COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
LAW REFORM COMMISSION

REPORT

A REGULATORY FRAMEWORK FOR ADULT SAFEGUARDING

VOLUME 2

(LRC 128 - 2024 VOL. 2)

Report

A Regulatory Framework for Adult Safeguarding

(LRC 128 - 2024)

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Glossary

Term	Definition
Abuse	A single or repeated act or failure to act that has a negative impact on a person. Abuse can involve physical abuse, emotional abuse, sexual abuse or financial abuse. This is not an exhaustive list of the forms of abuse.
Adult at risk of harm/at-risk adult	A person who is not a child, and by reason of their physical or mental condition or other particular personal characteristics or family or life circumstance (whether permanent or otherwise) needs support to protect themselves from harm at a particular time.
Adult safeguarding	Measures that are, or may be, put in place to promote the health, safety and welfare of at-risk adults, minimise the risk of harm to at-risk adults, and support at-risk adults to protect themselves from harm.
Adult Safeguarding Review	A learning review to identify ways to improve the safety, quality and standards of adult safeguarding services in response to very serious adult safeguarding incidents that meet a high threshold. In Chapter 17, the Commission recommends that Adult Safeguarding Reviews should be established on a statutory basis in Ireland (i.e. contained in Irish legislation).
Adult safeguarding statement	A written statement prepared by a provider of a relevant service which outlines the policy, procedures and measures that the provider has in place to minimise the risk of harm to adults availing of the service including adults who are, may be, or may become at-risk adults. In Chapter 7, the Commission recommends the components of an adult safeguarding statement.
Approved centre	A service regulated by the Mental Health Commission under the Mental Health Act 2001 to provide in-patient treatment to people experiencing mental illness or mental disorders.
At-risk customer	An at-risk adult who is a customer of a regulated financial service provider.
Authorised officer	A person appointed by the Safeguarding Body to carry out functions of the Safeguarding Body under the Commission's Adult Safeguarding Bill 2024.
Autonomy	The right to make decisions and take actions that are in line with one's beliefs and values.
Barred lists	Databases containing details of individuals who are banned from working or volunteering with children or at-risk adults

	due to past behaviours (which may have fallen below the threshold for a certain criminal offence to have been committed) or because they have committed certain criminal offences. Barred lists are in place in other jurisdictions but are not currently in place in Ireland.
Capacity	Decision-making capacity as defined in the Assisted Decision-Making (Capacity) Act 2015. A person's ability to make decisions for themselves. This is based on the person's ability to make a specific decision about something, at a specific time.
Care plan	A plan that outlines the health, personal and social care needs of an adult availing of a service and how a service intends to meet those needs in line with the adult's preferences. This is usually developed between the service and the adult concerned following an assessment of care and support needs.
Care setting	The place where a person receives care, for example, a person's home, a hospital, a nursing home, a residential centre, or a day service.
Coercive control	A pattern of controlling and threatening behaviour. This is a criminal offence under section 39 of the Domestic Violence Act 2018 which criminalises a person knowingly and persistently engaging in behaviour that is controlling or coercive, has a serious effect on a person, and which a reasonable person would expect to have a serious effect on a person. In Chapter 19, the Commission recommends the creation of an offence of coercive control of a relevant person that extends to a broader category of relationships that the existing offence under the Domestic Violence Act 2018.
Coercive exploitation	A new criminal offence proposed by the Commission in Chapter 19. This proposed offence would criminalise a person who, without a reasonable excuse, controls or coerces a "relevant person" so as to get control or be able to exercise control over their property or financial resources to gain a benefit or advantage for themselves or another person.
Committee of the Person / Committee of the Estate	In the past, if a person was unable to make certain decisions because of capacity difficulties, they might have been made a ward of court. When a person was made a ward of court, a Committee was appointed to control their assets and make decisions about their affairs. This has changed since most of the provisions of the Assisted Decision-Making (Capacity) Act 2015 came into force in April 2023.

Community Health Organisations	Nine HSE structures providing primary care, social care, mental health, and health and wellbeing services across Ireland. Community Health Organisations are currently being replaced by six health regions as part of the restructuring of the HSE.
Cooperation	A range of bodies working together for a common purpose. It involves the sharing of information, shared decision-making and responsibility, the pooling of resources, and the sharing of expertise and best practice. In Chapter 15, the Commission recommends that the Safeguarding Body, certain public service bodies and certain service providers should have a duty to cooperate with one another to address adult safeguarding concerns.
CORU	The Health and Social Care Professionals Council, otherwise known as CORU, protects the public by promoting high standards of professional conduct, education, training and competence through statutory registration of health and social care professionals in Ireland. It regulates multiple health and social care professions including social workers, occupational therapists, physiotherapists and speech and language therapists.
Cross-sectoral legislation	Legislation that applies to a variety of sectors, instead of one specific sector.
Cuckooing	A practice where a person or many people take over an at-risk adult's home and use the property for anti-social behaviour or criminal activity.
Day services	Services provided to adults with disabilities and older adults in day centres where they participate in activities such as recreational, social, leisure and rehabilitation activities. These services are usually provided in the community and are non-residential.
Decision Support Service	A service established under the Assisted Decision-Making (Capacity) Act 2015 to support people who face difficulties and need support exercising their decision-making capacity. It is a part of the Mental Health Commission, but it has a separate role. The Decision Support Service promotes awareness of the 2015 Act, regulates and registers decision support arrangements, and supervises the actions of decision supporters.
Designated centre	A service or centre within the meaning of section 2 of the Health Act 2007 that is regulated by HIQA. These services or centres are inspected and monitored by the Chief Inspector of Social Services. It includes residential centres for older people and residential centres for adults with disabilities.

DSGBV Agency ("Cuan")	The Domestic, Sexual and Gender-Based Violence Agency, established on 1 January 2024. The legal name for the Domestic, Sexual and Gender-Based Violence Agency is An Ghníomhaireacht um Fhoréigean Baile, Gnéasach agus Inscnebhunaithe. It will be known as Cuan.
Empowerment and person-centredness	This includes the presumption of decision-making capacity; the facilitation of supported decision-making, where requested or required; ensuring informed consent; respecting the right to autonomy and the right to full and effective participation in society; the realisation of the right to independent advocacy; ensuring respect for will and preferences; ensuring respect for the right to have risks and options explained; and ensuring respect for the right to be consulted at every step of an intervention under adult safeguarding legislation.
Financial abuse	Theft, fraud, exploitation or pressure relating to wills, property, inheritance or financial transactions, including: (a) wrongful or unauthorised taking, withholding, appropriation or use of money, assets or property; (b) action or inaction to control, through deception, intimidation or undue influence, money, assets or property; or (c) wrongful interference with or denial of ownership, use, benefit or possession of money, assets or property.
Financial services	Services involving the investment, lending or management of money, assets or property that are provided by banks, post offices or credit unions.
Harm (civil)	Assault, ill-treatment, neglect or self-neglect in a manner that affects or is likely to affect health, safety or welfare of an at-risk adult, sexual abuse of an at-risk adult, or loss of, or damage to, property by theft, fraud deception or coercive exploitation. It may be a single, series or combination of acts, omissions or circumstances.
Harm (criminal)	Harm to body or mind which includes pain and unconsciousness, any injury or impairment of physical, mental, intellectual, emotional health or welfare, or any form of property or financial loss.
Health care assistant	These workers provide direct personal care and assistance with activities and daily living to patients and residents in a variety of health care settings. They work on implementing care plans and practices and work under the supervision of medical, nursing or other health professionals.
Home support services	Services providing care and assistance to older people and people with disabilities to allow them to live at home. This could include assisting older people and people with

	disabilities with their personal hygiene, their nutrition, or helping them take their medication or helping them to exercise.
HSE National Safeguarding Office	A national office established in 2015 in line with the HSE Social Care Division's Safeguarding Vulnerable Persons at Risk of Abuse National Policy and Procedures. The office oversees the implementation, monitoring, review and ongoing evaluation of the National Policy and Procedures. The office supports the work of the HSE's Safeguarding and Protection Teams.
HSE's National Policies and Procedures	The HSE's Safeguarding Vulnerable Persons at Risk of Abuse National Policy and Procedures published in 2014. It applies to HSE managed or funded disability services and older people's services, and to reports or allegations of harm in respect of adults living in the community who have disabilities or are over the age of 65.
Independent advocacy/ independent advocate	Advocacy support that is provided by an organisation or person who is independent from health and social care service providers and the family of the person receiving the advocacy support. An independent advocate can empower a person to express their will and preferences, communicate their perspectives and engage in decision-making processes that affect their lives.
Inherent jurisdiction of the High Court	A set of default powers, not contained in legislation, which arise from Article 34.3.1° of the Constitution. The powers have been used on a case-by-case basis to vindicate the fundamental constitutional rights of children and certain categories of adults.
International protection	Protection granted by the Government to someone who has left another country to escape being harmed or persecuted. This may include refugee status, subsidiary protection, permission to remain or temporary protection.
Issues Paper	The Law Reform Commission's Issues Paper on a Regulatory Framework for Adult Safeguarding (LRC IP 18-2019) which was published in January 2020.
Mandated person	People who are required by legislation to report actual or suspected abuse. The classes of persons (usually specific professions) who are subject to reporting requirements are generally listed in a schedule to legislation. In this report, where a mandated person knows, believes or suspects, that an at-risk adult has been harmed, is being harmed, or is at risk of being harmed, the Commission recommends that they should be under a statutory duty to report that knowledge, belief or suspicion as soon as possible to the

	Safeguarding Body. See the definition of "reportable harm" below.
Mandatory reporting	Requires the reporting of certain types of actual or suspected abuse or neglect or requires reporting of actual or suspected abuse or neglect in particular settings only, for example, a nursing home. It can also require the reporting of actual or suspected abuse by mandated persons.
Neglect	Neglect in a manner likely to cause an adult suffering or injury to their health or to seriously affect their wellbeing means a failure to adequately protect an adult under a person's care from preventable and foreseeable harm, a failure to provide adequate food, clothing, heating or medical aid, or in circumstances where a person cannot look after an adult under their care, a failure to take steps to have them looked after under relevant legislation.
No-contact order	An order proposed in Chapter 13 to be available under adult safeguarding legislation. If granted by the District Court, the order would prevent a non-intimate and non-cohabitating third party from engaging in one or more of the following behaviours: (a) following, watching, pestering or communicating (including by electronic means) with or about an at-risk adult for whose protection the order is made; (b) attending at, or in the vicinity of, or besetting a place where the at-risk adult resides; (c) approaching or coming within a specified distance of the at-risk adult. In addition to "full" no-contact orders, which may last for up to two years, the Commission recommends that interim and emergency no-contact orders be available in particular cases.
Permissive reporting	Permits people to report actual or suspected abuse or neglect of at-risk adults but does not require them by law to do so.
Personal plan	A plan specific to an adult availing of a service that reflects their needs, wishes, abilities and aspirations. Personal plans typically outline the goals an adult wants to achieve and how the service will support them in their personal development. They are tailored to the individual and developed between the service and the adult concerned.

Policing and Community Safety Authority	A body that will soon be established under the Policing, Security and Community Safety Act 2024. Its legal name will be An tÚdarás Póilíneachta agus Sábháilteachta Pobail.
Power of access to at-risk adults in places including private dwellings	A proposed power to allow authorised officers of the Safeguarding Body or members of the Garda Síochána, or both, to access at-risk adults in places, including private dwellings, to assess their health, safety or welfare. This power is exercisable on foot of a warrant issued by the District Court, which will be valid for three days.
Power of entry to and inspection of relevant premises	A proposed power to allow authorised officers of the Safeguarding Body to enter and inspect relevant premises to assess the health, safety or welfare of at-risk adults. The power is exercisable without a warrant, although a warrant may be obtained if entry and inspection is being obstructed. This would allow for accompaniment by a member of the Garda Síochána.
Power of removal and transfer	A proposed power to allow members of the Garda Síochána, accompanied by authorised officers of the Safeguarding Body, where possible, to remove an at-risk adult from where they currently are, and transfer them to a designated health or social care facility or other suitable place. The power would not allow for detention of an at-risk adult in the facility or suitable place. The power is exercised to assess the at-risk adult's health, safety and welfare, and assess whether any actions are needed to safeguard them, where this cannot be done in the place where the at-risk adult currently is. This power is exercisable on foot of an order issued by the District Court and is valid for three days.
Prevention	Proactive steps are taken to minimise the risk of harm to adults, including adults who are, may be or may become at-risk adults before harm occurs.
Relevant person	The term used to describe a specific category of at-risk adults against whom the Commission's proposed offences in Chapter 19 can be committed. A relevant person means an adult whose ability to guard themselves against violence, exploitation, abuse or neglect by another person is significantly impaired through (a) a physical disability, physical frailty, illness or injury, (b) a disorder of the mind, such as mental illness or dementia, (c) an intellectual disability, (d) autism spectrum disorder.
Regulated financial service provider	A financial service provider whose service is regulated by the Central Bank of Ireland or an authority in a country in the European Union, Iceland, Liechtenstein or Norway whose

	functions are comparable to the functions of the Central Bank of Ireland.
Regulated profession	A profession where access to, or the practice of, the profession is restricted to those who meet professional qualifications required by law.
Relevant premises	Certain premises in which adults, who may be at-risk adults, are likely to be residing in, and in receipt of care or services. This includes "designated centres", "approved centres", hospitals and residential centres for adults in the international protection process. The full list of premises is set out in Chapter 10.
Relevant service	Any work or activity provided by a person or organisation, a necessary and regular part of which consists mainly of a person or organisation having access to, or contact with adults, or adults who are, may be, or may become at-risk adults.
Reportable harm	Assault, ill-treatment or neglect in a manner that seriously affects, or is likely to seriously affect, health, safety or welfare, sexual abuse, or serious loss of, or damage to, property by theft, fraud, deception or coercive exploitation. This harm can be caused by a single act, omission or circumstances, or a series or combination of acts, omissions or circumstances. It excludes self-neglect where the person has capacity or is believed to have capacity to make personal care or welfare decisions.
Residential care settings	Where an adult who is, may be, or may become an at-risk adult is living in residential care, such as a public or private nursing home or a residential centre for people with disabilities, including a centre providing temporary residential respite care.
Rights-based approach	Ensuring that the rights of at-risk adults are respected, including their rights to autonomy, respect, dignity, bodily integrity, privacy, control over financial affairs and property, non-discrimination, equal treatment in respect of access to basic goods and services, and respect for their beliefs and values.
Risk assessment	A process to identify any risks arising in the provision of services to adults or adults who are, may be, or may become at-risk adults.
Safeguarding and Protection Teams	Teams of social workers established within the HSE, with responsibility for assessing and managing reports or concerns regarding abuse or neglect in HSE managed and

	funded services for older people and people with disabilities, and safeguarding referrals arising in the community. The teams support services in investigating reports, and directly assess complex cases. They also provide quality assurance, oversight and advisory support to HSE managed and funded services for older people and people with disabilities, provide training regarding adult safeguarding, and collate and publish data.
Safeguarding plan	A plan that is prepared where there is an adult safeguarding concern in relation to an adult availing of a service. It outlines the planned actions that have been identified to address the adult's needs and minimise the risk of harm to that adult or other adults within the service. It may be incorporated into a care plan or personal plan.
Self-neglect	Inability, unwillingness or failure of an adult to meet their basic physical, emotional, social or psychological needs, which is likely to seriously affect their wellbeing.
Serious harm	Injury which creates a substantial risk of death, is of a psychological nature which has a significant impact or causes permanent disfigurement or loss or impairment of the mobility of a body as a whole or of the function of any particular member or organ.
Social care	The planning and provision of services and supports to individuals who need them. This may include, for example, the provision of "Meals on Wheels", personal assistance, home care and home support, nursing care or residential services. It also encompasses delivery mechanisms and processes such as eligibility assessments and personal budgets.
Summary power of access to at-risk adults in places including private dwellings	A proposed power to allow members of the Garda Síochána to access at-risk adults in places including private dwellings, where the member reasonably believes there is a risk to the life and limb of the at-risk adult. This power is exercisable without a warrant, and is to be used when there is insufficient time to make an application for a warrant for access to the District Court. This summary power reflects the existing position under the common law, but adds clarity and strengthens the applicable safeguards.
Transitional care arrangements	Arrangements for young people as they move from the care of the State to aftercare, independent living, supported living or residential care. They can also be put in place when

	young people move from children's social care services to adult social care services.
Undue Influence	Exploitation of a position of power to cause a person to act, or not act, in a way that is detrimental to their best interests and which confers, or intends to confer, a benefit or advantage on another person.
United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD")	An international agreement which aims to protect the human rights and fundamental freedoms of people with disabilities.
Universal mandatory reporting	Requires everyone to report actual or suspected abuse or neglect of at-risk adults, irrespective of the setting or profession.
Vetting	Enquires and examinations conducted by the National Vetting Bureau of the Garda Síochana, employers recruiting employees or bodies recruiting volunteers to determine whether or not a person applying for work or activity, a necessary and regular part of which consists mainly of the person having access to, or contact with, children or "vulnerable persons", has a criminal history or criminal convictions. has any This is required by Irish vetting legislation for some professions and volunteer groups.
Ward of Court	In the past, if a person was unable to make certain decisions because of capacity difficulties, they might have been made a Ward of Court to protect them and their property. When a person was made a Ward of Court, a Committee was appointed to control their property and finances and make decisions about their affairs, including their welfare. This has changed since most of the provisions of the Assisted Decision-Making (Capacity) Act 2015 came into force in April 2023.
Wardship	The legal practice of a person being made a Ward of Court. The purpose of wardship was to protect the person and their property and finances when they lacked the capacity to do so themselves. The arrangements under the Assisted Decision Making (Capacity) Act 2015 are now replacing wardship, and all existing Wards of Court are being gradually discharged from wardship.
Warrant	An order granted by a court, usually allowing named individuals (such as members of the Garda Síochána) to enter a particular place and search it. The Commission discusses warrants for access in the adult safeguarding context in Chapters 10 and 11.

