participation as fully as possible in decision-making processes.³² A related key advantage of independent advocacy is that in some cases, it may enable people to self-advocate by giving people an awareness of their rights, boosting their confidence and supporting them to express their views.³³ It could therefore be argued that to ensure a rights-based approach, as reflected in the underlying principles of the *Assisted Decision-Making (Capacity) Act 2015*, a statutory provision for independent advocacy is required.
- [9.17] Arguments have been put forward in favour of a national advocacy framework in order to create a context within which the practice, skills, development and coordination of advocacy can be effectively realised.³⁴ The lack of statutory powers for advocacy are considered to be a barrier which can prevent advocacy services from accessing, or acting on behalf of, at risk adults. It has been suggested that the practical implications

³¹ Lonbay and Brandon, "Renegotiating power in adult safeguarding: the role of advocacy" (2017) *The Journal of Adult Protection* 19(2), at 84.

³² Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018), at 24; Lonbay and Brandon, "Renegotiating power in adult safeguarding: the role of advocacy" (2017) *The Journal of Adult Protection* 19(2), at 84.

³³ Lonbay and Brandon, "Renegotiating power in adult safeguarding: the role of advocacy" (2017) *The Journal of Adult Protection* 19(2), at 84.

³⁴ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 23.

of legal recognition for independent advocacy would need to be further identified and implemented through the establishment of a national advocacy body.³⁵ It has been stated that the role of such a body could include, among other matters:

- (a) Enabling access by all vulnerable or at risk adults to independent advocacy;
 - (b) Integrating the various funding strands for advocacy and related reporting structures;
 - (c) Providing for uniform access to independent advocacy by all vulnerable or at risk adults;
 - (d) Overseeing funding requirements;
 - (e) Setting standards, awarding qualifications and providing training;
 - (f) Preparing, publishing and monitoring the implementation of codes of practice;
 - (g) Conducting research, monitoring and evaluating services; and
 - (h) Implementing and maintaining data information systems.³⁶
- [9.18] It has been suggested that active consideration be given to establishing such a national advocacy body and that initial scoping should be carried out to explore how such a national advocacy body might operate.³⁷ It has been identified that the key questions that would need to be addressed in this regard are:
- How would such a body relate to the National Patient Safety Office³⁸ and the development by that office of a Patient Complaints and Advocacy Policy and a National Patient Advocacy Service
 - Who would draw up a National Advocacy Plan and oversee its implementation?
 - Who needs to be consulted in order to identify the most appropriate model of independent advocacy?
 - Will the advocacy service be run by paid advocates or volunteers or a judicious blend of both?
 - What competencies and qualifications will be required of advocates?
 - Who will manage advocacy services?
 - Who will fund independent advocacy services?
 - Who will recruit, train and supervise the advocates?

³⁵ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 37-38.

³⁶ *Ibid.* at 37-38.

³⁷ *Ibid.* at 38.

³⁸ The National Patient Safety Office was established by the Department of Health in 2016, and is located within the Department. The role of the National Patient Safety Office is to provide leadership with regard to patient safety policy and legislation. It is guided by a National Advisory Council for Patient Safety and its work has three streams: clinical effectiveness; patient safety surveillance; and patient advocacy and policy.

- How will the advocacy service link with staff in residential care facilities, acute hospitals, primary care and GPs?
 - How can the experience to date of delivering advocacy services in Ireland be built upon?
 - What standards will be used to define the minimum quality of service and how will these be enforced?
 - How would it relate to new legislative provisions for the appointment of independent advocates and to the Code of Practice for Advocates being developed by the Director of the Decision Support Service?
 - How would it link in with a national adult safeguarding authority (as proposed in the *Adult Safeguarding Bill 2017*) and the ongoing role of Safeguarding Ireland?³⁹
- [9.19] A structure for the establishment and servicing of such a national advocacy body would need to be implemented and options would need to be identified and explored in this regard, perhaps using an existing State agency.⁴⁰
- [9.20] This Issues Paper is therefore seeking views on whether a statutory provision for independent advocacy is required and whether there is a need for a national advocacy body specifically in the context of adult safeguarding legislation.

³⁹ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 38-39.

⁴⁰ Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at 38-39.

Questions for Issue 9

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

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?

ISSUE 10 ACCESS TO SENSITIVE DATA AND INFORMATION SHARING

1. Need for access to data and information sharing in adult safeguarding

- [10.1] Access to sensitive data and information sharing in the context of adult safeguarding can be vitally important to identifying where adults may be at risk and protecting them from abuse, to conducting investigations in cases of the abuse of at risk adults and to planning for the effective meeting of care needs. An issue that often arises in the context of adult safeguarding is about striking the balance between the public and private interests of maintaining confidentiality and the public and private interests of disclosure.¹ Conflicts can arise between the right to privacy of individuals and the need or duty to prevent harm or protect individuals from harm, particularly where the capacity of an individual to make decisions is at issue.
- [10.2] In relation to safeguarding adults, information disclosure may arise in a number of different ways:
- (i) Sharing of information between agencies with or without consent of the subject;
 - (ii) Subject access to personal information;
 - (iii) Third-party access to non-personal information;
 - (iv) Other specific legislation affecting the disclosure of information.²
- [10.3] It appears that the disclosure of personal information between agencies without the consent of the person concerned poses the greatest uncertainty with regards to data protection law in the context of adult safeguarding.
- [10.4] The Commission on the Future of Policing in Ireland found, in the preparation of its report, that there is currently little sharing of information between An Garda Síochána and other agencies, even where memoranda of understanding exist concerning cooperation between them.³ It recommended that cooperation between An Garda Síochána and other public agencies must be underpinned by an efficient sharing of information and that transparency in information exchanges with other agencies,

¹ Mandelstam, *Safeguarding vulnerable adults and the law* (Jessica Kingsley Publishers 2009) at 248.