The following abbreviations are used throughout this Report:

Abbreviation	**Definition**
ALRC	Australian Law Reform Commission
APC	Adult Protection Committee
ASPP	Adult Support and Protection Partnership
ASU	Adult Safeguarding Unit (South Australia)
CBI	Central Bank of Ireland
CCPC	Competition and Consumer Protection Commission
CEO	Chief Executive Officer
CFA	Child and Family Agency
CHO	Community Health Organisation
CIB	Citizen's Information Board
CIS	Care Inspectorate Scotland
CIW	Care Inspectorate Wales
CO	Chief Officer of the HSE Community Health Organisation
COG	Chief Officer Group in the HSE
CORU	Health and Social Care Professionals Council
CPC	Consumer Protection Code
CQC	Care Quality Commission
DBS	Disclosure and Barring Service
DHSSPS	Department of Health, Social Services and Public Safety in Northern Ireland
DPA	Data Protection Act
DPC	Data Protection Commission
DPO	Data Protection Officer
DSGBV	Domestic, Sexual and Gender Based Violence
DSS	Decision Support Service
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EEA	European Economic Area
EU	European Union
GDPR	General Data Protection Regulation (EU) 2016/679
HCA	Health Care Assistant
HCCI	Home and Community Care Ireland
HCSA	Health Care Support Assistant
HETAC	Higher Education and Training Awards Council
HIQA	Health Information and Quality Authority
HIS	Healthcare Improvement Scotland
HMICS	His Majesty's Inspectorate of Constabulary in Scotland

HSE	Health Service Executive
HSENI	Health and Safety Executive for Northern Ireland
IASW	Irish Association of Social Workers
ICO	Information Commissioner's Office
IFSAT	Irish Financial Services Appeal Tribunal
IHA	Integrated Health Area
IPAS	International Protection Accommodation Service
ISCO	International Standard Classification of Occupations
LCDC	Local Community Development Committee
LCSP	Local Community Safety Partnership
LED	Law Enforcement Directive (EU) 2016/680
MABS	Money Advice and Budgeting Service
MHC	Mental Health Commission
NAS	National Advocacy Service for People with Disabilities
NDA	National Disability Authority
NGO	Non-governmental organisation
NHS	National Health Service
NISCC	Northern Ireland Social Care Council
NIRP	National Independent Review Panel
NMBI	Nursing and Midwifery Board of Ireland
NPHET	National Public Health Emergency Team
NMBI	Nursing and Midwifery Board of Ireland
NSO	National Safeguarding Office
OECD	Organisation for Economic Co-operation and Development
OPCAT	United Nations Optional Protocol to the Convention against Torture
PAS	Patient Advocacy Service
PHA	Public Health Agency
PSNI	Police Service of Northern Ireland
QQI	Quality and Qualifications Ireland
RFSP	Regulated Financial Service Provider
RQIA	Regulation and Quality Improvement Authority (Northern Ireland)
SAB	Safeguarding Adults Board
SAI	Serious Adverse Incident
SALRI	South Australia Law Reform Institute
SAO	Senior Accountable Officer according to HSE Incident Management Framework
SAR	Safeguarding Adult Review
SCR	Serious Case Review
SEC	Securities and Exchange Commission
SPT	Safeguarding and Protection Team

SPPG	Strategic Planning and Performance Group in Northern Ireland
SRE	Serious Reportable Event
SSSC	Scottish Social Services Council
SUSR	Single Unified Safeguarding Review (Wales)
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
VCPR	Voluntary Care Professional Register
WHO	World Health Organisation

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CHAPTER 8 INDEPENDENT ADVOCACY

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1. Introduction

[8.1] Independent advocacy plays a crucial role in providing support to individuals by helping them to understand complex situations, involving them in decision-making processes, and giving voice to their views.[1] Independent advocacy specifically refers to advocacy support provided by organisations or individuals that are independent of family members or service providers. These organisations are free from conflicts of interest which enables them to be led and guided solely by the wishes and preferences of the person on whose behalf they are advocating.

[8.2] The primary objective of independent advocacy is to empower and assist individuals who face challenges in exercising their rights, expressing their opinions, weighing up options and making informed choices.[2] The role of the independent advocate is not to make decisions for the person. Instead, independent advocates empower people to advocate for themselves and ensure that their will and preferences are heard and duly considered.

[8.3] At-risk adults can sometimes face obstacles to participating in decision-making processes and having their voices heard by professionals or family members. For example, an at-risk adult may have different methods of communication that make it difficult for them to communicate with relevant professionals or there may be power imbalances or attitudinal prejudices at play that impact their ability to assert their wishes and for these wishes to be taken into account and respected. While many at-risk adults may receive assistance from family members where these difficulties arise, some may have limited support networks, and in certain cases, family members may be incapable of objectively representing the at-risk adult's interests or communicating their perspective. Promoting access to independent advocacy services reduces the overreliance on family members and ensures that at-risk adults can avail of independent services that will help them to advocate for themselves.

[8.4] In Chapter 6 of this Report, the Commission recommends that a Safeguarding Body should be established on a statutory basis and should have the duties,

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[1] Joint Committee on Health, *Report on Adult Safeguarding* (2017) at page 18 <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/reports/2017/2017-12-13_report-adult-safeguarding_en.pdf> accessed 6 April 2024; Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document* (Department of Health 2022) at page 4 <https://assets.gov.ie/227034/a9bd3397-7163-46a6-8d44-496291499360.pdf> accessed 6 April 2024.

[2] Decision Support Service, *Code of Practice for Independent Advocates* (DSS 2023) at para 1.1.3 <https://decisionsupportservice.ie/sites/default/files/2022-01/DSS_COP_for%20independent%20advocates.pdf> accessed 6 April 2024.

powers and functions outlined in Chapter 5 to promote the health, safety and welfare of at-risk adults, and take action to prevent harm to them. While the Commission believes that these functions are necessary to safeguard at-risk adults, the exercise of these functions may cause upset, fear and stress for the at-risk adult, particularly if any action taken is not explained to the at-risk adult in a way that they can understand. In order to ensure that at-risk adults can meaningfully engage with the Safeguarding Body and that every effort to alleviate distress is pursued, the Commission believes it is necessary to consider whether more should be done to strengthen and encourage the provision of independent advocacy in the context of adult safeguarding. This is not to say that independent advocacy is the only way to ensure that at-risk adults can express their views.

[8.5] Often, social workers play a critical role in ensuring the at-risk adult's views are heard, respected and duly considered. One of CORU's standards on professional knowledge and skills provides that social work graduates will "recognise the role of advocacy in promoting the needs and interests of service users; be able to advocate on behalf of service users".[3] Social workers who have spent time building trusting relationships with an at-risk adult will often be well placed to assist the at-risk adult in communicating their needs, wishes and concerns.[4]

[8.6] There are also a number of self-advocacy and peer-advocacy groups in operation around the country, which promote a person's ability to advocate for themselves by talking to others about their experiences of self-advocacy or peer-advocacy.[5] The Irish Association of Social Workers note that it is important that advocacy should not be presented as something "done to someone by an external agency", and that support given through self-advocacy and peer advocacy should be recognised as it is "by far the most useful (and cost-effective) form of advocacy".[6]

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3 CORU, *Social Workers Registration Board – Standards of Proficiency for Social Workers* (CORU, 2019), standard 5.15 < https://www.coru.ie/files-education/swrb-standards-of-proficiency-for-social-workers.pdf> accessed 6 April 2024.

4 As discussed in Chapters 5 and 6, the Commission considers that the authorised officers of the Safeguarding Body will be social workers.

5 See for example, Inclusion Ireland, Self-Advocacy Groups in Ireland < https://inclusionireland.ie/self-advocacy-groups-in-ireland/> accessed 6 April 2024; Inclusion Ireland, The Self-Advocacy Toolkit < https://inclusionireland.ie/the-self-advocacy-toolkit/> accessed 6 April 2024; Disability Federation of Ireland, Self Advocacy < https://www.disability-federation.ie/our-work/self-advocacy/> accessed 6 April 2024; National Platform of Self Advocates, Our Work < https://thenationalplatform.ie/our-work/> accessed 6 April 2024; Peer Advocacy in Mental Health, Mission < https://www.peeradvocacyinmentalhealth.com/mission> accessed 6 April 2024;

6 Irish Association of Social Workers, *IASW Response to Public Consultation on Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (IASW 2024) at page 8 < https://iasw.ie/download/1238/IASW%20Submission%20to%20DOH%20re.%20Adult%20Safeguarding_02.04.24.pdf> accessed 6 April 2024.

[8.7] The focus of this Chapter is whether more can be done to promote access to independent advocacy services in Ireland. It does not examine advocacy by social workers, self-advocacy or peer-advocacy in depth; whether more can be done to support these forms of advocacy may be given further consideration by Government in the future.

[8.8] Currently in Ireland, the duty to facilitate access to independent advocacy is limited to people with disabilities residing in residential centres, older people residing in residential centres, and people with mental disorders who are resident in approved centres.[7] This leaves many at-risk adults who may have difficulty participating in decision-making processes without support to communicate their will and preferences. At present, there are multiple organisations operating in the independent advocacy landscape in Ireland that have different mandates and funding streams and provide varying types and levels of advocacy to service users. There is no regulation of independent advocacy services or independent advocates in Ireland nor are there common standards or codes of practices that must be adhered to across all care settings.[8]

[8.9] It is important that a statutory and regulatory framework for adult safeguarding places at-risk adults at the centre of all decisions and enhances their ability to actively participate in decision-making that affects their lives. Excluding at-risk adults from the decision-making process can be perceived as an abusive act itself, as it undermines their autonomy, capabilities, skills, and personhood.[9] Not involving the at-risk adult in the process can serve to compound safeguarding concerns.

[8.10] The independent advocate's role in the adult safeguarding context would involve informing at-risk adults of their rights, explaining safeguarding processes, assisting at-risk adults to participate in the development of safeguarding plans, supporting them to express their views and wishes and helping them to engage with the Safeguarding Body when it exercises its safeguarding functions.

[8.11] In considering the case for reform, this Chapter:

- examines current legislative provisions related to independent advocacy in Ireland;
- discusses existing independent advocacy organisations in Ireland;
- analyses the gaps in the current independent advocacy landscape;

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7 For further discussion, see section 2(a) of this Chapter.

8 There is a Code of Practice for independent advocates that provides guidance for in the context of the Assisted Decision-Making (Capacity) Act 2015, see Decision Support Service, *Code of Practice for Independent Advocates* (DSS April 2023).

9 Lonbay and Brandon, "Renegotiating power in adult safeguarding: the role of advocacy" (2017) 19 The Journal of Adult Protection 78 at page 79.

- explores the approach of comparative jurisdictions when it comes to independent advocacy in the adult safeguarding context; and
- considers how independent advocacy can be strengthened in the adult safeguarding context.

2. Independent advocacy services in Ireland

(a) Current provisions, standards and policies related to independent advocacy in Ireland

(i) Comhairle Act 2000 as amended by the Citizens Information Act 2007

[8.12] This Act established the Comhairle, now known as the Citizens Information Board (the "CIB").[10] The CIB is intended to be a "one stop shop" for information and advice on social services and entitlements of people within the State.[11] The functions of the CIB are set out in section 7(1) of the Comhairle Act 2000, as amended by the Citizens Information Act 2007. Its functions include:

> (a) to support the provision of or, where the Board considers it appropriate, to provide directly, independent information, advice and advocacy services so as to ensure that individuals have access to accurate, comprehensive and clear information relating to social services and are referred to the relevant services;
>
> (b) to support the provision of or, where the Board considers it appropriate, to provide directly, advocacy services to individuals, in particular those with a disability, that would assist them in identifying and understanding their needs and options and in securing their entitlements to social services.[12]

[8.13] This section does not establish a duty to provide or facilitate advocacy services. The CIB is required to provide independent advocacy services or "accurate, comprehensive and clear information" only if it "considers it appropriate".[13]

[8.14] Uncommenced provisions of the Citizens Information Act 2007 provided for amendment of the Comhairle Act 2000 to give the CIB the function to "provide, or to arrange for the provision of, a Personal Advocacy Service to qualifying persons and, in so doing, the Board shall take account of the following:

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[10] Section 3 of the Citizens Information Act 2007.

[11] Seanad Éireann Debates 24 February 2000 vol. 162 no 10.

[12] Section 7(1)(a) and (b) of the Comhairle Act 2000. Paragraph (b) was substituted by section 4(a) of the Citizens Information Act 2007.

[13] Section 7(1)(a) of the Comhairle Act 2000.

(i) the financial resources of the Board; and

(ii) whether qualifying persons can obtain advocacy otherwise than under this Act".[14]

[8.15] The uncommenced sections of the Act also provide for the establishment of a Personal Advocacy Service.[15] This advocacy service was intended to provide advocacy services for adults with a disability who, due to their disability, are unable or have difficulty in obtaining social services without assistance or support.[16] To meet the threshold, there would also need to be reasonable grounds for believing that there is a risk of harm to the adult's health, welfare or safety if they are not provided with the relevant service.[17] The Personal Advocacy Service was never established due to the economic downturn caused by the recession and the relevant sections remain uncommenced.[18]

[8.16] A large number of consultees who responded to the Commission's Issues Paper consider that the provisions regarding the Personal Advocacy Service contained in the Citizens Information Act 2007 should not be commenced because thinking on independent advocacy has progressed significantly since their enactment, as evidenced by the adoption of the Assisted Decision-Making (Capacity) Act 2015 and the ratification of the United Nations Convention on Rights of People with Disabilities by Ireland.[19] Consultees argued that the provisions are inadequate to offer independent advocacy to all at-risk adults due to:

- the limited scope of the proposed Personal Advocacy Service. It would exclude individuals who do not meet the definition of disability specified in the legislation,[20] and would only apply to support in accessing services.

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[14] Section 7(1)(bb) of the Comhairle Act 2000, as amended by section 4(a) of the Citizens Information Act 2007 (not yet commenced).

[15] Section 7A of the Comhairle Act 2000, as amended by section 5 of the Citizens Information Act 2007 (not yet commenced).

[16] Section 7A(3)(a)(i) of the Comhairle Act 2000, as amended by section 5 of the Citizens Information Act 2007 (not yet commenced).

[17] Section 7A(3)(a)(ii) of the Comhairle Act 2000, as amended by section 5 of the Citizens Information Act 2007 (not yet commenced).

[18] Citizens Information Board, *A Regulatory Framework for Adult Safeguarding - Law Reform Commission Issues Paper - Submission by the Citizens Information Board* (CIB 2020) at page 18 <https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/Adult_Safeguarding_LRC_052020.pdf> accessed 6 April 2024.

[19] Most of the provisions in the Assisted Decision Making (Capacity) Act 2015 came into operation on the 26 April 2023. Ireland ratified the UNCRPD on the 20 March 2018.

[20] The term disability under section 2 of the Comhairle Act 2000 as amended by section 2(c) of the Citizens Information Act 2007 refers to "a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health

This means that it would not cover all matters with which adults may require support including in relation to engagement with the Safeguarding Body under the Commission's proposed statutory framework for adult safeguarding.

- the threshold to be eligible to receive services from the proposed Personal Advocacy Service is excessively high. Advocacy services would only be available to adults with a disability, who are unable to access social services without the help of an advocate and where there would be a risk of harm to their health, welfare or safety if these services are not provided.
- the lack of provision in the Act for pro-active outreach to at-risk adults that would increase awareness of, and the demand for, advocacy services.

[8.17] The Commission agrees that the relevant uncommenced provisions in the Citizens Information Act 2007 are not fit for purpose in the adult safeguarding context. Many at-risk adults, for example, older adults, would fall outside the scope of the Personal Advocacy Service as they may not have a disability, as defined in the Act. Additionally, the provision of the Personal Advocacy Service was envisaged to be dependent on the financial resources of the CIB.[21] Independent advocacy is crucial when a Safeguarding Body needs to engage directly with at-risk adults for the purposes of exercising its functions, and this should not be limited by resource constraints that would weaken a duty to provide independent advocacy services.

[8.18] While the provisions in the Citizens Information Act 2007 related to the Personal Advocacy Service have not been commenced, the CIB does play a crucial role in providing advocacy services in Ireland. The National Advocacy Service for People with Disabilities ("NAS") provides independent advocacy exclusively for adults with disabilities. NAS has a particular remit to work with people with disabilities who:

(a) live in residential services;
(b) attend day-services;
(c) live in inappropriate accommodation;
(d) have communication differences;
(e) are isolated from their communities or have limited supports.[22]

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or intellectual impairment." It is important to remember that other people, for example older people, may be considered to be at-risk adults, who do not have a disability.

[21] Section 7(1)(bb)(i) of the Comhairle Act 2000, as amended by section 4(a) of the Citizens Information Act 2007 (not yet commenced).

[22] National Advocacy Service for People with Disabilities, Background and Remit <https://advocacy.ie/about-us/background-and-remit/> accessed 3 October 2023.

[8.19] NAS is an independent, free and confidential advocacy service that is funded and supported by the CIB, which has a mandate under section 7(1)(b) of the Comhairle Act 2000, as amended by the Citizens Information Act 2007, to provide advocacy for people with disabilities. NAS receives enquiries from various sources, including individuals with disabilities, family members or friends, healthcare professionals, service providers, and other organisations. Its aim is to provide assistance to individuals with disabilities in various areas such as housing, decision-making, access to finance, and healthcare.[23]

[8.20] In addition, NAS was awarded the tender to provide the Patient Advocacy Service ("PAS"). This independent advocacy service is available to all patients in public acute hospitals and nursing homes, including private nursing homes.[24] They support patients or residents in making complaints about their experiences and provide information about the complaints process. They can also provide support to patients following a patient safety incident.[25] PAS is funded by the Department of Health and is independent of the HSE and all service providers.[26]

(ii) Mental Health Act 2001

[8.21] The existing regulations under the Mental Health Act 2001 provide that a registered proprietor of an approved centre must ensure that details of relevant advocacy and voluntary agencies are provided to each resident in an understandable form and language.[27] In addition, the Mental Health Act 2001 provides that a person should be provided with independent legal representation in the review process of involuntary detention.[28] Legal representatives are assigned by the Mental Health Commission from a panel.[29]

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23 National Advocacy Service for People with Disabilities & Patient Advocacy Service *Annual Report 2021* (NAS 2022) at page 16.

24 Patient Advocacy Service, Patient Advocacy Service to Offer Support to Residents of Private Nursing Homes <https://www.patientadvocacyservice.ie/patient-advocacy-service-to-offer-support-to-residents-of-private-nursing-homes/> accessed 6 April 2024.

25 Patient Advocacy Service, Overview and Remit <https://www.patientadvocacyservice.ie/about-us/overview-and-remit/> accessed 6 April 2024.

26 Patient Advocacy Service, Overview and Remit <https://www.patientadvocacyservice.ie/about-us/overview-and-remit/> accessed 6 April 2023.

27 Regulation 20 of the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006).

28 Section 16(2)(b) of the Mental Health Act 2001.

29 The cost of the legal representative is covered by legal aid unless the patient appoints their own legal representative: Mental Health Commission, Legal Representatives, <https://www.mhcirl.ie/what-we-do/mental-health-tribunals/tribunal-panel-members/legal-representatives> accessed 6 April 2024.

[8.22] Limiting this duty to legal advocacy was criticised during the debate on the Mental Health Bill 1999. In the Seanad debates, an amendment was proposed under section 66 of the Bill that aimed to introduce regulations regarding "approved centres" and their obligation to maintain proper standards. The proposed amendment specifically focused on requiring these centres to assist residents in arranging meetings with independent patient advocates upon request. However, at the time of the debates, this amendment was not adopted. The then Minister of State at the Department of Health and Children, during the debates, argued that the government already showed support for independent advocacy by providing financial support to various advocacy agencies. Furthermore, the then Minister stated that the legal advocacy provision included in the Bill was superior to any form of lay advocacy.[30]

[8.23] Advocacy bodies including Mental Health Reform and statutory bodies including the CIB, which incorporates NAS, have welcomed a commitment in the Programme for Government to examine the extension of the Patient Advocacy Service to support those accessing public mental health services.[31]

[8.24] It is important to note that the Mental Health Act 2001 (Approved Centres) Regulations 2006 came into operation on 1 November 2006, and have not been amended since then. Undoubtedly, thinking on independent advocacy has progressed in recent years, as can be seen in the Health Act 2007 regulations discussed below. The Commission understands that reform of the Mental Health Act 2001 is expected in the coming years. In the Government's Legislative Programme for the Spring Session 2024, reform of the Mental Health Act was prioritised for drafting.[32] This will likely result in an overhaul of the regulations made under the Act.