² *Ibid*, at 248-249.

³ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at 15.

subject to relevant legal safeguards, will lead to better multi-agency approaches to community safety problems.⁴

2. Existing Legislative Provisions

(a) Data Protection Act 1988

- [10.5] Section 8(b) of the *Data Protection Act 1988* provides that any restrictions in the Act on the processing of personal data do not apply if the processing is "required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offender". This allows for an individual's right to privacy to be balanced against the need to investigate offences effectively and means that where it is suspected that an at risk adult may be subject to harm constituting an offence, personal information can be processed to allow the offence to be prevented, detected or investigated, or to apprehend or prosecute the perpetrator of the abuse.
- [10.6] Section 8(d) of the Act provides that any restrictions in the Act on the processing of personal data do not apply if the processing is: "required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property". Under section 8(d), an at risk adult's right to privacy can be set aside through the sharing of personal data between agencies where personal data must be processed in order to save someone's life or protect someone's health, or to prevent property from being destroyed. This provision does not authorise processing of personal information for general health research purposes, or for other medical purposes where there is no immediate or urgent risk to someone's life or health. In such cases, the normal data protection rules apply, including the obtaining of consent where necessary.⁵

(b) Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012

- [10.7] Section 3(1) of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* provides that a person shall be guilty of an offence if (a) he or she knows or believes that an offence, that is a Schedule 2 offence, has been committed by another person against a vulnerable person⁶, and (b) he or she

⁴ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at XV and 15.

⁵ Data Protection Commission, *Disclosures Permitted under section 8 of the Data Protection Act*, <https://www.dataprotection.ie/docs/Disclosures-Permitted-under-Section-8-of-the-Data-Protection-Act-Section/237.htm>

⁶"Vulnerable person" is defined in section 1 of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* as "a person (including, insofar as the offences specified at paragraph 8 of Schedule 2 are concerned, a child aged 17 years old)—(a) who— (i) is suffering from a disorder of the mind, whether as a result of mental illness or

has information, which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of An Garda Síochána. Section 4 of the 2012 Act provides for a number of defences including one where the accused person can show:

- (a) that the view of the child or vulnerable person (provided that he or she was capable of forming a view on the matter) was that the commission of that offence, or information relating to it, should not be disclosed to An Garda Síochána, and
- (b) that the accused person knew of and relied upon that view.

- [10.8] The Act also provides that, if none of the defences are available to the accused person, it shall be an offence for an accused person to fail to disclose information in relation to a prescribed offence against an at risk person that may assist in securing the apprehension, prosecution or conviction of the perpetrator.

(c) General Data Protection Regulation (GDPR) and the Data Protection Act 2018

- [10.9] Provisions of relevance to the processing of data regarding the safeguarding of adults are set out in articles 6(1), 9 and 23 of the *General Data Protection Regulation (GDPR)*, the European Union data protection framework that came into force across the European Union in May 2018. Relevant provisions of the GDPR are reflected in the *Data Protection Act 2018*, which gives further effect to the GDPR in measures where Member States were granted flexibility. The 2018 Act also transposes the *Law Enforcement Directive*⁷ into Irish law. The Directive operates in parallel to the GDPR and provides for the processing of personal data by data controllers for law enforcement purposes i.e. in relation to criminal offences and penalties.
- [10.10] Section 41 of the *Data Protection Act 2018* provides for the processing of data for purposes other than the purpose for which data was collected. It provides that the processing of personal data and special categories of personal data⁸ for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for certain purposes

dementia, or (ii) has an intellectual disability, which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or (b) who is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána or both."

⁷ *Law Enforcement Directive* (Directive (EU) 2016/680).

⁸ "Personal data" and "special categories of personal data" are defined in section 69(1) of the *Data Protection Act 2018*.

including the prevention of a threat to national security, defence or public security; the prevention, detection or investigation or prosecution of criminal offences, or where it is necessary for the purpose of legal advice and legal proceedings, as specified in section 47. It is of particular relevance to adult safeguarding that the definition of "special categories of personal data" under sections 2 and 69(1) of the Act includes "data concerning health".

- [10.11] Section 45 of the 2018 Act provides that, subject to compliance with the *General Data Protection Regulation* and any other relevant enactment or rule of law, the processing of special categories of personal data shall be lawful to the extent that the processing is (a) authorised by section 41 and sections 46 to 54 of the Act, or (b) otherwise authorised by Article 9 of the GDPR. Article 9(2) allows for the processing of special categories of personal data in a number of specified circumstances including where:
- Processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent (paragraph c); and
 - Processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions or safeguards referred to in paragraph 3 of Article 9 (paragraph h).⁹
- [10.12] Section 60 of the 2018 Act relates to Article 23 of the GDPR in legislating for restrictions on obligations of controllers and rights of data subjects for important objectives of general public interest with a list of such objectives set out under Article 23(6) including:
- Preventing, detecting, investigating or prosecuting breaches of ethics for regulated professions (paragraph (d));
 - Taking any action for the purposes of considering and investigating a complaint made to a regulatory body in respect of a person carrying out a profession or other regulated activity where the profession or activity is

⁹ Article 9(3) of the *General Data Protection Regulation* provides that personal data may be processed for the purposes referred to in Article 9(2)(h) when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under European Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under European Union or Member State law or rules established by national competent bodies.

regulated by that body and the imposition of sanctions on foot of such a complaint (paragraph (e));

- Preventing, detecting, investigating or prosecuting, whether in the State or elsewhere, breaches of the law which are subject to civil or administrative sanctions and enforcing such sanctions (paragraph (f));
- Protecting members of the public against financial loss or detriment in various circumstances (paragraph (k)).

(d) Data Sharing and Governance Act 2019

- [10.13] The *Data Sharing and Governance Act 2019* was enacted to provide for the regulation of the sharing of information, including personal data, between public bodies. It also provides for the regulation of the management of information by public bodies, the establishment of base registries and for the collection of public service information as well as the establishment of the Data Governance Board.
- [10.14] Section 13 provides that where there is no other enactment or law of the European Union in operation under which specific provision is made permitting or requiring such data-sharing, a public body may disclose personal data to another public body, in a case in which this section applies to such disclosure, only where the personal data concerned is disclosed for the purpose of the performance of a function of the first or second mentioned public body, and for one of a number of specified purposes including, *inter alia*, to verify the identity of a person, where the first or second mentioned public body is providing or proposes to provide a service to that person; and to facilitate the improvement or targeting of a service, programme or policy delivered or implemented or to be delivered or implemented, as the case may be, by, for or on behalf of the first or second mentioned public body. Section 13(2)(g) provides that the disclosure of the must be necessary for the performance of the functions in relation to which the information is being disclosed, and proportionate in the context of the performance of those functions and the effects of the disclosure on the rights of the data subjects concerned.
- [10.15] Once commenced, section 14(1) will provide that the relevant Minister may direct one or more public bodies to disclose information to one or more other public bodies. This provision is subject to the consent of such other Minister of the Government, if any, in whom functions in relation to a public body to which the Minister proposes to issue a direction are vested, and regard must be had to the matters referred to in subsection (8). Subsection (8) will provide that the Minister shall have regard to whether the disclosure of the information would have a number of specified effects including, *inter alia*, assisting in the carrying out of a function or one or more of the public bodies concerned, and assisting a public body in verifying the identity of a person receiving a

service being delivered by the public body. Section 14(9) will provide that a public body, to which a direction under subsection (1) applies, must comply with the direction.

- [10.16] Once commenced, section 16 will provide that a public body shall enter into a data-sharing agreement with the public body to which it proposes to disclose personal data prior to commencing that disclosure, while section 17, once commenced, will provide that such a data-sharing agreement shall be in writing. Section 19 specifies a list of information that, upon commencement, must be included in a data-sharing agreement including, *inter alia*, the information to be disclosed, the purpose of the data-sharing, and whether the disclosure of information under the agreement will be on a once-off or ongoing basis.

(e) National Vetting Bureau (Children and Vulnerable Persons) Act 2012

- [10.17] The *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* provides for the protection of children and vulnerable persons and, for that purpose, provides for the establishment and maintenance of a National Vetting Bureau (Children and Vulnerable Persons) database system. It also provides for the establishment of procedures that are to apply in respect of persons who wish to undertake certain work or activities relating to children or vulnerable persons or to provide certain services to children or vulnerable persons.
- [10.18] Section 10(1) provides that the Chief Bureau Officer shall cause to be established and maintained, in such form (including electronic form) as he or she considers appropriate a register of specified information. "Specified information", in relation to a person who is the subject of an application for vetting disclosure, is defined in section 2 as information concerning a finding or allegation of harm to another person that is received by the Bureau from (a) the Garda Síochána pursuant to an investigation of an offence or pursuant to any other function conferred on the Garda Síochána by or under any enactment or the common law, or (b) a scheduled organisation pursuant to subsection (1) or (2) of section 19.
- [10.19] Section 15(3) provides that the Chief Bureau Officer shall assess the application for vetting disclosure and the specified information relating to the person who is the subject of that application but a determination that information concerned should be disclosed should not be made unless:
- (a) he or she reasonably believes that that information is of such a nature as to give rise to a bona fide concern that the person concerned may—
- (i) harm any child or vulnerable person,
- (ii) cause any child or vulnerable person to be harmed,

- (iii) put any child or vulnerable person at risk of harm,
 - (iv) attempt to harm any child or vulnerable person, or
 - (v) incite another person to harm any child or vulnerable person,
- and
- (b) he or she is satisfied that its disclosure is necessary, proportionate and reasonable in the circumstances for the protection of children or vulnerable persons or both, as the case may be.