[8.25] The draft Heads of Bill to amend the Mental Health Act 2001 were published in July 2021. Its provisions provide for an increased role of advocates under the

[30] Seanad Éireann Debates 19 June 2001 vol 167 no 4 and vol 167 no 2.

[31] Department of Taoiseach, *Programme for Government: Our Shared Future* (2020) at page 49 https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/ accessed 6 April 2024; Mental Health Reform, *Public Consultation on Draft Legislation to Update the Mental Health Act 2001* (MHR 2021) https://mentalhealthreform.ie/wp-content/uploads/2021/06/MHRSubmissionMHAApril2021.pdf accessed 6 April 2024; National Advocacy Service for People with Disabilities, *NAS submission to the Public consultation on draft legislation to update the Mental Health Act 2001* (NAS 2021) https://assets.gov.ie/201690/be5bc1a2-f022-4e6f-838d-01c8a205217f.pdf accessed 6 April 2024.

[32] Department of Taoiseach, *Government Legislation Programme Spring 2024* (January 2024) at page 10. The Heads of the Mental Health Bill were published in July 2021 and pre-legislative scrutiny of the Mental Health (Amendment) Bill took place in May 2022. The Mental Health (Amendment) Bill follows on from recommendations made by the Expert Group Review of the Mental Health Act 2001 which published its report on 5 March 2015.

Act.[33] In the proposed guiding principles to apply in respect of adults under the Act, section 4(3) provides that a person shall not be considered unable to make a decision that affects them unless all practicable steps have been taken unsuccessfully to help them to do so, including:

> giving the person concerned an opportunity, if he or she so wishes, to consult with a person or persons of his or her choosing prior to making a decision, including an advocate.[34]

[8.26] The draft Heads of Bill also provide that:

- a person who is subject who is involuntarily admitted to an approved inpatient facility or subject to an intermediate admission or renewal order should be provided with information regarding their entitlement to engage an advocate, in an understandable form and language[35]
- when a person is attending a mental health review board sitting, all relevant supports should be provided to them, including the attendance of their advocate, where they have engaged one or requested one to help them present their case,[36]
- when a person is going to be discharged, or has been discharged, a member of their multi-disciplinary team should, with the person's consent, engage with the person's advocate so far as is practicable on discharge planning,[37]
- a person may engage an advocate where an inquiry takes place under section 55 of the Act,[38]

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33 Advocates are defined in Head 3 – Section 2 – Interpretation as "an individual, acting independently of the approved inpatient facility, on behalf of a person receiving treatment in an approved inpatient facility, with the expressed consent of the person concerned". Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 9 https://assets.gov.ie/179798/a9ce77e7-a494-4460-bea5-4c2beaedfe80.pdf accessed 6 April 2024.

34 Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 24.

35 Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 61.

36 Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 69.

37 Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 111.

38 Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 158.

- where a person is making a decision on whether to consent to treatment, they may consult with an advocate,[39]
- where a person is voluntarily admitted to approved inpatient facilities, they are entitled to engage an advocate, and the advocate may be provided with information of a general nature on the care and treatment of the person.[40]

[8.27] In October 2022, the report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001 was published. Many stakeholders told the Sub-Committee that access to independent advocacy services is crucial in any reform of the Act.[41] The Sub-Committee noted that wrap-around supports for the most marginalised who are being involuntarily detained should include access to independent advocacy,[42] and where a person's case is being examined by a mental health review board (which will replace mental health tribunals should the Bill be passed in its current form) access to independent advocacy is important as a potential support.[43] Representatives from mental health organisations informed the committee that "people need supports to navigate the often-complex mental health services and systems" and that:

> often, we are prescriptive in the way services are delivered but it is more important to have a person-centred approach. In care planning and recovery planning, it is really about individuals stating who works for them, who they trust and their supporters.[44]

[8.28] The Sub-Committee recommended that "independent, accessible advocacy services" should be "offered to persons involuntarily detained at the earliest

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[39] Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 161.

[40] Department of Health, *Draft Heads of Bill to amend the Mental Health Act 2001* (July 2021) at page 240.

[41] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at pages 33, 52, 68 and 69 https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_sub_committee_on_mental_health/reports/2022/2022-10-12_report-on-pre-legislative-scrutiny-of-the-draft-heads-of-bill-to-amend-the-mental-health-act-2001_en.pdf accessed 6 April 2024.

[42] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at page 33.

[43] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at page 42.

[44] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at pages 68 and 69.

possible juncture".[45] It also recommended that the funding and resources of the National Advocacy Service should be increased to "expand its remit across both community and inpatient mental health services".[46] It recommended that the funding and resources for community and voluntary organisations providing advocacy services to people accessing mental health services and supports in the community, approved centres and outpatients settings should be increased. Additionally, it called for an increase in recruitment of peer support advocacy workers and networks across all community health organisations (soon to be health regions).[47]

(iii) Disability Act 2005

[8.29] The Disability Act 2005 requires certain ministers to prepare and publish sectoral plans that contain programmes of measures they propose to take in relation to the provision of services to people with disabilities.[48] Section 33(1) of the Disability Act 2005 details the information that must be contained in the sectoral plan prepared by the Minister for Social Protection. This plan must include specific information regarding the provision of information, advice, advocacy services, and sign language interpretation services to people with disabilities by the CIB. The term "disability" is defined as a:

> substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.[49]

(iv) Regulations under the Health Act 2007

[8.30] Under Part 13 of the Health Act 2007, the Minister for Health having consulted, where appropriate, with the Minister for Children, Equality, Disability, Integration and Youth may adopt regulations regarding residential centres for older persons,

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[45] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at page 43.

[46] Houses of the Oireacthas, *Sub-Committee on Mental Health – Report on Pre-Legislative Scrutiny of the Draft Heads of Bill to Amend the Mental Health Act 2001* (October 2022) at page 70.

[47] As discussed in the background section of this Report, the restructuring of the HSE began on the 1 March 2024 when the transition from Community Health Organisations to six new healthcare regions began. Community Health Organisations will be stood down in September 2024. See Health Service Executive, Regional Executive Officers for the 6 HSE Health Regions appointed https://healthservice.hse.ie/staff/news/staff-news-listing-page/regional-executive-officers-for-the-6-hse-health-regions-appointed/ accessed 9 April 2024.

[48] Section 31 of the Disability Act 2005.

[49] Section 2(1) of the Disability Act 2005.

persons with disabilities and children in need of care and protection.[50] The Health Act 2007 does not provide for a statutory duty to facilitate access to independent advocacy services, but regulations have been adopted to that effect.

[8.31] The relevant regulations under the Health Act 2007 in relation to people with disabilities,[51] provides that registered providers of residential centres for adults with disabilities must ensure that all residents have access to advocacy services and information about their rights in accordance with their wishes, age and the nature of their disability,[52] and that residents have access to advocacy services for the purposes of making a complaint.[53]

[8.32] The Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022,[54] ("the 2022 regulations") came into effect on 1 March 2023 and amended the regulations providing for the care and welfare of older people in residential centres under the Health Act 2007.[55] The 2022 regulations state:

> The purpose of these Regulations is to ensure access to independent advocacy services. These regulations also contain provisions providing for effective complaints mechanisms for residents of designated centres.[56]

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[50] Section 101 of the Health Act 2007. The Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013) sets out the standards applicable for the care and support of children and adults with disabilities, residing in designated centres. The Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013) sets out the standards applicable for the care and support of older people residing in designated centres.

[51] Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

[52] Regulation 9(2) of the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013). The term advocacy is defined as "a process of empowerment of the person which takes many forms and includes taking action to help communicate wants, secure rights, represent interests or obtain services needed". See regulation 2 of the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

[53] Regulation 34(1)(c) of the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

[54] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022 (SI No 628 of 2022).

[55] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013).

[56] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022 (SI No 628 of 2022).

[8.33] Prior to the 2022 regulations taking effect, the relevant regulations provided that a registered provider must, in so far as is reasonably practical, ensure that a resident has access to independent advocacy services.[57] The amendments introduced by the 2022 regulations mean that a registered provider must ensure that each resident has access to independent advocacy services, including access to in-person awareness campaigns by independent advocacy services.[58] There is no longer any reference to "in so far as is reasonably practical". A registered provider must ensure that the above independent advocacy services are made available to residents in residential centres and in private, as required. Each resident must also be provided with a guide that contains access to information regarding independent advocacy services.[59]

[8.34] The amendments made by the 2022 regulations also set out the complaints procedure to be followed in residential centres. The amended regulation provides that the registered provider must offer or otherwise arrange practical assistance for a complainant, as is necessary, to enable the complainant to understand the complaint process, make a complaint, request a review of a decision, or refer the matter to an external complaints process.[60] The registered provider may assist complainants, with their consent, in identifying another person or independent advocacy service who can help the person make a complaint.[61] Importantly, the term "complainant" is defined as meaning:

- a resident;
- a spouse, civil partner, cohabitant, close relative or carer of the resident;
- any person who, by law or by appointment of a court, has the care of the affairs of the resident;

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[57] Regulation 9(3)(f) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013).

[58] Regulation 9(5) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), as amended by the 2022 regulations.

[59] Regulation 20(2)(e) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), as amended by the 2022 regulations. This makes sure that residents are aware of the availability of independent advocacy services from the outset. Rees, a carer who spent years visiting her mother in a nursing home, notes that "every person who enters a care home (where they will constantly be under the power of other people) should have the name of an advocate or representative who will support and represent them from the day of entry". See Rees "Protecting my mother" (2011) 13(1) The Journal of Adult Protection 46 at page 51.

[60] Regulation 34(5)(a) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), as amended by the 2022 regulations.

[61] Regulation 34(5)(b) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013) as amended by the 2022 regulations.

- any other person with the consent of the resident.[62]

[8.35] This means that residential centres must engage with those representing the resident, including independent advocates, if they are making a complaint on behalf of a resident. Previously, residential centres were under no legal obligation to engage with independent advocates who were representing the resident or assisting them throughout the complaints process.

[8.36] The 2022 regulation amendments require residential centres to provide information on the level of engagement of independent advocacy services with residents within the residential centre in the centre's annual review report.[63] This provision promotes accountability and compliance with the statutory requirements. The 2022 regulation amendments were introduced in response to the Crowe Review of Nursing Homes Complaints Policies,[64] which recommended better access to independent advocacy services, particularly in relation to complaints processes.[65] The Older Persons Policy Development Unit in the Department of Health commissioned the review as part of a wider ambition to oversee a range of policy and legislative reforms relating to recommendations from the COVID-19 Nursing Homes Expert Panel Report.[66] The Commission understands that this was the impetus for amendments in respect of independent advocacy being made to the residential centres for older people regulations but not for the regulations for people with disabilities in residential centres.

(v) National Standards

[8.37] One of HIQA's roles is to set national standards for health and social care services. Some of these standards include references to the need for independent advocacy. For example, the National Standards for Residential Care Settings for Older People in Ireland provide that one of the ways in which residential care settings can respect and safeguard the rights and diversity of each resident is to

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[62] Regulation 2 of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013) as amended by the 2022 regulations.

[63] Regulation 34(6)(b)(i) of the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013) as amended by the 2022 regulations. They are also required to include information on complaints received in the centre and reviews conducted in response to complaints in the annual review report.

[64] Department of Health, *Review of Nursing Homes Complaints Policies – October 2022* (7 December 2022).

[65] Department of Health, Minister for Health welcomes changes to regulations to strengthen access to advocacy services and to standardise complaints processes in private nursing homes (December 2022) < https://www.gov.ie/en/press-release/86ce1-ministers-for-health-welcome-changes-to-regulations-to-strengthen-access-to-advocacy-services-and-to-standardise-complaints-processes-in-private-nursing-homes/> accessed 6 February 2024.

[66] Department of Health, *Review of Nursing Homes Complaints Policies – October 2022* (7 December 2022).

ensure that "each resident is facilitated in accessing advocacy services, and receives information about their rights".[67] Residents should also be provided with assistance and support to access information and to communicate with advocacy services if they so wish.[68] The National Standards make numerous references to the importance of residents being facilitated to access independent advocacy services to enable them to make informed decisions and engage in decision-making and complaint processes.[69] Similar references to advocacy are contained in the National Standards for Residential Services for Children and Adults with Disabilities.[70] Neither distinguish between self-advocacy, informal advocacy by friends and family or those with similar experiences, or by independent professional advocates.[71]

[8.38] In 2019, HIQA and the Mental Health Commission published the National Standards for Adult Safeguarding which aim to develop consistent approaches to adult safeguarding in health and social care services.[72] The National Standards define advocates as people who assist individuals to make their views known and includes informal support or independent advocacy services.[73] One of the standards is that "each person is supported to engage in shared decision-making about their care and support to reduce their risk of harm and promote their rights, health and well-being".[74] The document notes that a service meeting this standard is likely to include the following two features:

- Each person is supported and facilitated to advocate for themselves; and

[67] Health Information and Quality Authority, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at page 19.

[68] Health Information and Quality Authority, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at page 25.

[69] Health Information and Quality Authority, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at pages 26 to 27.

[70] Health Information and Quality Authority, National Standards for Residential Services for Children and Adults with Disabilities (HIQA 2013) at pages 64, 70, 80.

[71] Health Information and Quality Authority, *National Standards for Residential Care Settings for Older People in Ireland* (HIQA 2016) at page 80; Health Information and Quality Authority, National Standards for Residential Services for Children and Adults with Disabilities (HIQA 2013) at page 100.

[72] Health Information and Quality Commission and the Mental Health Commission, *National Standards for Adult Safeguarding* (HIQA, MHC 2019).

[73] Health Information and Quality Commission and the Mental Health Commission, *National Standards for Adult Safeguarding* (HIQA, MHC 2019) at page 15.

[74] Health Information and Quality Commission and the Mental Health Commission, *National Standards for Adult Safeguarding* (HIQA, MHC 2019) at page 23.

- Each person is informed about advocacy and support services and what they can offer. They are facilitated and supported to access these services.[75]

(vi) Interim Standards for New Directions, Services and Supports for Adults with Disabilities

[8.39] The Interim Standards for New Directions, Services and Supports for Adults with Disabilities require service providers and key stakeholders to involve people with disabilities in the design, delivery, monitoring and evaluation of services and supports provided. It applies to day service providers funded by the HSE to provide services to adults with disabilities. It provides a framework for the delivery of services and supports for people with disabilities in the State. These Interim Standards positively endorse the importance of independent advocacy in the design and delivery of services and independent advocacy is referred to across a number of standards.

[8.40] For example, under the theme of individualised services and supports, standard 1.4 provides that "the right of each person to make decisions" should be "supported and respected" and that "supports for decision-making, including access to advocacy services" should be provided.[76] It also provides that self-advocacy should be supported and facilitated in accordance with each person's needs and wishes.[77] Standard 1.4 provides that each person should have access to information to support them to make "informed plans and choices, provided in a format that is accessible to their information and communication needs".[78] This encompasses the person being informed about how to access advocacy services or an advocate of their choice.

[8.41] Standard 1.4 provides that the right of each person to make decisions should be respected and supported, and that supports for decision-making including advocacy services should be provided. Standard 1.4.5 provides that each person should be "facilitated and supported to access Citizen's Information Services, appropriate advocacy services or an advocate of their choice when making decisions, in accordance with their needs and wishes".[79] Once a person accesses independent advocacy services, effective engagement between the service

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[75] Health Information and Quality Commission and the Mental Health Commission, *National Standards for Adult Safeguarding* (HIQA, MHC 2019) at page 23.

[76] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 13.

[77] See also standard 1.1.4 and 1.1.5 which are similar to standard 1.4.

[78] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 20, standard 1.3.4.

[79] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 22, standard 1.4.5.

provider and the advocate must be supported and facilitated.[80] Again, the Interim Standards state that self-advocacy should also be supported and facilitated.

[8.42] Where a person wishes to make a complaint or raise a concern, standard 1.9.7 provides that they should be able to access appropriate advocacy services or an advocate of their choice. It states that when an advocate is supporting someone to make a complaint, the service provider must ensure that "timely and effective engagement is facilitated".[81] In terms of protecting a person from abuse, and ensuring their safety and welfare is promoted, standard 3.1.2 provides that people should have private access to advocacy services or an advocate of their choice in accordance with the HSE's Safeguarding Policy and Procedures, mentioned below.[82]

[8.43] Advocacy is defined in the standards as:

> A process of empowerment of the person which takes many forms. It includes taking action to help say what they want, secure their rights, represent their interests or obtain the services they need; it can be undertaken by people themselves, by their friends and relations, by peers and those who have had similar experiences, and/or by independent trained volunteers and professionals.[83]

[8.44] An advocate is defined as:

> A person, preferably nominated by the person using the service, who is independent of any aspect of the service and of any of the statutory agencies involved in purchasing or providing the service, and who acts on behalf of, and in the interests of the person using the service who feels unable to represent herself or himself when dealing with professionals. The advocate helps the person to express herself or himself.[84]

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[80] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 22, standard 1.4.5.

[81] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 29, standard 1.9.7.

[82] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 51, standard 3.1.2.

[83] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 79.

[84] HSE, *New Directions – Interim Standards for New Directions, Services and Supports for Adults with Disabilities* (HSE, 2015) at page 79.

(vii) Safeguarding Vulnerable Persons at Risk of Abuse – National Policy and Procedures

[8.45] One of the building blocks for safeguarding and promoting welfare in the HSE's National Policy and Procedures is advocacy. The policy recognises the important role that advocacy can play in supporting and protecting at-risk adults and that it can be preventative in that it allows at-risk adults to express themselves in "potentially, or actually, abusive situations".[85] It acknowledges that access to independent advocacy can provide pathways to social and other services and can enable people to be involved in decisions that would otherwise be made for them by others.[86]

[8.46] The policy does not place any obligation on service providers or organisations to facilitate access to independent advocacy. It mentions the HIQA National Standards for residential services for adults with disabilities and for residential care settings for older people discussed above and the rights of residents to access independent advocacy services.

(viii) Assisted Decision-Making Capacity Act 2015: Code of Practice for Independent Advocacy

[8.47] The Assisted Decision-Making Capacity Act 2015 ("the 2015 Act") does not include statutory provisions regarding access to independent advocacy. Instead, section 103(2) of the 2015 Act enables the Director of the Decision Support Service ("DSS") to prepare, or request another body to prepare, a code of practice to provide guidance to persons acting as advocates on behalf of relevant persons.[87] A Code of Practice for Independent Advocates has been prepared and published by the DSS.[88]

[8.48] The Code of Practice provides guidance to independent advocates on how to engage and interact with relevant persons and decision supporters and interveners.[89] It also contains guidance on how independent advocates should

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85 HSE, *Safeguarding Vulnerable Persons at Risk of Abuse – National Policy and Procedures* (HSE, 2014) at page 16.

86 HSE, *Safeguarding Vulnerable Persons at Risk of Abuse – National Policy and Procedures* (HSE, 2014) at pages 16 to 17.

87 A "relevant person" is an individual whose capacity is in question or may soon have their capacity questioned in relation to one or more matters. It also includes individuals who lack capacity in regard to one or more matters. Additionally, a relevant person can be someone who falls under both categories (capacity being questioned and lacking capacity) simultaneously, but for different matters. See section 2(1) of the Assisted Decision-Making (Capacity) Act 2015.

88 Decision Support Service, *Code of Practice for Independent Advocates* (DSS 2023).

89 Under the Assisted Decision-Making (Capacity) Act 2015, a decision supporter may be a decision-making assistant, a decision-making representative, a co-decision-maker, a

interact with family members or informal carers who do not have legal authority in terms of a decision support arrangement under the Act.[90]

[8.49] If the relevant person already has a decision supporter, the independent advocate should assess whether their roles overlap.[91] The relevant person can request an independent advocate themselves, or a third-party, for example, a family member or a healthcare professional, can contact an advocacy organisation if they believe that a person could benefit from independent advocacy services.[92] The independent advocate must obtain the consent of the relevant person before providing services to them.[93] If the relevant person is unable to give consent and a decision supporter is in place, then the independent advocate should not proceed. However, the independent advocate may provide independent advocacy support to the decision supporter if appropriate.[94]

[8.50] The role of an independent advocate is to provide professional assistance that is free from conflicts of interest and independent from both family and service providers by helping the relevant person to understand their own wishes and preferences, enabling them to make decisions, and if necessary, representing their interests through negotiation or advocacy.[95]

[8.51] The Code of Practice provides that where appropriate, the DSS may issue guidance and practice notes and may prescribe training that should be undertaken by independent advocates.[96] It states that independent advocates should follow any guidance issued and complete training required by virtue of their role as an independent advocate in the context of the 2015 Act.

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designated healthcare representative or their attorney. An intervener is a person who is making an intervention under the 2015 Act, such as healthcare professionals or general or special visitors. See Decision Support Services, *Code of Practice for Independent Advocates* (2023) at pages 5 and 8.

[90] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 9.

[91] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 7.

[92] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 7.

[93] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 7.

[94] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 8. The Code of Practice provides that an independent advocate may provide independent advocacy support to the decision supporter, even where the relevant person is unable to consent to independent advocacy themselves. The Code uses the example of a decision-making representative requesting the services of an independent advocate to provide assistance in ascertaining the relevant person's will and preferences in relation to a particular decision in the decision-making representation order.

[95] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 5.

[96] Decision Support Services, *Code of Practice for Independent Advocates* (2023) at page 13.

(ix) Government's Policy Proposals on Adult Safeguarding in the Health and Social Care Sector

[8.52] The Government's Policy Proposals on Adult Safeguarding in the Health and Social Care Sector make a number of references to how access to advocacy services can empower at-risk adults and promote their autonomy.[97] The Policy Proposals state that:

> (a) Providers must support adults at risk by ensuring that they have access to advocacy services when needed for safeguarding purposes. Services should pay particular attention to the needs of those who have difficulty expressing their views;
>
> (b) Services must ensure that adults at risk who use their services are informed on how and where to access such advocacy services in a manner and format they can easily understand;
>
> (c) Services must facilitate access on-site to advocacy services for adults at risk who use residential services (in privacy where required) in the centres where they reside, irrespective of the unit's type of ownership/operation.[98]

[8.53] The Policy Proposals do not exclusively relate to independent advocacy. The definition of advocate/ advocacy provides:

> A person nominated by an adult to speak on their behalf and represent their views. Advocacy comes in different forms including informal support and independent advocacy services. Advocacy should always be independent from the service providing care or support.[99]

[97] The Policy Proposals were prepared by the Department of Health. See Government of Ireland, *Public Consultation Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at pages 11 and 18 <https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf> accessed 9 April 2024.

[98] The Policy Proposals were prepared by the Department of Health. See Government of Ireland, *Public Consultation Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 19 <https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf> accessed 9 April 2024.

[99] The Policy Proposals were prepared by the Department of Health. See Government of Ireland, *Public Consultation Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 31 <https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf> accessed 9 April 2024.

(b) Gaps in the provision of independent advocacy in Ireland

[8.54] At present, the only statutory provisions regarding independent advocacy in Ireland are limited to older people and individuals with disabilities who live in residential centres, as per the Health Act 2007 regulations outlined above, or individuals with a mental disorder resident in approved centres under the Mental Health Act 2001. This leaves many at-risk adults without statutory entitlements to access independent advocacy services or receive information about such services.

[8.55] In addition, the approach in the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022, which amended the regulations providing for the care and welfare of older people in residential centres under the Health Act 2007,[100] bestows greater independent advocacy duties on registered providers of residential centres for older people[101] than those that exist in the regulation in respect of people resident in residential centres for people with disabilities[102] or people with mental disorders resident in approved centres under the Mental Health Act 2001.[103] There does not appear to be any rationale for this inconsistency in approach to independent advocacy across care settings.

[8.56] Advocacy services in Ireland have the potential to assist a wide number of at-risk adults, although there are limitations to their reach. For instance, NAS covers various areas, but it is exclusively available for individuals with disabilities.[104] This

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[100] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013).

[101] The amendments place an obligation on registered providers to ensure each resident has access to independent advocacy services, including access to in-person awareness campaigns by independent advocacy services and access to meet and receive support from such services. They must ensure residents have access to information regarding services. They are also required arrange or offer to arrange for a resident to have access to an independent advocate to help them understand the complaints process and they must engage with independent advocates who are making a complaint on a resident's behalf, Information about the level of engagement between independent advocacy services and residents must be included in the annual review of a designated centre.

[102] Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013). This regulation provides that registered providers of residential centres for adults with disabilities must ensure that all residents have access to advocacy services and information about their rights in accordance with their wishes, age and the nature of their disability, and that residents have access to advocacy services for the purposes of making a complaint.

[103] Section 16(2)(b) of the Mental Health Act 2001provides that a registered proprietor of an approved centre must ensure that details of relevant advocacy and voluntary agencies are provided to each resident in an understandable form and language. It also provides for each resident to be provided with independent legal representation for the review process of involuntary detention.

[104] The remit of the services provided by NAS falls under section 7(1)(b) of the Comhairle Act 2000 as amended by section 4(c) of the Citizens Information Act 2007. The term disability is

definition of disability is not fully inclusive of all types of disabilities, as it excludes individuals with temporary physical, sensory, mental health, or intellectual impairments.

[8.57] Similarly, PAS aims to provide information and support to individuals who wish to file a complaint regarding the care they have received in a publicly funded hospital or an HSE-operated nursing home or private nursing home. However, this service is not accessible to those receiving healthcare in private facilities, with the exception of private nursing homes.[105] PAS's remit does not extend to mental health services, although there is a commitment in the Programme for Government to consider extending the PAS to support those accessing public mental health services.[106] There is also no duty to provide access to, or information about, independent advocacy services where adults are accessing day services or are in receipt of professional home care services.

[8.58] All of this creates a gap in the provision of independent advocacy as it is not mandated in the same way in every care setting where at-risk adults may be resident or in receipt of services, and the organisations providing advocacy services do not have a broad or general remit that covers all at-risk adults.

[8.59] It is important that at-risk adults' voices are duly considered when they are receiving care and support in residential centres or where the Safeguarding Body engages with an at-risk adult directly for the purposes of exercising its functions. Independent advocates can play a role in assisting at-risks adults to express their will and preferences, where difficulties arise in communicating with relevant persons or participating in decision-making processes. Independent advocates can also help at-risk adults understand the purpose of the safeguarding processes. They can also help adults receiving care and support to express concerns about their care, which can prevent issues escalating to safeguarding concerns. For this reason, independent advocacy is a crucial element of any proposed statutory framework for adult safeguarding. It will ensure that safeguarding is preventative and will facilitate the Safeguarding Body in its

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defined under section 2 of the Comhairle Act 2000 as inserted by section 2(c) of the Citizens Information Act 2007: "'disability', in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment".

[105] Patient Advocacy Service, *Patient Advocacy Service to Offer Support to Residents of Private Nursing Homes* (2022) https://www.patientadvocacyservice.ie/patient-advocacy-service-to-offer-support-to-residents-of-private-nursing-homes/ accessed on 29 June 2023. The current PAS contract for 2022 to 2027 expands PAS services to private nursing homes. The 2022 regulations referred to above amended the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013) to support this expansion.

[106] Government of Ireland, *Programme for Government – Our Shared Future* (2020) at page 49.

engagement with an at-risk adult, to respect their autonomy and decision-making and allow them to contribute to discussions about their welfare and life.

[8.60] There are a number of safeguarding guidelines in place promoting access to independent advocacy in order to uphold a human rights-based approach.[107] However, relying solely on guidelines or codes is inadequate because they lack the necessary enforceability and consistency across different situations and settings. In contrast, a statutory provision can provide a clear legal framework that outlines the rights and entitlements of individuals to independent advocacy services and places obligations on service providers to provide and facilitate independent advocacy and promote its availability.

[8.61] The majority of consultees who responded to the Commission's Issues Paper stated that adult safeguarding legislation should provide for adults to have access to independent advocacy services in respect of decisions to be made about measures intended to safeguard them. In its submission on the Issues Paper, HIQA stated that the lack of an adequate statutory framework means that service providers are not legally required to engage with advocates.[108] Similarly, the CIB noted that it and NAS have sought legislation to give NAS statutory powers of access to people, services, documents, meetings and decision-makers.[109] The CIB and NAS said that the need for statutory powers arises from resistance by some service providers to the practice of independent advocacy. The submission stated that "there is no current effective mechanism to compel service providers to support people with disabilities to exercise their autonomy and to access an independent advocate which is a requirement under HIQA

[107] Decision Support Services, *Code of Practice for Independent Advocates* (2023); Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse–National Policy and Procedures* (2014); HIQA and Safeguarding Ireland, *Guidance on a Human Rights-based Approach in Health and Social Care Services* (2019); HIQA and Safeguarding Ireland and Mental Health Commission, *National Standards for Adult Safeguarding* (2019); HIQA and Safeguarding Ireland, *National Standards for Residential Care Settings in Ireland* (2016).

[108] Health Information and Quality Authority, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' - Response by the Health Information and Quality Authority (HIQA)* (HIQA May 2020), at page 43, available at: < https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf> accessed 9 April 2024. This submission was received before the 2022 regulations for designated centres for older persons came into effect. The changes it made requires registered providers to engage with independent advocates where the resident wants the independent advocate to make a complaint on their behalf.

[109] Citizens Information Board, *A Regulatory Framework for Adult Safeguarding Law Reform Commission Issues Paper Submission by the Citizens Information Board – May 2020* (CIB 2020) at page 17, available at: < https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/Adult_Safeguarding_LRC_052020.pdf> accessed 9 April 2024.

standards".[110] CIB and NAS concluded that statutory powers are regarded as crucial to ensuring that NAS advocates can effectively and efficiently provide a service to people who would benefit from advocacy.[111] The need for such powers has also been publicly addressed including in multiple NAS annual reports.[112]

[8.62] Placing the same statutory obligations on service providers regarding independent advocacy would set a standard that must be met consistently across care settings, regardless of the specific circumstances or location of the at-risk adult concerned. It would create a robust and reliable system that can effectively respond to the diverse needs of individuals, fostering consistency and fairness throughout the adult safeguarding process. It would also provide certainty to independent advocates in terms of their dealings with service providers, particularly where they are providing services to a diverse range of at-risk adults across care settings. Independent advocates would be able to assert their entitlement to have contact with individuals who wish to avail of their services or who may wish to learn more about the kinds of assistance that can be provided. Service providers would also become more aware of their statutory obligations regarding independent advocacy and what they must do to meet these obligations.

[8.63] The Commission's Issues Paper queried whether a national advocacy body such as a national advocacy council should be established in the context of adult safeguarding. As outlined above, there are multiple advocacy organisations that have varying remits to provide advocacy services in different care settings. Most submissions stated that a national advocacy body should be established as a new

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[110] Citizens Information Board, *A Regulatory Framework for Adult Safeguarding Law Reform Commission Issues Paper Submission by the Citizens Information Board – May 2020* (CIB 2020) at page 17, available at: < https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/Adult_Safeguarding_LRC_052020.pdf> accessed 9 April 2024.

[111] Citizens Information Board, *A Regulatory Framework for Adult Safeguarding Law Reform Commission Issues Paper Submission by the Citizens Information Board – May 2020* (CIB 2020) at page 17, available at: < https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/Adult_Safeguarding_LRC_052020.pdf> accessed 9 April 2024.

[112] For example, see National Advocacy Service, *Annual Report 2018* (NAS 2019) at page 10, available at: < https://advocacy.ie/app/uploads/2019/09/NAS-Annual-Report-2018-published-September-2019.pdf> accessed 3 October 2023; National Advocacy Service, *NAS Annual Report 2017* (NAS 2018) at page 18< https://www.citizensinformationboard.ie/downloads/advocacy/NAS_AnnualReport_2017.pdf > accessed 9 April 2024. The CIB submission also stated that NAS and the CIB worked collaboratively in 2018 to progress the case for statutory powers for NAS and that the then Minister for Employment Affairs and Social Protection expressed support for the legislative change to grant NAS advocates statutory powers of access. See National Advocacy Service, *Annual Report 2018* (NAS 2019) at page 10 < https://advocacy.ie/app/uploads/2019/09/NAS-Annual-Report-2018-published-September-2019.pdf> accessed 9 April 2024.

independent agency or within a national adult safeguarding regulator. However, several submissions stated that statutory powers should be conferred on the CIB or on a range of advocacy services provided by various organisations. The CIB in particular stated that while it acknowledges the need for a national framework within which the practice, skills and profession of independent advocacy can be developed in an integrated manner, it does not believe that a national advocacy body is the best way forward. In its view, statutory powers for advocacy could be vested in the CIB if it was given sufficient resources to take on this role, as it is a statutory body that already has a legislative remit to provide advocacy and is independent of health and social care services.[113]

[8.64] A few respondents expressed the view that a national advocacy body would be helpful to set standards, qualifications, codes of practice and commission research on independent advocacy. Some respondents considered that it would be preferrable to have an overarching advocacy agency with a wide remit that extends beyond adult safeguarding. One consultee believed that instead of a national advocacy body, it would be better to allow advocates across a range of organisations to provide independent advocacy services to increase the capacity and number of available advocates and ensure a consistent approach. If this path were to be followed, the consultee considered that there would need to be a universally applied definition of "independent advocacy" to ensure consistency in approach.

[8.65] At present, there is no overarching national body in charge of overseeing or arranging independent advocacy services. Independent advocates are not regulated nor are there set qualifications that must be obtained for someone to become an independent advocate. While a Code of Practice for independent advocates in the context of the Assisted Decision-Making (Capacity) Act 2015 has been created, this Code of Practice does not apply more broadly to independent advocates acting in respect of at-risk adults who do not fall within the definition of "relevant person" for the purposes of the 2015 Act. Despite the absence of regulation or direct oversight, independent advocacy services are being provided across the health and social care sector, and as noted above, regulations under the Health Act 2007 and the Mental Health Act 2001 bestow varying levels of statutory obligations on service providers to either facilitate access to or promote independent advocacy services.

[113] Citizens Information Board, *A Regulatory Framework for Adult Safeguarding Law Reform Commission Issues Paper Submission by the Citizens Information Board – May 2020* (CIB 2020) at page 19 <https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/Adult_Safeguarding_LRC_052020.pdf> accessed 9 April 2024.

(c) Advocacy organisations in Ireland

[8.66] There are a broad range of advocacy services operating in Ireland presently that offer support to different cohorts of people. Advocacy services are unregulated. There is no body that oversees the commissioning and delivery of independent advocacy, and therefore all advocacy organisations operate and are funded differently. The advocacy services outlined below are particularly relevant in the context of adult safeguarding. Some of these advocacy services are provided by public bodies and others are provided by charities and voluntary organisations. Services provided by public bodies include:

- NAS provides advocacy services to people with disabilities. It is funded by the Citizen's Information Board (CIB).
- PAS provides advocacy services to people who wish to make a complaint about care they experienced or are experiencing in a public acute hospital or nursing home. They also support people following patient safety incidents when requested. PAS is funded by the Department of Health and the Citizen's Information Board (CIB). NAS won the tender to develop and provide PAS.[114]
- The Office of the National Confidential Recipient acts as an independent voice and advocates for vulnerable adults with disabilities and older persons who are receiving services in residential services, day services, community services, mental health, older person services including HSE nursing homes, community nursing units and primary care services, and wish to make a complaint or report concerns.[115] The Confidential Recipient is appointed by the HSE but is completely independent in the carrying out of their duties.

[8.67] The services provided by charities and voluntary organisations include:

- Sage Advocacy, which provides a national advocacy service for older people. It also supports vulnerable adults and healthcare patients in

[114] Patient Advocacy Service, Who We Are < https://www.patientadvocacyservice.ie/about-us/who-we-are/> accessed 9 April 2024.

[115] Health Service Executive, National Confidential Recipient: Appointed by the HSE < https://www.hse.ie/eng/about/who/complaints/confidentialrecipient/> accessed 9 April 2024; Health Service Executive, *Confidential Recipient Annual Report 2021* (HSE 2021).

certain circumstances where no other service is available.[116] It is primarily funded by the HSE.[117]

- Inclusion Ireland, the National Association for People with an Intellectual Disability, which works collaboratively with self-advocacy groups around the country and supports people with intellectual disabilities to become self-advocates.[118] It is primarily funded by the HSE.[119]

- Peer Advocacy in Mental Health, which provides peer advocacy support to people who experience mental health challenges. This means that advocates have been personally affected by mental health challenges themselves. It also provides a self-advocacy learning programme to build the capacity of people experiencing mental health challenges to advocate for themselves.[120] It is primarily funded by the HSE and the Belfast Trust.[121]

- The Office of the National Confidential Recipient, which acts as an independent voice and advocates for vulnerable adults with disabilities and older persons who are receiving services in residential services, day services, community services, mental health, older person services including HSE nursing homes, community nursing units and primary care services, and wish to make a complaint or report concerns.[122] The Confidential Recipient is appointed by the HSE but is completely independent in the carrying out of their duties.

[8.68] Other advocacy organisations may provide support to at-risk adults in certain circumstances. For example, the charity Dignity4Patients provides information and advocacy support to people who have experienced sexual abuse or inappropriate sexual behaviour in medical, healthcare or therapeutic environments.[123] EPIC – Empower Young People in Care, a national voluntary

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[116] Sage Advocacy, *Annual Report 2022 and Financial Statements* (Sage Advocacy 2022) at page 3.

[117] It has also received funding from the Department of Justice, the Irish Human Rights and Equality Commission and the Erasmus programme. See Sage Advocacy, *Annual Report 2022 and Financial Statements* (2022) at page 16.

[118] Inclusion Ireland, *Strategic Plan 2023 – 2026* (2023) at page 7.

[119] Inclusion Ireland, *Annual Report 2022* (2022) at page 34.

[120] Peer Advocacy in Mental Health, Mission < https://www.peeradvocacyinmentalhealth.com/mission> accessed 9 April 2024.