[10.20] Section 15(4) sets out a list of matters that the Chief Bureau Officer shall have regard to in assessing, for the purposes for the purposes of making a determination, whether the specified information relating to a person should be disclosed. Section 15(5) provides that the Chief Bureau Officer may, but shall not be obliged to, make a request for further information from the scheduled organisation or member of the Garda Síochána who furnished the specified information concerned to the Bureau and, where he or she does so, the scheduled organisation or member of the Garda Síochána, as the case may be, to whom the request is made shall comply with it within such reasonable period as the Chief Bureau Officer may specify in the request.

3. Access to data and information sharing in other jurisdictions

(a) Scotland

[10.21] In Scotland, a power to access records in order to gather information relevant to an adult safeguarding investigation, for example bank account statements where financial harm is suspected, is provided under section 10 of the *Adult Support and Protection (Scotland) Act 2007*. Research carried out among practitioners in Scotland found that the provision for a right to access records had proved helpful. The research found that the power was particularly useful in relation to financial harm where records from banks were sought and received.¹⁰ The records helped to establish such things as money being taken when the account holder could not personally have withdrawn money, unusually large sums of money being withdrawn and demonstrating unusual patterns that could be linked to the perpetrator.¹¹

¹⁰ Mackay et al., "What difference does the Adult Support and Protection (Scotland) Act 2007 make to social work service practitioners' safeguarding practice?" (2012) *The Journal of Adult Protection* 14(4), at 201.

¹¹ *Ibid.*

(b) England

- [10.22] In England, section 45 of the *Care Act 2014* provides that if a Safeguarding Adult Board 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 Safeguarding Adult Board to exercise its functions.
- Research conducted among social services managers in England prior to enactment of the 2014 Act found that data protection legislation and confidentiality requirements had been cited by managers as restricting the sharing of information by agencies with social services.¹² However, more recent research has indicated that, as well as a legislative duty to share information with Safeguarding Adult Boards on request, there is also a need for formal information sharing mechanisms between other agencies and bodies and even with different sections of the same organisation.¹³

4. Need for additional measures to improve access to data and information sharing

- [10.23] Research in the United Kingdom has established that a barrier to effective safeguarding of at risk adults from financial abuse is the existence of a reluctance among safeguarding staff to share information with regard to possible financial abuse due to stringent policies on data sharing operated by banks and agencies.¹⁴ Research in England has also shown that training is required to support banking staff in making decisions regarding the reporting of concerns of financial abuse to outside agencies due to concerns about data protection and customer privacy.¹⁵ Similar to other jurisdictions, concerns regarding data protection and working within data protection legislation were identified as challenges affecting reporting among banking staff surveyed as part of a recent Irish research study.¹⁶
- [10.24] A number of research participants in a recent Irish study suggested that mandatory reporting supported by legislation to safeguard against financial abuse could address

¹² Manthorpe et al, "Managing relations in adult protection: a qualitative study of the views of social services managers in England and Wales." (2010) *Journal of Social Work Practice* 24(4), at 368.

¹³ Braye et al, "Serious case review findings on the challenges of self-neglect: indicators for good practice." (2015) *The Journal of Adult Protection* 17(2), at 82.

¹⁴ Chandria, *Short Changed: Protecting People with Dementia from Financial Abuse* (Alzheimer's Society (UK) 2011) at 47-48.

¹⁵ Harries et al., "Detection and prevention of financial abuse against elders" (2013) *Journal of Financial Crime* 21(1), at 85.

¹⁶ Age Action, *Raising Awareness about Financial Abuse* (2015), at 11 and 17.

the banking staff's concerns of intervening and issues of data protection.¹⁷ It appears that clarity on the restrictions of data protection legislation and the thresholds for processing or sharing personal data without consent is also required to ensure that all service providers have a clear understanding of the law and are following the same standards in ensuring that information is shared where it is vital to the safeguarding of at risk adults. The Council of Europe has stated, in the context of safeguarding adults and children with disabilities, that governments should take a view about how to balance the principle of confidentiality enshrined in data protection legislation with the mandate to share information appropriately and they should act to synchronise the understanding of this responsibility across all the relevant professions, which might otherwise work to different standards and with different understandings of abuse.¹⁸

- [10.25] The *Data Protection Act 1988*, the GDPR and the *Data Protection Act 2018*, the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* and the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* all require, or provide for, the sharing of information in certain circumstances, which may assist in the safeguarding of at risk adults. The *Data Sharing and Governance Act 2019* was enacted to provide clarity on the issue of the circumstances in which agencies are permitted to share personal data and to set out mechanisms for regulating the sharing of information, but, other than where the Minister will, once commenced, direct one or more public bodies to disclose information to one or more other public bodies under section 14(1), the Act does not place a duty on public bodies to share information with one another. This could therefore be of limited use in adult safeguarding cases where one or more agencies are reluctant to share information unless the Minister is willing to intervene.
- [10.26] The Commission on the Future of Policing in Ireland noted in its report that legislation is currently under development in Ireland to empower An Garda Síochána to convene multi-agency "assessment teams" to address risks posed by sex offenders.¹⁹ The teams proposed by this new legislation would comprise representatives from the Child and Family Agency as well as the Prison Service, Probation Service and others. Under proposed legislation, relevant state agencies would be required to share all relevant information with An Garda Síochána and to cooperate with An Garda Síochána in

¹⁷ Phelan et al., *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (NCPOP 2018), at 100.