[121] Irish Advocacy Network CLG, Annual Report 2020 (2020) at page 64.

[123] Dignity4Patients, Our Services https://www.dignity4patients.org/information accessed 9 April 2024.

[123] Dignity4Patients, Our Services https://www.dignity4patients.org/information accessed 9 April 2024.

organisation, provides advocacy support for children and young people up until the age of 26 years who are in receipt of aftercare support.[124] At-risk adults who are experiencing financial abuse or difficulties in managing their finances may also avail of support and advice from the Money Advice and Budgeting Service ("MABS") within the CIB

3. Independent advocacy during the safeguarding process in other jurisdictions

[8.69] This section examines how other countries approach independent advocacy for at-risk adults, particularly in the context of adult safeguarding processes, but also care and support more broadly for at-risk adults, where adult safeguarding provisions are incorporated within social care legislation.

(a) England

[8.70] As mentioned elsewhere in this Report, in England, adult safeguarding provisions are situated within social care legislation and the relevant legislation and statutory code of practice therefore contain provisions for access to independent advocacy in respect of care and support more broadly, and in respect of some adult safeguarding processes.

[8.71] 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.[125] These functions include carrying out needs assessments and preparing or revising care and support plans. In certain circumstances,[126] 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 to facilitate their involvement in the process.[127]

[8.72] Section 68 of the Care Act 2014 places a duty on local authorities to arrange for an independent advocate to represent and support an individual where a safeguarding enquiry or a Safeguarding Adults Review ("SAR") is to be carried

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[124] EPIC, *Advocacy Report 2021* (2021) at page 11.

[125] Section 67(1) of the Care Act 2014 (England).

[126] The local authority must do this if it considers that if an independent advocate was not involved, the individual would experience substantial difficultly in doing one or more of the following: understanding relevant information, retaining that information, using or weighing that information as part of the process of being involved, or communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means). This does not apply if the local authority is satisfied that there is a suitable independent person who could assist the individual. See section 67(4) and (5) of the Care Act 2014 (England).

[127] Section 67(2) of the Care Act 2014 (England).

out. This must be done if the local authority considers that without the assistance of an independent advocate, the individual would have substantial difficulty 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)."[128]

[8.73] The local authority is not under a duty to provide access to an independent advocate if the local authority is satisfied that there is a person:

> (a) who would be an appropriate person to represent and support the adult for the purposes of facilitating the adult's involvement; and
> (b) who is not engaged in providing care or treatment for the adult in a professional capacity or for remuneration.[129]

[8.74] The local authority is not required to wait for the independent advocate to assist the adult if it needs to act immediately. Section 68(6) of the Care Act 2014 provides that "if the enquiry or review needs to begin as a matter of urgency, it may do so even if the authority has not yet been able to comply with the duty".[130] Statutory guidance provides that where this occurs, an independent advocate must be appointed as soon as possible.[131]

[8.75] The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 provide further detail on the independent advocacy requirements in England. It details specific requirements in order for a person to become an independent advocate,[132] and specifies the manner in which independent advocates should

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[128] Section 68(3) of the Care Act 2014 (England).

[129] Section 68(4) of the Care Act 2014 (England). Under section 68(5), someone is not deemed to be an appropriate person to help the adult unless the adult has capacity to consent to being represented and supported by that person and do so, or if the adult lacks capacity to consent, the local authority is satisfied that being represented and supported by that person would be in the adult's best interests.

[130] Section 68(6) of the Care Act 2014 (England).

[131] Department of Health and Social Care, *Care and support statutory guidance* (2016) (updated 5 October 2023) at para 7.27 < https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance> accessed 9 April 2024.

[132] Regulation 2 of the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England). Someone cannot act as an independent advocate unless the local authority is satisfied that the person has appropriate experience, has undertaken proper training, is competent to represent and support the individual for the purpose of facilitating their involvement, has integrity and is of good character, and has arrangements in place to receive appropriate supervision.

carry out their functions.[133] It also sets out the matters to which the local authority must have regard in deciding whether an individual would experience substantial difficulty in participating in care and support processes.[134]

[8.76] The Regulations give the local authority the power to request information in connection with the performance of an independent advocate's functions and it states that the independent advocate must comply with any requests.[135] It also gives the independent advocate the power to examine and take copies of any relevant records relating to the individual in circumstances where:

> (a) the individual has capacity, or is competent, to consent to the records being made available to the independent advocate and does so consent; or
> (b) the individual does not have capacity, or is not competent, to consent to the records being made available to the independent advocate but the independent advocate considers it is in the best interests of the individual.[136]

[8.77] The Care Act 2014 and the supplemental regulations ensure that individuals receive the necessary support and representation during safeguarding enquiries or reviews or during the care and support process, especially when they would encounter difficulties in fully engaging without an independent advocate. It also emphasises the importance of having someone who is competent, qualified, adequately supervised and not directly involved in providing care or treatment to the individual, to ensure their interests are properly represented and protected.

(b) Scotland

[8.78] In Scotland, local authorities have a "duty to consider the importance of providing independent advocacy" when (1) making an initial inquiry to assess

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[133] Regulation 5 of the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England). It provides that the independent advocate must "determine in all the circumstances how best to represent and support the individual in question but at all times must act with a view to promoting the individual's well-being". The regulation outlines how the independent advocate should assist the individual, who else they should consult in relation to the individual's care and how they should deal with matters of capacity.

[134] Regulation 3 of the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England). The local authority must take into account any health condition, learning difficulty, disability the individual has, the degree of complexity of the individual's circumstances in terms of their need for care and support, whether the individual has previously refused assessments and whether they are experiencing or are at risk of experiencing abuse or neglect.

[135] Regulation 6(3) of the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England).

[136] Regulation 5(6) of the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England).

whether the individual is an adult at risk of harm or (2) if local authorities decide to intervene to protect an adult at risk of harm.[137] Therefore, unlike under section 68 of the Care Act 2014:

- the at-risk adult does not have a legal entitlement to an independent advocate, and
- local authorities do not have to assess whether at-risk adults will face significant challenges in participating in the decision-making process.[138]

[8.79] In practice, a public body would refer an adult they believe to be at risk of harm to the relevant department or section of their local Council.[139] This department or section will then make an initial inquiry to assess whether this individual is at risk of harm, as defined under section 3 of the Adult Support and Protection (Scotland) Act 2007 ("the 2007 Act"). At that stage, the relevant department or section has the duty to consider the importance of providing independent advocacy. It is advised in the Code of Practice of the Adult Support and Protection (Scotland) Act 2007 that:

> where advocacy is offered, declined by the adult or not deemed appropriate, the reasons for this should be clearly recorded, as should the reasons for not referring to any other 'appropriate' services.[140]

[8.80] However, this is not always the case, which creates challenges in comprehending the rationale behind the Council's decision to deem advocacy services unnecessary. For instance, Perth and Kinross Council recognised in its biennial report that:

> the second area for improvement following this audit work relates to our use of well-articulated, defendable, and defensible recording. Where advocacy has been considered but not required,

[137] Section 6 of the Adult Support and Protection (Scotland) Act 2007.

[138] Mackay and Notman, "Adult Support and Protection (Scotland) Act 2007: Reflections on Developing Practice and Present Day Challenges" (2017) 19(4) The Journal of Adult Protection 187 at page 189.

[139] For instance, any staff of City of Edinburgh Council who has concerns or was provided with information that an adult is at risk must make a referral to the relevant department or section of of the Council. See the City of Edinburgh Council, Adult Protection <https://www.edinburgh.gov.uk/downloads/file/26916/adult-protection-procedure> accessed 9 April 2024.

[140] Scottish Government, *Adult Support and Protection (Scotland) Act 2007: Code of Practice* (2022) at page 41.

and legitimate reasons exist for advocacy not being used, this needs to be recorded.[141]

[8.81] Finally, it is worth noting that not all at-risk adults are provided with the same rights to access independent advocacy. For example, adults suffering from a mental disorder have a statutory right to access independent advocacy and relevant authorities have a duty to secure the availability of independent advocacy services for such persons and assist them to access and utilise those services effectively.[142] During the debates on the 2007 Act, it was noted that individuals to whom the 2007 Act apply should have the same right to independent advocacy as those who are subject to interventions under mental health legislation.[143]

[8.82] This did not come to pass. While section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") places a duty to provide access to independent advocacy for individuals with a mental disorder, section 6 of the 2007 Act only places a duty to consider the need for an independent advocate. This is despite the fact that section 6 of the 2007 Act expressly applies the definition of "independent advocacy services" in the mental health legislation. However, the Code of Practice for the Adult Support and Protection (Scotland) Act 2007 states that the section 2 principles in the 2007 Act need to be considered, including the need to have regard to the wishes and feelings of the adult, to facilitate the adult's participation and the need to provide them with information and support to enable their participation.[144] It provides that it "may be that independent advocacy in a particular case will be appropriate even where a person does not have a mental health disorder as defined in the 2003 Act".[145]

[8.83] The Code of Practice also states that the expectations in relation to advocacy services in section 259(4) and (5) of the 2003 Act apply "to all advocacy services in relation to adults at risk of harm irrespective of whether they fall within the ambit

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[141] Perth and Kinross Adult Protection Committee, *Biennial Report 2020-2022* (2022), <https://www.pkc.gov.uk/media/50551/APC-Adult-Protection-Biennial-Report-2020-22/pdf/Biennial_Report_2020-22_24.10.22.pdf?m=638041981706830000> accessed 9 April 2024.

[142] Section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003. Mental disorders include mental illness, learning disability or personality disorder.

[143] In the debates, it was submitted that "…people to whom the bill applies should have parallel rights to those who are subject to interventions under existing statutes, such as the Mental Health (Care and Treatment) (Scotland) Act 2003, regarding reciprocity and advocacy services". See Scottish Parliamentary Corporate Body, *Debate of the Health Committee on Adult Safeguarding Bill Stage 2* 12 December 2006 col. 3269-3300.

[144] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 41.

[145] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 41.

of the 2003 Act".[146] These expectations include that advocacy services are those that support and represent a person to enable them to have as much control, capacity and influence over their care and welfare as is appropriate, and that the services are independent of organisations and services responsible for caring for or providing medical treatment to the person.[147]

[8.84] Scotland has a national intermediary organisation for independent advocacy known as the Scottish Independent Advocacy Alliance. It receives funding from the Scottish Government's Healthcare Quality and Improvement Directorate.[148] It is not a governing body or regulator of independent advocacy services, but it plays a role in raising awareness and understanding of independent advocacy, developing and promoting good practice,[149] providing information and support to its members who are providing advocacy services, and influencing policy changes in the sector.[150]

(c) Wales

[8.85] 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 who require care and support regardless of whether the local authority is providing said care and support, subject to a number of restrictions set out under section 182 of the same Act.[151] Instead of adopting regulations, the Welsh Government published a statutory Code of Practice on the exercise of social services functions in relation to advocacy under Part 10 of the Social Services and Well-being (Wales) Act 2014.[152]

[8.86] The code requires local authorities to provide for an Independent Professional Advocate ("IPA") in situations where an individual requires assistance from a

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[146] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at pages 41 to 42.

[147] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at pages 41 to 42.

[148] Scottish Independent Advocacy Alliance, About us <https://www.siaa.org.uk/about-us/> accessed 9 April 2024.

[149] Scottish Independent Advocacy Alliance, *Independent Advocacy Principles, Standards and Code of Best Practice* (SIAA 2019) <https://www.siaa.org.uk/information-hub/principles-standards-code-of-best-practice/> accessed 9 April 2024.

[150] See for example, Scottish Independent Advocacy Alliance, *SIAA Advocacy Map: Sustainability of Independent Advocacy in Scotland* (SIAA 2023). The SIAA also makes regular contributions to public consultations and reviews.

[151] Most of the restrictions relate to circumstances where the local authority or the Welsh Ministers are already required to make arrangements for the provision of assistance, independent advocacy services, a mental health advocate or a mental health capacity advocate, to a person under other pieces of legislation.

[152] Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (2019).

suitable person to "participate fully in the assessment, care and support planning, review, and safeguarding processes."[153] This support becomes necessary when there is no appropriate individual available to fulfil this role. The concept of "participating fully" involves enabling the individual to express their views, wishes, feelings and opinions, understand their rights and entitlements and take part in decision-making processes that concern them.[154]

[8.87] The Code sets out more detailed requirements in relation to advocacy under the Act. It outlines what types of circumstances may require advocacy services, the barriers which can impact on an individual's ability to engage and fully participate, and what makes someone inappropriate to act as an advocate. Annex 1 of the Code also describes the role of the IPA in supporting and representing the individual and the steps that the IPA can take to assist the individual.[155]

(d) Northern Ireland

[8.88] As mentioned elsewhere in this Report, Northern Ireland does not currently have adult safeguarding legislation. However, it has taken steps in this regard in the form of its Adult Protection Bill. In 2021, the Department of Health published a consultation document entitled Legislative Options to Inform the Development of An Adult Protection Bill for Northern Ireland.[156] Most consultees were supportive of including provisions for independent advocacy in the proposed legislation.[157] Its final Bill proposals suggest that the draft Bill will introduce a statutory provision for independent advocates who can "assist adults at risk to be involved in and influence decisions taken about their care".[158] The intention is that the draft Bill will include a power to make regulations setting out any future requirements in respect of independent advocacy, including eligibility criteria.

[8.89] Northern Ireland's equivalent to HIQA in this jurisdiction, the Regulation and Quality Improvement Authority ("RQIA") has published operational procedures that aim to protect adults from harm.[159] The procedures acknowledge that

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[153] Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (2019) at page 16.

[154] Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (2019) at page 16.

[155] Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (2019) at pages 39 to 40.

[156] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland* (2021) at pages 31 to 33.

[157] Department of Health (Northern Ireland), *Adult Protection Bill Consultation Analysis Report* (2021) at pages 26 to 27.

[158] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at page 5.

[159] Regulation and Quality Improvement Authority, *Adult Safeguarding Operational Procedures Adults at Risk of Harm and Adults in Need of Protection* (RQIA 2016).

responsibility to protect adults from abuse, neglect or exploitation is primarily the responsibility of the Health and Social Care Trusts and the Police Service of Northern Ireland. In saying that, it states that safeguarding is everyone's business, and the operational procedures are intended to apply to all organisations that work with or provide services to adults on a paid, voluntary, statutory, community, independent or faith basis. There is no obligation in the procedures to provide or to facilitate access to independent advocacy, but simply to consider a referral to advocacy services.[160]

4. Recommendations

(a) Strengthening independent advocacy duties in health and social care and other settings

[8.90] As outlined earlier in the Chapter, there are stronger independent advocacy duties contained in regulations providing for the care and welfare of older people in residential centres under the Health Act 2007,[161] than there are in regulations on residential centres for adults with disabilities under the Health Act 2007,[162] and approved centres under the Mental Health Act 2001.[163] Many of the amendments introduced by the 2022 regulations, which amended the regulations on care of older people in residential centres,[164] addressed the issues raised by consultees in response to the Issues Paper. These included service providers not providing information about, or access to, independent advocates, and service providers refusing access to, and refusing to engage with, independent advocates.

[8.91] However, while the 2022 regulations amended the provisions in respect of independent advocacy for residents of residential centres for older people, similar amendments were not made to the regulations providing for the care and welfare of adults in residential centres for people with disabilities,[165] and adult

[160] Regulation and Quality Improvement Authority, *Adult Safeguarding Operational Procedures Adults at Risk of Harm and Adults in Need of Protection* (RQIA 2016) at pages 5 and 47.

[161] The Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022 amended the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2014 to strengthen the independent advocacy duties on service providers to facilitate access to services and engage with independent advocates in complaints processes. This is discussed further above in the section on current provisions of advocacy in Ireland.

[162] The Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

[163] Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006).

[164] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022 (SI No 628 of 2022).

[165] The Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

residents in approved centres under the Mental Health Act 2001.[166] Equally, the Interim Standards for Day Services for people with disabilities take a different approach again – instead of placing obligations on service providers providing day services, it focuses on the entitlements of people with disabilities to independent advocacy, and for this to be facilitated. It should be noted that the Interim Standards do not exist on a statutory basis and therefore any entitlements are non-statutory.

[8.92] The Commission takes the view that it is unsatisfactory to have disparate duties on service providers to facilitate access to independent advocacy services, and different entitlements to access services depending on the care setting where the care for the at-risk adult is provided. There is a significant difference between imposing a duty on service providers to engage with, and proactively facilitate access to independent advocacy services, and merely requiring service providers to provide information regarding independent advocacy services (as is the case under the Mental Health Act regulations). The distinction is particularly important in the context of adult safeguarding, where at-risk adults may experience difficulties contacting an independent advocate themselves due to age, disability, or circumstances, for example, not having access to a phone.

[8.93] The regulations under the Health Act 2007 and Mental Health Act 2001, discussed above, relate to care of older adults, adults with disabilities and adults with mental health disorders more generally in terms of their care within residential centres under the Health Act 2007 or approved centres under the Mental Health Act 2001. They do not specifically relate to the adult safeguarding context. However, as emphasised elsewhere in this Report, it is important for an adult safeguarding framework to take a prevention-based approach. Residents in residential centres or approved centres may need the assistance of an independent advocate to help them to express views on their care and life in the centre. Enabling them to do so may prevent adult safeguarding issues arising in the future.

[8.94] For example, if a resident in a nursing home feels uncomfortable in the presence of another resident due to inappropriate sexual comments, an independent advocate could help the resident engage with the staff in the nursing home to facilitate a move to another part of the home, which could prevent the possibility of the resident being sexually abused by the other resident. The staff would also be able to take action in relation to other residents that are in the company of the resident of concern, and make sure that safeguarding plans are in place.

[166] Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI 551 of 2006).

[8.95] Independent advocacy can be especially important in circumstances where at-risk adults are residing in institutional settings. For instance, Browne notes in Safeguarding Ireland's scoping document on independent advocacy:

> in residential care settings, it may sometimes still be the case that the traditional mode of control and "best interests" continues to operate and, as a result, these facilities are to all intents and purposes places of detention as well as care. An ethos of identifying and respecting the will and preferences of people with reduced decision-making capacity and responding accordingly may still not be the norm in some facilities.[167]

[8.96] The Commission believes that it would be beneficial for there to be consistency across the regulations under the Health Act 2007 and the Mental Health Act 2001 in terms of the duties on service providers and the entitlements of independent advocates and residents in respect of independent advocacy.[168] As noted above, the 2022 regulations[169] address many concerns raised by consultees in response to the Commission's Issues Paper, particularly in relation to the need for a stronger duty to facilitate access to independent advocacy services. However, they have only recently been introduced, and the Commission has no information on the efficacy of their operation or whether they should be amended to bring about operational improvements. For this reason, the Commission is not in a position to recommend that the regulations on the care of older persons in residential centres, or people with mental health disorders in approved centres, should be amended to mirror the 2022 regulations concerning residential centres for older persons. However, the Commission does recommend that the Government should adopt a consistent approach to the duty to facilitate access to independent advocacy services across all health and social care settings, including for example, those regulated by the Health Act 2007 and the Mental Health Act 2001.