¹⁸ Council of Europe, *Safeguarding adults and children with disabilities against abuse* (Council of Europe Publishing 2003) at 140.

¹⁹ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at 14.

relation to the broader issue of community safety.²⁰ The Commission on the Future of Policing stated that such practical multi-agency cooperation is what it envisages is required in the new legislation that it has recommended to help reduce harm to people at risk.²¹ This therefore indicates that the Commission on the Future of Policing in Ireland was in favour of a legislative obligation on agencies to share all relevant information within their possession in order to help reduce harm to people at risk.

- [10.27] The question of information sharing raises complex issues having regard to the interaction between, on the one hand, the general principles in the GDPR and, on the other hand, the *Law Enforcement Directive*, both of which were implemented in the *Data Protection Act 2018*. Developing appropriate information sharing mechanisms will likely require close cooperation and coordination between relevant bodies, including An Garda Síochána and other regulatory and oversight bodies. Thus, the question of data sharing overlaps with the issue of cooperation and coordination between relevant bodies, which the Commission discusses in Issue 11, below. The Policing Authority noted in July 2019 that the information sharing protocol between An Garda Síochána and the Child and Family Agency may not be achievable as it may require a change to legislation that is outside the control of An Garda Síochána.²² Issues that arise in relation to information sharing, and the related area of cooperation and collaboration between relevant agencies, may need to be addressed through arrangements such as Memorandums of Understanding or interagency protocols or, where possible, through legislation. Provisions on data sharing or mutual cooperation could arise in the forthcoming *Policing and Community Safety Bill* and any legislative framework that emerges from this project. At the time of writing (December 2019), the Commission understands that the General Scheme of the *Policing and Community Safety Bill* will be published in 2020.
- [10.28] In light of the above, it appears that training and information resources may be required to educate service providers regarding the legal parameters of sharing sensitive information, particularly where the person concerned has not provided consent. It may also be necessary to introduce a specific duty on agencies and service providers to share sensitive data where it is relevant to an adult safeguarding concern. Such a duty could help to avoid a lack of clarity around the legality of information sharing, place a specific onus on relevant bodies to cooperate in information sharing and could thereby assist in protecting at risk adults from abuse or further abuse. The

²⁰ Department of Justice and Equality, *Minister Flanagan announces Government approval for drafting of key Policing legislation* (DJE 25 June 2019), <http://www.justice.ie/en/JELR/Pages/PR19000170>

²¹ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at 14.

²² Policing Authority, *Policing Authority Assessment of Policing Performance* (Policing Authority 2019) at 15.

Issues Paper is therefore seeking views on the inclusion of a power to access records or duty to cooperate in information sharing in adult safeguarding legislation.

Questions for Issue 10

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.

ISSUE 11 MULTI-AGENCY COLLABORATION

1. Need for multi-agency collaboration in adult safeguarding

- [11.1] Multi-agency collaboration involves the cooperation of one agency with one or more others, which can assist in the protection and safeguarding of at risk adults. This section will discuss a multi-agency approach to adult safeguarding and the need for a statutory duty on bodies to cooperate in the safeguarding of at risk adults.
- [11.2] If an independent regulatory body for adult safeguarding were to be established, the coordination of the powers of the proposed body with other regulatory and oversight bodies, such as the HSE and HIQA on health matters, the Central Bank on financial matters and the Department of Employment Affairs and Social Protection on social welfare matters would be vitally important in ensuring effective regulation. If additional powers were to be granted to existing bodies, coordination of the powers between the various bodies would also be crucial to achieving effective regulation. Reflecting this, section 9(2)(b) of the *Adult Safeguarding Bill 2017* proposes that, in carrying out its functions, the proposed authority would have regard to the need to co-operate with and co-ordinate its activities with public authorities, including the HSE and HIQA, as the performance of the functions of those bodies may affect or relate to the functions of the proposed authority.
- [11.3] The responsibility for the safeguarding of adults spans across a number of sectors and bodies from health to social protection, justice and finance. The Minister for Health has acknowledged that the issues in the *Adult Safeguarding Bill 2017* extend far beyond the scope of the health sector alone or of any one Department. The Minister stated: "Strong collaboration and joined-up thinking will be required from a number of Departments and State agencies to ensure we provide the best legislative solution to safeguarding vulnerable adults across all services provided by the State."¹ The Joint Oireachtas Committee on Health also recommended in its *Report on Adult Safeguarding* that any legislation should take into consideration the need for inter-agency collaboration and that the proposed safeguarding authority would adopt a similar approach to the National Safeguarding Committee (now Safeguarding Ireland) in its inter-agency collaborations.² The Commission on the Future of Policing in Ireland outlined a vision for policing founded on a new definition of policing which includes

¹ Minister Simon Harris, Adult Safeguarding Bill: Second Stage, Seanad Éireann debate -

Wednesday, 5 Apr 2017 (5 April 2017) Volume 251, Number 5, available at
<https://www.oireachtas.ie/en/debates/debate/seanad/2017-04-05/9/>

² Joint Oireachtas Committee on Health, *Report on Adult Safeguarding* (Houses of the Oireachtas 2017) at 7.

the prevention of harm (which would include harm to at risk adults) as a policing objective and a New District Policing Model focused on problem oriented policing.³ Improved cooperation between relevant state agencies was highlighted as being critical for these approaches while engagement between police and community stakeholders and agencies was identified as necessary for building better multiagency approaches to community safety problems.⁴

2. Multi-agency collaboration in the Irish context

- [11.4] In the context of adult safeguarding in Ireland, many existing multi-agency collaboration arrangements are underpinned by policy or are on an informal basis and are not adequately resourced or implemented consistently at a regional level. A number of relevant agencies have reported a lack of multiagency partnerships and protocols, which makes it difficult for individual agencies to offer comprehensive person-centred solutions to at risk adults.
- [11.5] This section will outline 3 examples of multi-agency collaboration related to adult safeguarding in the Irish context.

(a) Safeguarding Ireland

- [11.6] Safeguarding Ireland (formerly the National Safeguarding Committee) is an example of multiagency collaboration in the Irish adult safeguarding context. It was established in December 2015 as an independent entity with the assistance of the HSE, in line with one of the commitments of the HSE's 2014 national policy and procedures on *Safeguarding Vulnerable Persons at Risk of Abuse*.⁵ Safeguarding Ireland is a multi-agency and inter-sectoral body, which is chaired by an independent chairperson. It works collaboratively with stakeholders in recognising that safeguarding at risk persons from abuse is something that cannot be addressed by any single agency working in isolation and cannot be solely viewed as a health or social services responsibility. Membership is comprised of key stakeholders from public, legal and financial services, health and social care professions, regulatory authorities and NGOs representing older people and people with disabilities.⁶ Safeguarding Ireland

³ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at 23.

⁴ *Ibid*, at XV and 23.

⁵ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE Social Care Division 2014) at 52. Paragraph 22.4 provides for the establishment of a National Inter-Sectoral Committee for Safeguarding Vulnerable Persons. Safeguarding Ireland (formerly the National Safeguarding Committee) was established in fulfilment of that commitment.

⁶Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 30.

published its first Strategic Plan in 2017, which covers the period 2017-2021 and sets out the core objectives of the multi-agency body.⁷ The core objectives are:

- (i) To raise public understanding of attitudes, behaviours, circumstances and systems that create vulnerability that may result in abuse and that may require a safeguarding response;
- (ii) To promote 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; and
- (iii) To inform and influence Government policy and legislation to safeguard the rights of people who may be vulnerable.⁸

(b) Transitions in Care

- [11.7] A further example of multiagency collaboration is the joint protocol between the HSE and the Child and Family Agency setting out how children in the care of the State access disability services when they turn 18 years old.⁹ The need to have measures in place became particularly apparent in Ireland following the case of a young woman known as 'Mary' in which it was found that the young woman who had been placed with a foster family as a child was not removed from the foster placement until two years after allegations of sexual abuse were made. A decision had been made to remove the young woman from the home but as she had turned 18 years of age, she was no longer under statutory care or under the remit of the Child and Family Agency. The Child and Family Agency did not therefore have the power to remove her from the home. It wasn't until two years later in 2016 that the HSE removed the woman from the home and placed her in residential care.
- [11.8] In other jurisdictions, there are statutory provisions governing the transition from child care services to adult services. In England, section 58 of the *Care Act 2014* provides that, where it appears to a local authority that a child is likely to have needs for care and support after becoming 18, the authority must, if it is satisfied that it would be of significant benefit to the child to do so and if a consent condition is met, assess the following issues:
- Whether the child has needs for care and support and, if so, what those needs are; and

⁷ National Safeguarding Committee (now Safeguarding Ireland), *Strategic Plan 2017-2021* (National Safeguarding Committee 2016).

⁸ *Ibid*, at 9-11.

⁹ Tusla – Child and Family Agency and the HSE, *Joint Protocol for Interagency Collaboration between the Health Service Executive and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (Tusla and HSE 2017).

- Whether the child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be.

- [11.9] The Statutory Code of Practice accompanying the *Scottish Adult Support and Protection (Scotland) Act 2007* emphasises the importance of ensuring that transitional arrangements between child and adult protection services are in place.¹⁰
- [11.10] In Ireland, a review was commissioned of the case of "Mary" by the HSE and the Child and Family Agency; and a report was published in 2017.¹¹ The review identified a general lack of clarity regarding which agency is responsible for a person in statutory care once they reach 18 years of age.¹² It also found that the Child and Family Agency was unclear of what action it was legally allowed to take, and that safeguarding measures were not in place.¹³ It further highlighted a lack of coordination between the HSE and the Child and Family Agency.¹⁴ In response to the review, the multiagency protocol was agreed between the HSE and the Child and Family Agency.¹⁵ The protocol provides clarity regarding which agency is responsibility for providing necessary care and support. It is aimed at ensuring that all young people in care who have continuing needs will transfer immediately from the care of the Child and Family Agency to the HSE upon turning 18 years of age.