[8.97] In Chapter 7, the Commission discusses a number of non-statutory standards that apply to specific services for example, those providing accommodation to international protection applicants or people experiencing homelessness. It also

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[167] Browne, *Independent Advocacy in Ireland – Current Context and Future Challenge* (Safeguarding Ireland 2018) at page 36.

[168] The Mental Health Act 2001 (Approved Centres) Regulations 2006 came into operation on the 1 November 2006, and have not been amended since then. Undoubtedly, thinking on independent advocacy has progressed in the intervening years, as evident from the more recent regulations under the Health Act 2007 for designated centres. The Commission understands that reform of the Mental Health Act 2001 is expected and as discussed above, this will likely place stronger obligations on service providers in respect of facilitating access to independent advocacy services.

[169] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022 (SI 628 of 2022). These regulations came into operation on 1 March 2023.

discusses the Interim Standards for Day Services for people with disabilities and the draft regulations for home support services. The Commission recommends that the government should carefully consider whether relevant services, which are not currently subject to statutory regulatory regimes including statutory inspections, should be brought within such regulatory regimes. In the context of independent advocacy, the Commission considers that the government should adopt a consistent approach to the provision of independent advocacy across all care settings. With that in mind, relevant funding agencies and Government Departments should consider amending existing standards, or ensuring any standards introduced in the future align with the independent advocacy obligations in the regulations under the Health Act 2007 and Mental Health Act 2001. Equally, if the Government decides to regulate such services on a statutory basis, it could impose independent advocacy obligations through primary or secondary legislation.

R. 8.1 **The Commission recommends that** the Government should adopt a consistent approach to the provision of independent advocacy across all care settings.

[8.98] Regardless of the approach adopted at the level of detail, the Commission believes that it is imperative that service providers who run residential centres for adults with disabilities and approved centres for people with mental health disorders are under an obligation to facilitate access to independent advocacy services for residents within their centres. Accordingly, the Commission recommends that the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013) should be amended to require that residential centres for adults with disabilities facilitate access to independent advocacy services for adults residing in those centres. These regulations also apply in relation to children with disabilities residing in residential centres. For practical reasons, it may be necessary for duties to facilitate access to independent advocacy services to apply equally in respect of adults and children with disabilities in residential centres, otherwise there would not be parity in treatment for adults and children with disabilities in the regulations. However, it is beyond the scope of this project to consider whether residential centres for children with disabilities should be required to facilitate access to independent advocacy services.

[8.99] In addition, the Commission recommends that the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006) should be amended to require approved centres to facilitate access to independent advocacy services for adults residing in those centres. If the reforms of the Mental Health Act 2001 take place and a broader number of facilities are captured under the Act, the same duty to facilitate access to independent advocacy services for adults in receipt of services in those facilities should apply.

R. 8.2 **The Commission recommends that** the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013) should be amended to require designated centres for adults with disabilities to facilitate access to independent advocacy services for adults residing in those centres.

R. 8.3 **The Commission recommends that** the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006) should be amended to require approved centres to facilitate access to independent advocacy services for adults residing in those centres.

[8.100] As mentioned above, consultees expressed the view that more needs to be done to ensure that service providers are required to engage with independent advocates, who are acting on behalf of residents. Refusal or reluctance to engage with independent advocates can arise in particular where the independent advocate wishes to make a complaint on behalf of a resident who otherwise would face barriers to making a complaint about the care they are receiving in the centre. Service providers may be hostile to independent advocates being involved in the complaints process, as they could highlight significant concerns about institutional cultures or practices within the centre.

[8.101] To combat this, the Commission recommends that amendments to the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006) should provide that where a resident wishes for an independent advocate to engage with a service provider for the purposes of making a complaint on behalf of the resident, the service provider must engage with the independent advocate.

R. 8.4 **The Commission recommends that** amendments to the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013) and the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006) should provide that where a resident wishes for an independent advocate to engage with a service provider for the purposes of making a complaint on behalf of the resident, the service provider must engage with the independent advocate.

[8.102 The Commission is cognisant that its adult safeguarding framework needs to extend across care settings to ensure that no at-risk adults fall through the gaps. It endeavours to do this by placing safeguarding duties on service providers within the health and social care sector, and in other sectors. This is discussed in detail in Chapter 7. As mentioned above, independent advocacy can be a crucial support for at-risk adults to help them to articulate and express their views on the care they are receiving, which can serve to prevent safeguarding issues from arising or existing issues being compounded.

[8.103] At present, not all services that at-risk adults attend or receive are regulated, which makes it more difficult to mandate that service providers must abide by requirements in relation to the provision of independent advocacy. For example, professional home support services and day services are not currently regulated in Ireland.[170] The regulation of other services is discussed in Chapter 7, where the Commission recommends that the Government should carefully consider regulating these services.

[8.104] The Commission did consider introducing a broader statutory duty on all service providers to facilitate access to independent advocacy for those in receipt of services, regardless of the particular health or social care setting, or whether the service provider is subject to regulation. However, the Commission believes that it would be difficult to monitor and oversee compliance with the statutory duty in circumstances where the service provider is unregulated. In contrast to service providers regulated by HIQA and the Mental Health Commission, there is no primary or secondary legislation outlining the obligations on unregulated service providers. There is also no regulator to monitor compliance. The Commission recommends in Chapter 7 that the Government should carefully consider whether to introduce regulation for certain unregulated relevant services. These services are listed in Chapter 7. If regulation is introduced for these services, the Commission thinks that it would be important that the same independent advocacy requirements that it proposes to apply to residential centres for older people and people with disabilities and approved centres should also apply to these new regulated services. In the meantime, pending regulation, consideration could be given to amending contracts providing for section 38 and section 39 service arrangements between the HSE and unregulated service providers under the Health Act 2004, or existing and future non-statutory standards, to place obligations on such service providers to facilitate access to independent advocacy for service users.

(b) A duty on the Safeguarding Body to facilitate access to independent advocacy services when engaging directly with an at-risk adult

[8.105] In this Report, the Commission has recommended that the Safeguarding Body should be permitted to exercise a number of functions in the context of adult safeguarding. The functions of the Safeguarding Body are discussed further in

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[170] HIQA in its 2017 paper on Exploring the regulation of Health and Social Care Services, suggested that the Department of Health and the Government should consider the regulation of day care services, as an analysis of other jurisdictions highlighted that these, and other care and support services are regulated in some other jurisdictions. For example, Northern Ireland's equivalent of HIQA, the Regulation and Quality Improvement Authority ("RIQA") regulates day care services and has specific regulations on this. See Health Information and Quality Authority, *Exploring the regulation of health and social care settings – Disability Services* (HIQA 2017) at pages 26 and 35.

Chapter 5. It may be necessary for the Safeguarding Body to engage with at-risk adults directly in the course of exercising these functions. Having an independent advocate present to help an at-risk adult understand the purpose of the Safeguarding Body's actions, what has happened or is going to happen, and to help them communicate their perspective on the situation to relevant professionals could make it easier for the at-risk adult in stressful and difficult circumstances.

[8.106] The Commission considers that it is essential that the voice of the individual is heard when the Safeguarding Body engages with an at-risk adult directly in the course of exercising their functions to empower the at-risk adult to make decisions, in so far as they have the capacity to do so, and express their views on any measures to safeguard them. The importance of independent advocacy in the adult safeguarding context has been recognised in neighbouring jurisdictions.

[8.107] The Commission recommends that adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, so far as is reasonably practicable, access to independent advocacy services where it engages with an adult who is, or is believed to be, an at-risk adult, directly for the purposes of exercising its functions under adult safeguarding legislation. This would involve, for example, providing information regarding relevant independent advocacy services and arranging a meeting with independent advocacy services for the adult concerned. The Commission is conscious that it will not always possible to provide for independent advocacy ahead of the Safeguarding Body exercising its functions under adult safeguarding legislation. There may be situations where the Safeguarding Body needs to act with urgency to respond to allegations of abuse or neglect, particularly if there is apprehension that the life of the adult concerned is in danger or that they would be at risk of serious harm if facilitating access to independent advocacy resulted in a delay in gaining access to a person, for example. For this reason, the Safeguarding Body could comply with this duty to facilitate access to independent advocacy by facilitating access either before, during or after it exercises its functions.

[8.108] Some at-risk adults may have no difficulties engaging with adult safeguarding processes, expressing their preferences and perspectives, or communicating with relevant professionals. For this reason, in England, the statutory duty to ensure that adults have access to independent advocacy only applies where (1) the individual would have "substantial difficulty"[171] in being involved in the process

[171] To decide whether someone has substantial difficulty in participating in safeguarding enquiries or reviews in England, a local authority must assess whether an individual would experience significant challenges in doing one of more of the following; (a) understanding the relevant information, (b) retaining that information, (c) using or weighing that information as part of the process of being involved, (d) communicating their views, wishes or feelings (by talking, using sign language or any other means). See section 68(3) of the Care Act 2014 (England).

without the assistance of an independent advocate, and (2) there is no appropriate individual available, who is not paid or professionally involved in caring or treating the individual, to support and represent their wishes.[172] The Commission agrees with the approach adopted in England in this respect. The Commission therefore recommends that the proposed duty to facilitate access to independent advocacy services should apply only where the Safeguarding Body is satisfied that, without access to independent advocacy services, an adult who is, or is believed to be, an at-risk adult may experience significant challenges 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 engaging with the Safeguarding Body;
(d) communicating their views, wishes, or feelings (whether by talking, using sign language or any other means).

[8.109] The Commission also recommends that the proposed duty should apply only where the Safeguarding Body determines that there is no suitable person who could effectively support the adult who is, or is believed to be, an at-risk adult to enable their involvement. A suitable person could include, for example:

- a person serving as a decision-making assistant, co-decision-maker, decision-making representative, attorney, or designated healthcare representative under the Assisted Decision-Making (Capacity) Act 2015;
- an independent person who is not involved in providing professional care or treatment or any other paid assistance to the individual; or
- a person otherwise deemed appropriate to fulfil the role by independently and appropriately supporting the individual.

[172] Section 68 of the Care Act 2014 (England).

R. 8.5 **The Commission recommends that** adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, so far as is reasonably practicable, access to independent advocacy services for an adult who is, or is believed to be, an at-risk adult where it engages with such adult directly for the purposes of exercising its functions under adult safeguarding legislation.

R. 8.6 **The Commission recommends that** the proposed duty to facilitate access to independent advocacy services should only apply where the Safeguarding Body is satisfied that, without access to independent advocacy services, an adult who is, or is believed to be, an at-risk adult may experience significant challenges 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 engaging with the Safeguarding Body;

(d) communicating their views, wishes, or feelings (whether by talking, using sign language or any other means).

R. 8.7 **The Commission recommends that** the proposed duty should apply only where the Safeguarding Body is satisfied that there is no suitable person who could effectively support the adult who is, or is believed to be, an at-risk adult to enable their engagement with the Safeguarding Body.

(c) A duty to ensure access to independent advocacy in respect of care and support (social care)

[8.110] Many consultees who responded to the Issues Paper supported the introduction of statutory provisions for independent advocacy in respect of decisions more broadly, including care decisions and decisions about financial affairs. In other words, they were in favour of statutory provisions applying beyond the adult safeguarding context to social care more generally.

[8.111] In England and Wales, the adult safeguarding statutory provisions are situated within social care legislation and the relevant legislation and statutory code of practice therefore contain provisions for access to independent advocacy in respect of care and support more broadly.[173] In Northern Ireland, although it is proposed that the Adult Protection Bill will be adult safeguarding legislation only without any provisions for social care, the Department of Health in Northern Ireland has proposed that the Adult Protection Bill will include a statutory

[173] Sections 67 and 68 of the Care Act 2014 (England), section 181 of the Social Services and Well-being (Wales) Act 2014; Welsh Government, *Social Service and Well-being (Wales) Act 2014 – Part 10 Code of Practice (Advocacy)* (Welsh Government 2019), at page 16.

provision for independent advocates who can assist adults at risk to be involved in and influence decisions taken about their care more broadly.[174]

[8.112] There are many justifications for including statutory provisions for access to independent advocacy in respect of care and support in adult safeguarding legislation. Providing independent advocacy in the care and support context would mean that adults would be empowered and supported to protect themselves from harm from the first indicators that they may be at risk of abuse or harm. This could potentially help to prevent safeguarding issues from arising. It would also potentially help adults to understand the benefits of social care or financial supports that may be available to them, helping to reduce fear and apprehension about services which may in turn prevent safeguarding issues related to self-neglect, dependency on individuals or isolation from arising. As mentioned elsewhere in this Report, adult safeguarding legislation should be prevention-focused, and its provisions should seek to empower individuals to protect themselves from harm at the earliest possible opportunity, and thereby prevent safeguarding issues from arising down the line. Providing for independent advocacy for care and support issues can protect against adult safeguarding concerns emerging in the future.

[8.113] On the other hand, there are also many arguments against including broader provisions in adult safeguarding legislation for access to independent advocacy in respect of social care and support. At present, the social care landscape is complex as provision of services is largely organised on a policy basis, as opposed to in legislation.[175] Therefore, it is unclear how a duty to arrange access to independent advocacy services in respect of care and support would be fulfilled by the Health Service Executive, or another body given the responsibility for adult social care. Another concern is that fulfilment of a duty to ensure access to independent advocacy services in respect of care and support would likely result in a much greater demand for services. It would require careful consideration of the resourcing and capacity of advocacy services nationally, regionally, and locally.

[8.114] Earlier in this Chapter, the Commission recommends that the Government should adopt a consistent approach to the provision of independent advocacy across all care settings. These include settings within the health and social care sector, but also in other sectors outlined in detail in Chapter 7. The recommendation below relates to whether there should be a duty to ensure access to independent

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[174] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration (July 2021)* (2021) at section 7.

[175] The Health Service Executive ("HSE") primarily has social care responsibilities to adults. Its Social Care Division was established to support ongoing service requirements of older people and people with disabilities.

advocacy services in respect of care and support in primary adult safeguarding legislation.

[8.115] The Commission takes the view that a duty to ensure access to independent advocacy services in respect of care and support would more appropriately belong in social care legislation. In Chapter 1, the Commission recommends that the Government should consider the introduction of a comprehensive statutory framework for social care. Accordingly, the Commission recommends that if the Government considers the introduction of a comprehensive statutory framework for social care, as recommended in Chapter 1, the Government should also consider the introduction of a duty on the Health Service Executive to ensure access to independent advocacy in respect of the provision of social care services.

R. 8.8 **The Commission recommends that** if the Government considers the introduction of a comprehensive statutory framework for social care, as recommended in Chapter 1, the Government should also consider the introduction of a duty on the Health Service Executive to ensure access to independent advocacy in respect of the provision of social care services.

(d) Framework for provision or regulation of independent advocacy

[8.116] In its Issues Paper, the Commission queried whether there is a need for a national advocacy council in the context of adult safeguarding and whether such an agency should be independent or should be located within an existing agency, if established. Opinions among consultees varied on this question. Some consultees believed that a national advocacy body was necessary in the context of adult safeguarding considering the number of different bodies operating in the area. Many consultees considered that the agency should be independent and not established within an existing agency, to reinforce its independence from other services and funding providers. Others considered that independent advocacy services already exist and provide effective support to a diverse range of individuals. In their view, creating a new body would be unnecessary considering that existing services are operating effectively and with more resourcing, and could meet demand that arises as a result of new duties being placed on service providers and the Safeguarding Body to facilitate access to independent advocacy services. Some consultees expressed the view that efforts should be focused on establishing appropriate advocacy standards to support consistent and quality advocacy practice.

[8.117] On reflection, the Commission believes that the primary issue is that advocacy services are provided by an organisation that is independent of the HSE, the Safeguarding Body and service providers, such as nursing homes. As mentioned earlier in this Chapter, the CIB currently provides independent advocacy services through NAS and PAS. There is nothing to preclude the Government from funding a further advocacy service to provide independent advocacy services to adults who do not have disabilities or who do not qualify for PAS but who may be

at risk of harm. Such a service could be established within the CIB or if such a service were to be funded on a contract basis, the CIB or NAS could tender to provide such a service without any requirement for legislative reform. The CIB is a statutory body that has a legislative remit to provide advocacy services and is independent of health and social care providers. Other agencies, for example, Sage Advocacy, operating in the area could also tender to provide additional independent advocacy services. Equally, the Government may decide that it would be more efficient for independent advocacy services to be streamlined and could take action in this respect by widening eligibility criteria of PAS and NAS, merging the two services and expanding its scope, or establishing a national advocacy council with a wide remit.

[8.118] The Commission considers that issues relating to whether a national advocacy council should be established, how independent advocacy services are funded and what organisations provide such services are outside the scope of this project, as long as advocacy services to which referrals are made are independent of bodies providing and regulating health and social care services. If the Government adopts the Commission's proposals in respect of independent advocacy duties outlined above, it would be necessary for it to give advance consideration to how services are to be provided and funded on a national level to ensure that no at-risk adult falls through the gaps because they do not meet the eligibility criteria for PAS and NAS, or because there are insufficient resources. While existing agencies such as Sage Advocacy provide services to older people on a regional level, the capacity limits of such services would have to be taken into account considering funding constraints. It may be the case that additional resourcing of the sector would be necessary to meet the level of demand if independent advocacy duties are introduced in adult safeguarding legislation, and further embedded in regulations under the Health Act 2007 and Mental Health Act 2001, any future legislation, or existing or future non-statutory standards.

[8.119] Numerous consultees and stakeholders referenced the need for qualification requirements to apply to independent advocates and for certain quality and service standards to apply to the provision of independent advocacy services. Independent advocates, under the legislation being proposed by the Commission, would interact with a wide range of adults who are, or are believed to be, at-risk adults. For that reason, it is important to ensure that they are suitably qualified, independent, competent and supervised to carry out the role.

[8.120] As noted earlier in the Chapter, independent advocacy services are not presently regulated, nor are there any plans to regulate these services. If the Commission's recommendations relating to independent advocacy are accepted and implemented, this will give further legal recognition to the practice of independent advocacy in Ireland. In that context, it may be worthwhile for the government to consider whether a form of regulation for independent advocacy

services is required that captures organisations providing independent advocacy services, or individual independent advocates.

[8.121] Notably, in New Zealand, the Health and Disability Commissioner Act 1994 creates a statutory role of the Director of Health and Disability Services Consumer Advocacy to oversee independent advocacy services.[176] The Director of Advocacy's functions include:

> (a) to administer advocacy service agreements;
> (b) to promote, by education and publicity, advocacy services;
> (c) to oversee the training of advocates;
> (d) to monitor the operation of advocacy services, and to report to the Minister for time to time on the results of that monitoring.[177]

[8.122] Section 26 of the Health and Disability Commissioner Act 1994 provides that advocacy services should operate independently of the Health and Disability Commissioner, the Ministry, purchasers, health care providers and disability service providers. The role of the Director of Advocacy involves negotiating and

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[176] See also the Disability Services and Inclusion Act 2023 (Australia) (which commenced on 1 January 2024) that oversees the operations of advocacy services through funding arrangements. Previously, advocacy services were required to obtain a certificate of compliance under the Disability Services Act 1986. Now, providers only require a certificate of compliance if they deliver a regulated activity. It allows the Minister to "make, vary or administer" arrangements for the making of payments to a person, or to make, vary or administer a grant of financial assistance to a person in relation to a number of eligible activities including "advocacy supports or services". Advocacy supports or services are defined as supports or services to:

> (a) to assist a person with disability to exercise choice or control in matters that affect the person, including the provision of legal services; or
>
> (b) to assist a person with disability to understand and advocate for their rights and to uphold and enforce their rights, including the provision of legal services; or
>
> (c) to influence community attitudes, government policy or laws in relation to the rights and freedoms of people with disability.