(c) HSE multiagency safeguarding structures

- [11.11] The HSE's 2014 national policy and procedures on *Safeguarding Vulnerable Persons at Risk of Abuse* also provided for the establishment of a National Inter-agency Working Group and inter-agency Safeguarding and Protection Committees in each Community Healthcare Organisation. It proposed that the National Inter-Agency Working Group would be established in association with An Garda Síochána and the Child and Family Agency to develop joint protocols and collaborative arrangements.¹⁶ Safeguarding and Protection Committees have been established in each of the nine Community

¹⁰ Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (Scottish Government 2014) at 50.

¹¹ Tusla – Child and Family Agency, *Case Review Mary* (Tusla and the HSE 2017).

¹² *Ibid*, at 6-7.

¹³ *Ibid*, at 6-7.

¹⁴ *Ibid*, at 6-7.

¹⁵ Tusla – Child and Family Agency and the HSE, *Joint Protocol for Interagency Collaboration between the Health Service Executive and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (Tusla and HSE 2017).

¹⁶ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE Social Care Division 2014) at 52.

Healthcare Organisations.¹⁷ The Committees are appointed by the Chief Officer of the Community Healthcare Organisation, are chaired by the Head of Social Care and represent relevant personnel and agencies. The aims of each Committee are to:

- (i) Support the development of a culture within the area and within services which promotes the welfare of vulnerable persons;
 - (ii) Develop, approve and have oversight of the area plan to promote the welfare of vulnerable persons, consistent with Service Plan objectives;
 - (iii) Support interagency communication and collaboration in respect of services and responses to the needs of vulnerable persons; and
 - (iv) Provide a support and advisory service to the Senior Manager and Safeguarding and Protection Team (Vulnerable Persons) in addressing the needs of vulnerable persons, including consideration of particularly complex cases and system issues.¹⁸
- [11.12] The HSE has stated that while co-ordination has been improved with the establishment of Safeguarding Ireland and through the development of interagency protocols, legislation is needed on an interagency and societal level to effect the necessary changes.¹⁹ The representative of the HSE added that international research and evidence has consistently highlighted the importance of a process and structure for mandated interagency collaboration and co-ordination on adult safeguarding.²⁰

3. Adult safeguarding and multi-agency collaboration in other jurisdictions

(a) Wales

- [11.13] In Wales, there are a number of statutory provisions for multi-agency cooperation with regard to adult safeguarding. Section 162(1) of the *Social Services and Well-being (Wales) Act 2014* places a duty on local authorities to make arrangements to promote cooperation between the local authority, each of the local authority's relevant partners in the exercise of their functions relating to adults with needs for care and support or to adults who are carers and such other persons or bodies as the authority considers

¹⁷ Health Service Executive, *The National Safeguarding Office Report 2017* (HSE 2017) at 10.

¹⁸ Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (HSE Social Care Division 2014) at 52–53.

¹⁹ Pat Healy (National Director of the Social Care Division, HSE), *Joint Committee on Health debate – Wednesday, 4 Oct 2017 Adult Safeguarding: Discussion* (4 October 2017) available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_health/2017-10-04/2/

²⁰ *Ibid.*

appropriate, being persons or bodies of any nature who or which exercise relevant functions. Section 162(2) provides that a local authority must also make arrangements to promote co-operation between the officers of the authority who exercise its functions while section 162(6) provides that the relevant partners of a local authority must co-operate with the authority in the making of arrangements under this section. Section 162(7) provides that a local authority and any of its relevant partners may for the purposes of arrangements under section 162:

- (a) provide staff, goods, services, accommodation or other resources;
- (b) establish and maintain a pooled fund;
- (c) share information with each other.

- [11.14] Section 164 of the Act provides for a duty on certain prescribed agencies and persons to cooperate with a local authority, where requested, and to provide the local authority with information it requires for the purposes of the exercise of any of its social services unless it would be incompatible with the person's own duties or otherwise have an adverse effect on the exercise of the person's functions.

(b) Scotland

- [11.15] A duty to cooperate also exists in Scotland, as section 42.2 of the *Adult Support and Protection (Scotland) Act 2007* provides that Adult Protection Committees "must have regard to the desirability of improving cooperation" between relevant public bodies. Research among Scottish practitioners found the provision under the *Adult Support and Protection (Scotland) Act 2007* placing a duty on public bodies to cooperate had resulted in clear improvements such as increased inter-professional cooperation and case conferences that were more robust due to increased attendance, which in turn led to improved decision-making.²¹ This led to increased shared responsibility and also reduced the time that it took to resolve matters making the services more effective.²² There were a number of examples of excellent collaboration but also examples of where collaboration was lacking, including an unwillingness to share information, a lack of willingness to assist with the assessment process and the protection of professional boundaries.²³ However, the majority of examples provided during the research with practitioners referred to relationship building with at risk adults,

²¹ Mackay et al., "What difference does the Adult Support and Protection (Scotland) Act 2007 make to social work service practitioners' safeguarding practice?" (2012) *The Journal of Adult Protection* 14(4), at 203-204.

²² *Ibid.* at 203.

²³ *Ibid.*

involving the slow introduction of services when an adult might be willing to consider them, and the sharing out of responsibility across agencies.²⁴

(c) England

- [11.16] In England, the *Care Act 2014* places a duty on local authorities (councils) to cooperate with each of its partners and a duty on relevant partners to cooperate with local authorities. Section 6(1) provides that local authorities and their relevant partners must cooperate in the exercise of (a) their respective functions relating to adults with needs for care and support, (b) their respective functions relating to carers, and (c) functions relevant to functions referred to in paragraph (a) or (b). Section 6(2) further provides that a local authority must co-operate, in the exercise of its functions, with such other persons as it considers appropriate who exercise functions, or are engaged in activities, in the authority's area relating to adults with needs for care and support or relating to carers. Section 6 also sets out examples of persons with whom a local authority may consider it appropriate to cooperate; and examples of stakeholders between which the local authority must make arrangements for cooperation. Section 6 also lists the relevant duties or functions of local authorities; and lists each of those considered to be relevant partners of local authorities.
- [11.17] Section 7 of the 2014 Act provides that where a local authority requests the cooperation of a relevant partner or another local authority, or a relevant partner or other local authority requests the assistance of the local authority in the exercise of a function in the case of an individual with needs for care and support or in the case of a carer, each must comply with the request to cooperate unless it considers that doing so (a) would be incompatible with its own duties, or (b) would otherwise have an adverse effect on the exercise of its functions.
- [11.18] Prior to the introduction of a duty to cooperate in the context of adult safeguarding under the 2014 Act, there were numerous calls for such a statutory duty. Research in England has suggested that one possibility to encourage greater multi agency collaboration would be to extend the duty to cooperate under section 6 of the *Care Act 2014* to give more powers or responsibilities to enable attendance or cooperation from other agencies and professionals.²⁵ It has been suggested that this may include clearer criteria for the involvement of the police and advising hospital staff and GPs in

²⁴ Mackay et al., "What difference does the Adult Support and Protection (Scotland) Act 2007 make to social work service practitioners' safeguarding practice?" (2012) *The Journal of Adult Protection* 14(4), at 204.

²⁵ Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at vi.

their role in supporting social workers to have private conversations with adults at risk or in the community.²⁶

4. Need for legislative provision for multi-agency collaboration

- [11.19] In addition to the view of the HSE that a statutory duty to cooperate in adult safeguarding is required, the Commission on the Future of Policing in Ireland also recommended that there should be a statutory duty on other agencies to cooperate with An Garda Síochána in the prevention of harm. The *Garda Síochána Act 2005* provides that the Gardaí shall cooperate as appropriate with the other Departments of State, agencies and bodies, having, by law, responsibility for any matter relating to any aspect of An Garda Síochána's objectives, as specified in the Act.²⁷ The Report of the Commission on the Future of Policing highlighted that the Gardaí have formed partnerships with other agencies to address public protection issues such as vulnerable children and domestic abuse, but in many cases this is in the absence of a specific statutory obligation on those other agencies to cooperate with police in matters of community safety.²⁸ It was noted that, where such partnerships exist, they can be dependent upon the individuals involved and the relationships they are able to build with counterparts, rather than specific obligations to work together in the public service.²⁹
- [11.20] The Commission on the Future of Policing therefore recommended that there should be new legislation redefining policing and the role of the public service and other state agencies in harm prevention. It stated that the drafting of the legislation would require consultation among agencies to determine how they can all work together to serve the best interests of people at risk and the community as a whole.³⁰ It also recommended that other Departments, agencies and bodies with a function in policing, community safety and harm prevention should develop Joint Strategic Plans with An Garda Síochána and that these should be submitted to the Oireachtas Committee on Justice and Equality annually.³¹
- [11.21] The example of the HSE and the Child and Family Agency's joint protocol on transitional care arrangements, which sets out how children in the care of the State

²⁶ Stevens et al., *Helping or hindering in adult safeguarding: an investigation of practice* (Social Care Workforce Research Unit – King's College London, 2017) at vi.

²⁷ *Garda Síochána Act 2005*, section 7.

²⁸ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) at 14.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, at 15.

access disability services when they turn 18 years old, is a further example of welcome multiagency collaboration. However, while the protocol may be sufficiently provide for transitions between Child and Family Agency and HSE care, a statutory provision similar to that in the English *Care Act 2014* could be introduced to impose a legislative duty on the Child and Family Agency and the HSE to cooperate in implementing transitional arrangements, which may act as an impetus to ensure that effective and immediate protections are in place in all cases of persons transferring from child care to adult safeguarding services.

- [11.22] It is possible that carefully developed interagency protocols may be sufficient to ensure multiagency collaboration in some cases. However, such protocols may also need to be underpinned by a statutory duty on agencies to cooperate if the evidence indicates that such a duty is required.

Questions for Issue 11

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?

FULL LIST OF QUESTIONS TO CONSULTEES

For convenience, the Commission sets out here the full list of questions on which the views of consultees are sought. Submissions may address some or all of the issues raised in this Issues Paper, and may also address other issues that consultees believe may be of relevance to the development of a regulatory framework for 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?
- Q. 1.2** Do you consider that additional guiding principles should underpin the legislation? If yes, please outline the relevant additional guiding principles.
- 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?
- 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".
- 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?

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.

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

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?

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?

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?

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?

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

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?

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.

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?

We would like to receive submissions on this Issues Paper no later than close of business on **Thursday 30 April 2020** if possible. For e-mail and postal addresses, please see page xiii, above.