The Act provides for statutory funding conditions including that the person implements and maintains a complaint management and resolution system that "acknowledges the role of advocates (including independent advocates)" and provides for "cooperation with, and facilitates arrangements, for those advocates" to support people with disabilities who are affected by the complaints process and wish to be supported by an advocate. A breach of funding conditions can result in termination or variation of the funding agreement, arrangement or grant. All funded service providers must also comply with the Code of Conduct, and there is guidance aimed at providers and employees which provides more detail on how to comply with obligations many of which involve providing information about or engaging with advocates. See Disability Services and Inclusion (Code of Conduct) Rules 2023 (Australia); Australian Government, *Disability Services and Inclusion Code of Conduct – Guidance for Providers* (December 2023). See also Disability Services and Inclusion (Compliance Standards and Alternative Compliance Requirements) Rules 2023 which makes numerous references to the role of advocates.

[177] Section 25 of the Health and Disability Commissioner Act 1994 (New Zealand).

entering into advocate services agreements (with terms and conditions) on behalf of the crown and monitoring the performance of each advocacy service agreement.[178] The Director of Advocacy may from time to time, or shall, where directed by the Minister, issue guidelines relating to the operation of advocacy services.[179] These guidelines should include provisions regarding the procedures to be followed by advocates in carrying out their functions.[180] Every advocacy service agreement imposes a duty, on any person who agrees to provide, or arrange for the provision of, advocacy service, to ensure that the guidelines in force are followed in the provision of services.[181] This offers a useful model for consideration should the government decide to examine the case for regulation of independent advocacy services or independent advocates in this jurisdiction.

[8.123] There are no national eligibility requirements that must be met for an individual to become suitable for the role of independent advocate and no specific training that must be undertaken, outside of requirements set by individual advocacy organisations. The Commission is particularly concerned that there appears to be no avenue to remove someone from acting as an independent advocate or providing independent advocacy services where there has been serious wrongdoing by an advocate or an independent advocacy organisation (as would be the case with regulated activities or persons). It would be useful if there were mechanisms to suspend independent advocates or investigate allegations in relation to independent advocates, or an organisation that provides such services. Such mechanisms could apply where, for example, the service provided is consistently below standard, or the advocate has misconducted themselves in their interactions with the person on whose behalf they are advocating. Given the increasing importance of, and reliance on, independent advocacy in the health and social care sector and other sectors, there is an acute need for standardisation in training, conduct and procedures in respect of independent advocacy to ensure that independent advocates working in the area have sufficient expertise, are free from any conflict of interests, act in a person-centred manner on behalf of the at-risk adult and respect their autonomy.

[8.124] In saying this, the Commission takes the view that the regulation of independent advocates is outside the scope of this project as this is a broader question that is not specific to the adult safeguarding context. There are many different types of independent advocacy organisations operating in Ireland outside of the adult safeguarding sphere, and as such, the extent to which independent advocacy

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[178] Section 27 of the Health and Disability Commissioner Act 1994 (New Zealand).

[179] Section 28(1) of the Health and Disability Commissioner Act 1994 (New Zealand).

[180] Section 28(2) of the Health and Disability Commissioner Act 1994 (New Zealand). It should also include any special procedures that should be followed when advocates are dealing with any particular persons or classes of persons.

[181] Section 27(2) of the Health and Disability Commissioner Act 1994 (New Zealand).

organisations or individual independent advocates should be regulated involves many competing considerations. This should be considered as a whole across the various relevant sectors, as opposed to in isolation in the context of a regulatory framework for adult safeguarding. As such, the Commission recommends that the Government should consider whether a form of regulation of independent advocates or independent advocacy services is required.

[8.125] The Commission understands that often individual independent advocacy organisations will have policies, guidelines and procedures in place that must be observed by their staff.[182] However, there is no wider guidance available on a national basis apart from the Code of Practice for independent advocates published by the Decision Support Service in the context of the Assisted-Decision Making (Capacity) Act 2015. This Code of Practice does not apply more broadly to adults who are, or are believed to be, at-risk adults who do not fall within the definition of "relevant person" for the purposes of the 2015 Act. The Commission therefore recommends that adult safeguarding legislation should include a provision to allow the the Safeguarding Body to publish a code of practice for independent advocates providing support to adults who are, or are believed to be at-risk adults. This can be done in the absence of regulation of independent advocates or independent advocacy service providers, as demonstrated in the Code of Practice for independent advocates providing advocacy to persons who fall within the definition of "relevant person" for the purposes of the Assisted Decision Making (Capacity) Act 2015.

[8.126] As the Commission is making recommendations in respect of independent advocacy provisions in regulations under the Health Act 2007 and the Mental Health Act 2001, it considers that the Safeguarding Body may wish to prepare a code of practice in conjunction with another body, for example HIQA or the Mental Health Commission. The Commission's proposed legislative provisions for independent advocacy, allow for this eventuality.

R. 8.9 **The Commission recommends that** the Government should consider whether a form of regulation of independent advocates or independent advocacy services is required.

R. 8.10 **The Commission recommends that** adult safeguarding legislation should include a provision to allow the Safeguarding Body to publish a code of practice for independent advocates providing support to adults who are, or are believed to be, at-risk adults.

[182] For example, see Sage Advocacy, *Nothing about you/ without you – Service Policies and Guidelines* (2019).

CHAPTER 9
REPORTING MODELS

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1. Introduction

[9.1] Reporting of actual or suspected abuse or neglect of at-risk adults is an important element of adult safeguarding and can result in safeguarding assessments or screenings, which can allow at-risk adults to be supported to protect themselves from harm at a particular time and to receive necessary health or social care supports. In some cases, reporting may prevent further abuse or neglect of a victim or other at-risk adults by an alleged perpetrator, or it may uncover and bring an end to institutional abuse. Reporting can include self-reporting of abuse or neglect by a victim and reporting by others, including health or social care professionals, family members of at-risk adults, and members of the community.

[9.2] Reports may be based on:

(a) incidents of abusive or neglectful behaviour that reporting persons have directly witnessed or experienced;

(b) signs or symptoms of harm that reporting persons have observed, such as bruising, signs of emotional distress or malnourishment, or unfilled medical prescriptions; or

(c) information provided to, or acquired by, reporting persons.

[9.3] The need for reporting can arise in any setting, from community settings to residential care settings, in which abuse or neglect of an at-risk adult may be detected. Abuse or neglect of at-risk adults may be detected in various settings including in the following:

(a) **Community settings:** where an at-risk adult is living in the community in situations where an at-risk adult is, or is not, in receipt of formal care from a family member, other person, or a public or private home care service;

(b) **Residential care settings:** where an at-risk adult is living in residential care, such as a public or private nursing home or a residential centre for people with disabilities, including a centre providing temporary residential respite care;

(c) **Day settings:** where an at-risk adult attends a day service such as those provided by voluntary bodies in arrangements under the Health Act 2004;

(d) **Healthcare settings:** safeguarding concerns may arise in healthcare settings, such as primary care services and acute hospitals. Such concerns

may involve at-risk adults who live in the community or in a residential care centre;

(e) **Financial services:** in the provision of financial services by banks, post offices, credit unions and others to at-risk adults. Financial abuse may involve alleged perpetrators who are family members, friends, carers or people who are unknown to the at-risk adult. Such concerns may involve at-risk adults who live in the community or in a residential care centre; and

(f) **Community services settings, including sporting and religious bodies and unincorporated associations:** safeguarding concerns may arise where at-risk adults are involved in, or are members of, bodies or unincorporated associations involved in community activities, including sporting and religious bodies and unincorporated associations, social clubs and community centres.

[9.4] There are various models for reporting actual or suspected abuse or neglect of at-risk adults. Such reporting models may require, encourage or permit the reporting of actual or suspected abuse or neglect of at-risk adults. Specific protections or criteria may be attached to reporting. A summary of the various reporting models is set out below:

(a) **Permissive reporting**: this model allows or permits people to report actual or suspected abuse or neglect. A model of permissive reporting may exist on a legislative basis or on a non-legislative basis. Similar to the mandatory reporting model, the permissive reporting model may include provision for protections for reporters to encourage reporting of suspected abuse or neglect. As noted in the Issues Paper, 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 abuse or neglect.[1]

(b) **Universal mandatory reporting**: this model requires that all persons, irrespective of the setting or profession, must report actual or suspected abuse or neglect.

[1] Law Reform Commission, *Issues Paper on A Regulatory Framework for Adult Safeguarding* (LRC IP – 2019) at page 131 <https://www.lawreform.ie/_fileupload/Issues%20Papers/LRC%20IP%2018-2019%20A%20Regulatory%20Framework%20For%20Adult%20Safegaurding.pdf> accessed on 6 April 2024.

(c) **Reporting for mandated persons, reporting of specified incidents and reporting in specified settings:**

(i) **General reporting for mandated persons**: under this model, legislation provides that specified persons or office-holders known as "mandated persons" are required to report actual or suspected abuse or neglect. The thresholds for reporting can differ under this model. Mandated persons may be required to report all knowledge or suspicions of abuse or neglect. Mandated persons may be only required to report where actual or suspected abuse or neglect meets a certain threshold, or they may only be required to report specified types of actual or suspected abuse or neglect. Mandated persons may be required to report actual or suspected abuse of at-risk adults in the course of:

(a) their work generally, whether in community-based services, acute medical settings or residential care settings; or

(b) their work in specified settings only.

(ii) **Mandatory reporting of specified incidents**: this model requires the reporting of certain types of actual or suspected abuse or neglect or harm. This is known as a reportable incidents model. Some forms of this model may only mandate the reporting of, for example, physical or sexual abuse while other forms may include additional types of abuse or neglect.

(iii) **Mandatory reporting in specified settings**: under this model, legislation may require the reporting of actual or suspected abuse in specified settings only, such as in residential care settings, including nursing homes and residential centres for persons with disabilities. This model is often referred to as a hybrid model of reporting, and may require the reporting of any actual or suspected abuse, or certain types or incidents of actual or suspected abuse, which occur in specified settings. Such a model may require reporting by all persons working, volunteering or visiting specified settings, or may only require reporting by certain persons working in specified settings who are "mandated persons".

[9.5] Irish law provides for offences of withholding information about certain offences against "vulnerable persons" in specified circumstances and provides for supervisory requirements to notify a regulator of particular incidents of abuse in

specified settings.[2] Ireland has a permissive system of reporting in relation to concerns of actual or suspected abuse of at-risk adults more broadly. As noted in the Issues Paper, 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 abuse or neglect.[3] In other jurisdictions, permissive reporting is provided for on a statutory basis. In Ireland, however, permissive reporting exists in the absence of a specific statutory basis.

[9.6] An effective system of reporting must have clearly defined structures and procedures. It is important that the system is accessible to anyone who may need to make a report, so they can do so in a timely manner. A system that supports timely reporting can ensure that concerns are brought to light and addressed, while also preventing risks of further abuse or neglect of the alleged victim or others. People working or engaging with at-risk adults must be able to recognise signs of abuse or neglect, and be aware of the clear reporting pathways available. There have been several examples in Ireland of prolonged inaction, or the need to rely on whistle-blowers, as seen in the cases of 'Brandon' and 'Grace' which are discussed elsewhere in this Report.[4] Awareness of, and training on, a clearly structured reporting system should ensure that these types of cases never happen again.

[9.7] Reporting also plays a role in data collection and the ability of the State to recognise trends and allocate resources based on identified needs. Consistency in reporting thresholds and procedures across different regions in Ireland would allow needs for safeguarding supports to be more accurately identified and deployed.

[9.8] This Chapter considers the:

(a) current reporting regimes in Ireland;

(b) reporting models in other jurisdictions;

(c) gaps in existing reporting regimes;

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[2] See section 2 of this Chapter which discusses the current reporting regimes in Ireland.

[3] Law Reform Commission, *Issues Paper on A Regulatory Framework for Adult Safeguarding* (LRC IP – 2019) at page 131.

[4] McGarry, "HSE in damage control mode to block full publication of Brandon report" *The Irish Examiner* (13 January 2022) <https://www.irishexaminer.com/opinion/commentanalysis/arid-40783659.html> accessed on 6 April 2024.

(d) arguments for and against mandatory reporting; and

(e) provision of statutory protection for those who make a report in good faith.

[9.9] Moreover, this Chapter proposes a reporting regime for Ireland based on consultees' views and existing research, which includes proposals for a reporting model and statutory protection for those who report in good faith.

2. Current reporting regimes in Ireland

[9.10] Although Ireland has a permissive regime for reporting knowledge or suspicion of actual or suspected abuse or neglect of at-risk adults more broadly, there are offences for the withholding of information about specified offences perpetrated against "vulnerable persons".[5] There are also supervisory regulatory provisions in place which require the reporting of specified types of abuse or neglect in certain settings under the Health Act 2007 and the Mental Health Act 2001, or where particular arrangements are in place under the Health Act 2004 or the Assisted Decision-Making (Capacity) Act 2015. Additionally, there are professional conduct and ethical standards in place in respect of registered health and social care professionals, which encompass the reporting of actual or suspected abuse or neglect of patients or others, including at-risk adults.

[9.11] This section outlines:

(a) the various requirements in place in Ireland to assist with identifying whether there are any gaps in relation to the reporting of actual or suspected abuse or neglect of at-risk adults which could give rise to safeguarding concerns; and

(b) optional reporting mechanisms in Ireland that allow reports of actual or suspected abuse or neglect to be made to certain bodies, including the Office of the Ombudsman and the Office of the Confidential Recipient.

(a) Existing reporting requirements

(i) Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012

[9.12] Existing legislation 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

[5] See, for example, section 3(1) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

Information on Offences against Children and Vulnerable Persons) Act 2012 ("2012 Act") provides that a person shall be guilty of an offence if:

(a) they know or believe that an offence listed in Schedule 2 to the 2012 Act has been committed by another person against a "vulnerable person"; and

(b) they have information, which they know or believe might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and they fail without reasonable excuse to disclose that information, as soon as practicable, to a member of the Garda Síochána.[6]

[9.13] The relevant offences set out under Schedule 2 to the 2012 Act include, among others, offences of rape and sexual assault and the offence of assault causing harm under section 3 of the Non-Fatal Offences against the Person Act 1997.[7]

[9.14] Section 4 of the 2012 Act allows for a defence against an offence of withholding information about knowledge or a belief that an offence has been committed against a "vulnerable person" where the "vulnerable person" has capacity to form a view about disclosure of that knowledge or belief and indicates that they do not want the information to be shared with the Garda Síochána, and the person concerned was aware of this view.[8] Combined with a presumption of capacity, this provision respects the individual's choice regarding disclosure.

[9.15] Alternatively, where it has been shown that an individual lacks capacity, section 4(4) of the 2012 Act provides for a defence where the accused relied on the word of a parent or guardian of a "vulnerable person" who, on behalf of the "vulnerable person", informed the accused that the relevant information should not be disclosed to the Gardaí.[9]

[9.16] Furthermore, in the case where the perpetrator of the alleged offence is a parent or guardian of the "vulnerable person", the designated professional treating the "vulnerable person" can decide, on reasonable grounds, that information should not be disclosed to the Gardaí because disclosing such information may threaten

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

[7] Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

[8] Section 4(1) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

[9] Section 4(4) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

the health and wellbeing of the "vulnerable person".[10] In such a case, anyone who knew of the designated professional's view may use this as a defence against withholding information of an offence listed in Schedule 2 to the 2012 Act.[11]

[9.17] Recent research examining attitudes and awareness of adult safeguarding practice in an Irish acute hospital setting has found that some hospital staff (including nurses, doctors and health and social care professionals) are unaware of their information sharing requirements under the 2012 Act. In a recent participatory action research study, which surveyed 100 hospital staff including nurses, doctors and health and social care professionals, only 66 members of staff were aware of their information sharing requirements under the 2012 Act.[12]

(ii) Criminal Justice Act 2011

[9.18] More broadly, an offence of withholding information is provided for under the Criminal Justice Act 2011 ("2011 Act") where a person fails to disclose information to a member of the Garda Síochána as soon as it is practicable to do so, which they know or reasonably believe might be of material assistance in preventing the commission of a relevant offence or securing the apprehension, prosecution or conviction of any other person for a "relevant offence".[13] Relevant offences include, among others, the offence of fraud under the Criminal Justice (Theft and Fraud Offences) Act 2001.[14] The Commission is aware that staff of financial service providers and forensic accountants contracted by the Office of the General Solicitor for Minors and Wards of Court comply with these laws when providing information in cases where it is suspected that fraud has been committed against at-risk adults.

(iii) Offences against the State (Amendment) Act 1998

[9.19] A further offence of withholding information that applies more broadly than to information about actual or suspected abuse or neglect of at-risk adults is the offence in section 9 of the Offences against the State (Amendment) Act 1998 ("1998 Act"). Section 9 of the 1998 Act provides for an offence of withholding

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[10] Sections 4(8) and (11) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

[11] Section 4(8) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

[12] Donnelly, Casey, Lynch, Deaveney, Scanlon, McKenzie, "Using Participatory Action Research to Examine Attitudes and Awareness of Adult Safeguarding Practices in the Acute Hospital Context" (September 2023) Vol 52 Issue Supplement 3 Age and Ageing at page 70 <https://academic.oup.com/ageing/issue-pdf/52/Supplement_3/51548837> accessed on 6 April 2024.

[13] Section 19 of the Criminal Justice Act 2011.

[14] Relevant offences for the purposes of section 19 of the Criminal Justice Act 2011 are set out in Schedule 1 to the Criminal Justice Act 2011.

information in relation to the commission of a "serious offence", which is defined as including serious loss of, or damage to, property or a serious risk of any such loss or damage.[15]

(iv) Mental Health Act 2001 (Approved Centres) Regulations 2006

[9.20] Some at-risk adults may be resident in approved centres under the Mental Health Act 2001. The Mental Health Act 2001 (Approved Centres) Regulations 2006[16] provide, in regulation 32(3) relating to risk management procedures, that the registered proprietor of an approved centre must notify the Mental Health Commission of incidents occurring in the approved centre, with due regard to any relevant codes of practice issued by the Mental Health Commission which have been notified to the approved centre. The relevant incidents are not specified in the regulations. However, "serious or untoward incidents or adverse events involving residents", residents absent without leave, suicide, self-harm, assault and accidental injury to residents or staff are referenced in regulation 32(2) of the 2006 Regulations.

[9.21] Under the Mental Health Act 2001, the Inspector of Mental Health Services has the power to visit and inspect, at any time, any approved centre or other premises where mental health services are being provided.[17] While the Inspector has the power to inspect services only, and therefore does not have the power to investigate or assess individual incidents of actual or suspected abuse or neglect, the Inspector has, among others, duties to:

(a) see every resident whom they have been requested to examine by the resident themselves or by any other person; and

(b) see every patient the propriety of whose detention they have reason to doubt.[18]

[9.22] This means that the Inspector can take individual incidents into account in inspecting services and writing their report to the Mental Health Commission which contains the findings of their inspection.[19]

[15] Sections 8 and 9 of the Offences Against the State (Amendment) Act 1998.

[16] SI No 551 of 2006.

[17] Section 51(2)(a) of the Mental Health Act 2001.

[18] Section 52 of the Mental Health Act 2001.

[19] Section 52 of the Mental Health Act 2001.

(v) Health Act 2007

[9.23] The Minister for Health has made regulations under the Health Act 2007[20] in respect of the reporting of incidents in designated centres for older people[21] and designated centres for persons with disabilities[22] to the Health Information and Quality Authority ("HIQA"). The person in charge of the designated centre is required to notify the Chief Inspector of Social Services, in writing, within three working days of the occurrence of a "specified incident",[23] which include the following:

(a) the unexpected death of a resident;

(b) any serious injury to a resident that requires immediate medical or hospital treatment;

(c) any unexplained absence of a resident from a designated centre;

(d) any allegation of misconduct by the registered provider or by a member of staff; and

(e) any occasion where the registered provider became aware that a member of staff is the subject of a review by a professional body.[24]

[9.24] The Chief Inspector of Social Services must be notified, on a quarterly basis, of the occurrence of a number of further incidents in both designated centres for older people and designated centres for persons with disabilities. A record of the occurrence of such an incident must be kept. These further incidents include:

(a) any occasion where restraint or a restrictive procedure was used;

(b) a recurring pattern of theft or burglary;

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[20] Section 101(1) of the Health Act 2007. "Designated centre" is defined in section 2 of the Health Act 2007.

[21] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013).

[22] Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013).

[23] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31(1).

[24] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), Schedule 4, para 7(1); Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31(1).

(c) any death, including cause of death; and

(d) such other adverse incident as the Chief Inspector of Social Services may require.[25]

[9.25] Persons in charge of designated centres for people with disabilities are also required to report, at quarterly intervals, on the occurrence of non-serious injuries to residents.[26] Where no incidents occur that require notification to the Chief Inspector of Social Services, the registered provider is required to inform the Chief Inspector of this every six months.[27]

(vi) Health Act 2004

[9.26] Under sections 38 and 39 of the Health Act 2004, the Health Service Executive ("HSE") may enter into service arrangements with service providers for the provision of health or personal social services. These service providers are required to comply with reporting obligations set out in the relevant service arrangements which relate to the reporting of "Incidents" and "Serious Reportable Events".[28]

[9.27] Service providers are required to notify the HSE of the occurrence of any identified incidents, including serious incidents.[29] An "incident" is defined as "an event or circumstance which could have or did lead to unintended and/or unnecessary harm". This includes "adverse events which result in harm; near misses which could have resulted in harm, but did not cause harm, either by chance or timely intervention; and staff or service user complaints which are associated with harm". Incidents can be clinical or non-clinical in nature.

[9.28] Where a "Serious Reportable Event" occurs, the Chief Executive Officer (or equivalent) of section 38 and 39 service providers should immediately notify the

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[25] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), Schedule 4, para. 7(2); Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31(3).

[26] Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31(3).

[27] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31(4); Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31(4).

[28] HSE, Section 38 Documentation <https://www.hse.ie/eng/services/publications/non-statutory-sector/section-38-documentation.html> accessed on 10 April 2024; HSE, Section 39 Documentation <https://www.hse.ie/eng/services/publications/non-statutory-sector/section-39-documentation.html> accessed on 10 April 2024.

[29] HSE, Section 38 Service Arrangement – Part One (revised March 2024), Clause 1.1; HSE, Section 39 Service Arrangement – Part One (revised March 2024), Clause 23.6.

HSE and other applicable bodies which may include the State Claims Agency, HIQA and the Mental Health Commission.[30] The service arrangements define a "Serious Reportable Event" as "a serious, largely preventable patient safety incident that should not occur if the available preventative measures have been implemented by healthcare providers".[31] The relevant categories of Serious Reportable Events for the purposes of this Report are patient protection events and criminal events.[32]

[9.29] Patient protection events are as follows:

(a) a dependent person being discharged to the wrong person;

(b) patient death or serious disability associated with a patient absconding from a healthcare facility; and

(c) all sudden, unexplained deaths or injuries which result in serious disability of a person who is an in-patient/resident.[33]

[9.30] Criminal events are as follows:

(a) any instance of care ordered or provided by someone impersonating a healthcare professional;

(b) abduction of a patient of any age while being cared for in a healthcare service facility;

(c) sexual assault of a patient or other person within, or on the grounds of, a healthcare service facility; and

(d) death or serious injury/disability of a patient or other person resulting from a physical assault that occurs within, or on, the grounds of a healthcare service facility.[34]

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[30] HSE, Section 38 Service Arrangement – Part One (revised March 2024), Clause 3.2(c)(xvii) and HSE, Section 39 Service Arrangement – Part One (revised March 2024), Clause 3.2(c)(xiv).

[31] HSE, Section 38 Service Arrangement – Part One (revised March 2024), Clause 1.1; HSE, Section 39 Service Arrangement – Part One (revised March 2024), Clause 1.1.

[32] HSE, *Serious Reportable Events (SREs): HSE Implementation Guidance Document* (26 January 2015) at page 4.

[33] HSE, *Serious Reportable Events (SREs): HSE Implementation Guidance Document* (26 January 2015) at page 4.

[34] HSE, *Serious Reportable Events (SREs): HSE Implementation Guidance Document* (26 January 2015) at page 4.

[9.31] Service providers are also required to ensure that any requirements of the National Treasury Management Agency (Amendment) Act 2000 and of the State Claims Agency are complied with in relation to the notification of incidents.[35]

(vii) Codes of Professional Conduct and Ethics for Registered Health and Social Care Professionals

[9.32] Provisions relating to reporting are also included in Codes of Professional Conduct and Ethics published by bodies responsible for the regulation of the health and social care professions.

[9.33] The Health and Social Care Professional Council ("CORU") regulates a number of health and social care professions in Ireland. CORU is comprised of registration boards specific to each profession. These registration boards publish Codes of Professional Conduct and Ethics particular to each profession. However, there are many provisions within such codes that are common to all of the codes for the professions regulated by CORU. All professionals regulated by CORU have a duty to comply with their code, and must keep up to date with legal developments that affect their professional practice.[36] There are a number of duties relating to the reporting of concerns which are contained in the code of each profession. Health and social care professionals must:

(a) report concerns they have in relation to the welfare of "vulnerable adults" to the appropriate authorities;[37]

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[35] Clause 3.2(c)(iv) and clauses 23.8 and 23.12.

[36] Dietitians Registration Board, *Dietitians Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Medical Scientists Registration Board, *Medical Scientists Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Optical Registration Board, *Optical Registration Board Code of Professional Conduct and Ethics for Dispensing Opticians* (CORU 2019) at page 5; Optical Registration Board, *Optical Registration Board Code of Professional Conduct and Ethics for Optometrists* (CORU 2019) at page 5; Occupational Therapists Registration Board, *Occupational Therapists Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Podiatrists Registration Board, *Podiatrists Registration Board Code of Professional Conduct and Ethics* (CORU 2021) at page 5; Physiotherapists Registration Board, *Physiotherapists Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Radiographers Registration Board, *Radiographers Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Social Care Workers Registration Board, *Social Care Workers Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Speech and Language Therapists Registration Board, *Speech and Language Therapists Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5; Social Workers Registration Board, *Social Workers Registration Board Code of Professional Conduct and Ethics* (CORU 2019) at page 5.

[37] Section 8 of each Code of Professional Conduct and Ethics published by CORU. All Codes are available at <https://coru.ie/health-and-social-care-professionals/codes-of-professional-conduct-and-ethics/> accessed on 6 April 2024.

(b) put the safety and well-being of service users before professional or other loyalties in relation to raising concerns about safety and quality of care;

(c) inform an appropriate person or authority if they are aware of systems or service structures that lead to unsafe practices which put service users, themselves or others at risk;

(d) raise the issue outside of the organisation if their concerns are not resolved, despite reporting them to an appropriate person or authority;

(e) act to prevent any immediate risk to a service user by notifying the relevant authorities of any concerns they have about service user safety as soon as possible; and

(f) report any serious breaches of behaviour or "malpractice" by themselves or others. Malpractice includes negligence, incompetence, breach of contract, unprofessional behaviour, causing danger to health, safety or the environment, and covering up any of those issues.[38]

[9.34] The Medical Council's *Guide to Professional Conduct & Ethics for Registered Medical Practitioners* states that when sharing information about a patient with health professionals and others involved in the medical care and healthcare of the patient, registered medical practitioners should ensure that there is a justifiable basis for doing so and only share such information as is necessary.[39] Registered medical practitioners must be alert to the possibility of abuse of "vulnerable persons" and should notify the appropriate authorities if they have concerns.[40]

[9.35] Registered nurses and registered midwives must report any safety concerns they have about the healthcare environment and help to find solutions through appropriate lines of authority, such as their manager, employer or relevant regulatory body.[41] The supporting guidance in the *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives* states that this

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[38] Section 20 of each Code of Professional Conduct and Ethics published by CORU.

[39] Medical Council, *Guide to Professional Conduct & Ethics for Registered Medical Practitioners* 9th edition (1 January 2024) at paragraph 27.1 <https://www.medicalcouncil.ie/news-and-publications/publications/guide-to-professional-conduct-and-ethics-for-registered-medical-practitioners-2024.pdf> accessed on 6 April 2024.

[40] Medical Council, *Guide to Professional Conduct & Ethics for Registered Medical Practitioners* 9th edition (1 January 2024) at paragraph 6.1.

[41] Nursing and Midwifery Board of Ireland, *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives* (11 May 2021) at page 16 <https://www.nmbi.ie/NMBI/media/NMBI/Code-of-Professional-Conduct-and-Ethics.pdf?ext=.pdf> accessed on 6 April 2024.

responsibility extends to reporting concerns where it is considered that patient dignity is not respected.[42] If the safety or wellbeing of a patient or colleague is affected or put at risk by another colleague's actions, omissions or incompetence, registered nurses and midwives must take appropriate action to protect people from harm before immediately reporting such conduct to their manager, employer and, if necessary, the relevant regulatory body.[43]

(viii) The HSE's National Policy and Procedures – reporting by HSE and HSE-funded services

[9.36] The HSE's Safeguarding Vulnerable Persons at Risk of Abuse National Policy and Procedures (the "HSE's National Policy and Procedures") outline the procedures for responding to concerns or allegations of abuse arising in the community and in HSE-managed and HSE-funded service settings.[44]

[9.37] The outcome of any preliminary screenings of safeguarding concerns that arise in HSE-managed or HSE-funded service settings must be notified by the relevant service to the local HSE Safeguarding and Protection Team, who must agree to any subsequent actions.[45]

[9.38] The HSE also states that if there are significant concerns in relation to a "vulnerable person" at any stage in the preliminary screening procedure, the Chief Officer ("CO") of the HSE Community Healthcare Organisation in which the Safeguarding and Protection Team is based must be notified immediately.[46] The CO must immediately notify the HSE's Director of Social Care.[47] The HSE has stated that notification to, and advice from, the HSE's National Incident Management Team should be considered in such circumstances.[48]

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[42] Nursing and Midwifery Board of Ireland, *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives* (11 May 2021) at page 17.

[43] Nursing and Midwifery Board of Ireland, *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives* (11 May 2021) at page 20.

[44] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 27 <https://assets.hse.ie/media/documents/ncr/personsatriskofabuse.pdf> accessed on 6 April 2024.

[45] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 30.

[46] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 27.

[47] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 30.

[48] Health Service Executive, Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures (2014) at page 27.

[9.39] The HSE's National Policy and Procedures do not apply in private service settings, such as in private nursing homes, privately provided and funded home care services or private hospitals.

(ix) The Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023

[9.40] Previously, open disclosure was on a voluntary basis applicable to HSE and HSE-funded service providers only.[49] If a patient safety incident occurred in the provision of healthcare by a health services provider, the provider had the option to make an open disclosure to the patient.

[9.41] At the time of writing, the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 ("2023 Act") has not yet been commenced. A commencement order is required under section 1(2) of the 2023 Act. The 2023 Act introduces a legislative framework for the mandatory open disclosure of certain patient safety incidents which occur in the course of the provision of a public or private healthcare service. Upon commencement of the 2023 Act, if a patient safety incident listed in Schedule 1 to the 2023 Act occurs during the provision of a health service, there is an obligation on the health practitioner concerned to notify the health service provider. The health service provider is obliged to notify HIQA, the Chief Inspector of Social Services or the Mental Health Commission, depending on the health service provided.[50] There is a further obligation on the health service provider to notify the patient concerned or a "relevant person" in cases where it would not be appropriate or is not possible to inform the patient.[51]

[9.42] A failure by a health service provider to comply with the mandatory open disclosure procedure will amount to a criminal offence and a fine of up to

[49] Part 4 of the Civil Liability (Amendment) Act 2017; Civil Liability (Open Disclosure) (Prescribed Statements) Regulations 2018 (SI No 237 of 2018); HSE, *Open Disclosure Policy: Communicating with Patients Following Patient Safety Incidents* (NATOD-POL-001*)* (29 April 2019). The HSE Open Disclosure Policy went out for consultation in 2021. The launch of this revised policy is currently on hold due to the forthcoming commencement of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023. The policy will require further alignment with the Department of Health's National Open Disclosure Framework (2023) and the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023. At the time of writing, the Act has not yet commenced and a commencement order is required under section 1(2) of the Act. See also, Department of Health, National Open Disclosure Framework (2023) (19 October 2023) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/273442/1b63c986-f080-4c78-86e2-3e3d2a16fd22.pdf#page=null> accessed on 6 April 2024.

[50] Sections 27, 28 and 29 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023. The Act has not yet commenced and a commencement order is required under section 1(2) of the Act.

[51] Section 7 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023.

€5,000.[52] The 2023 Act does not explicitly mention the consequences of failing to comply with mandatory open disclosure by health practitioners. However, a failure to comply is likely to be addressed through the fitness to practice procedure relevant to that practitioner's profession. Furthermore, the 2023 Act provides for a review of the operation of the 2023 Act no later than 2 years after the commencement of the 2023 Act.[53]

[9.43] The Commission welcomes the 2023 Act, which aims to provide further transparency to incidents that occur during the provision of health care services. However, each of the incidents in the list of incidents required to be notified in Schedule 1 to the 2023 Act, or in regulations made under section 8 of the 2023 Act, could be categorised as a clinical incident. This creates a gap where harm or a risk of harm, which does not amount to a "notifiable incident" listed in Schedule 1 to the 2023 Act or in regulations made under section 8 of the Act, is not required to be notified under the 2023 Act.

(b) Discretionary reporting pathways

(i) The HSE's National Policy and Procedures – community reports

[9.44] As set out at paragraph 9.36 above, the HSE's National Policy and Procedures outline the procedures for responding to concerns or allegations of abuse arising in the community and in HSE-managed or HSE-funded service settings.[54] Safeguarding concerns arising in the community that are unrelated to the provision of a health or social care service can be notified to the local HSE Safeguarding and Protection Team and a preliminary screening can be carried out by the local HSE Safeguarding and Protection Team.[55] Such concerns may be notified to the HSE's Safeguarding and Protection Teams by alleged victims, family members, friends or neighbours of alleged victims, health and social care professionals, and other members of the public. Concerns or allegations may also be referred to the HSE's Safeguarding and Protection Teams by other bodies to whom a complaint or allegation has been reported, including the Garda Síochána, HIQA, the Mental Health Commission and advocacy bodies.

(ii) The Office of the Confidential Recipient

[9.45] The Office of the Confidential Recipient acts as a voice and advocate for at-risk adults. The Confidential Recipient is a person appointed by, but independent of,

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[52] Part 8 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023.

[53] Section 80(1) of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023.

[54] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 27.

[55] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 27.

the HSE.[56] The Confidential Recipient acts for people with disabilities and older people who are receiving services in residential care, day services and any community service from the HSE or by organisations funded, or partially funded, by the HSE who wish to report issues with the care they have received or are receiving.[57] Once the Office of the Confidential Recipient receives a complaint, the Office assesses it and decides whether it comes under its remit. The Confidential Recipient has received concerns and complaints in respect of the HSE's acute hospital setting and private nursing homes.[58] However such concerns and complaints fall outside the remit of the Confidential Recipient.[59] If the complaint is under its remit, the Office of the Confidential Recipient refers the complaint to the CO of the HSE's Community Healthcare Organisation in the at-risk adult's area.[60] In serious cases, the Office of the Confidential Recipient refers the complaint to the HSE's National Director of the Community Healthcare Organisation.[61] The CO has 15 days to respond to the Office of the Confidential Recipient with an assessment.[62] However, an outcome may take longer than 15 days.[63] The complaint remains open until the Confidential Recipient is satisfied that the person raising the concern agrees with the outcome or an appropriate reason has been given as to why the concern cannot be solved immediately.[64]

[9.46] Reports to the Office of the Confidential Recipient can relate to abuse, negligence and mistreatment, poor care practices, funding, placement and planning. The data published by the Office of the Confidential Recipient divides the reports it receives into the two subcategories of care issues and adult safeguarding.[65] In 2021, there were 218 reports received, 155 of which came under the remit of the Office.[66] In 2021, there were 96 reports about care issues, which represented 62%

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[56] Health Service Executive, *Report a concern about a vulnerable adult's care* <https://www2.hse.ie/complaints-feedback/report-a-concern-about-a-vulnerable-adult/> accessed on 6 April 2024; Health Service Executive, *Confidential Recipient Annual Report 2022* (2023) at page 3 <https://www.hse.ie/eng/about/who/complaints/confidentialrecipient/confidential-recipient-annual-report-2022.pdf> accessed on 6 April 2024.

[57] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 3 <https://www.hse.ie/eng/services/publications/disability/confidential-recipient-annual-report-2021.pdf> accessed on 6 April 2024.

[58] Health Service Executive, *Confidential Recipient Annual Report 2022* (2023) at page 7.

[59] Health Service Executive, *Confidential Recipient Annual Report 2022* (2023) at page 7.

[60] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 5.

[61] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 5.

[62] Health Service Executive, *Confidential Recipient Annual Report 2022* (2023) at page 11.

[63] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 5.

[64] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 10.

[65] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 7.

[66] Health Service Executive, *Confidential Recipient Annual Report 2021* (2022) at page 7.

of the reports, compared to 59 reports about adult safeguarding, which represented 38% of the overall reports.[67] Data from 2015 to 2021 indicated that there was a trend of more care issue reports being made than adult safeguarding reports. However, the margin varies depending on the year.[68]

(iii) The Office of the Ombudsman

[9.47] The Office of the Ombudsman has the remit to investigate complaints in relation to actions taken by "reviewable agencies" which include, for example, government departments, public bodies, publicly funded voluntary and private bodies, the HSE, agencies delivering health and personal social services on behalf of the HSE, charitable organisations, voluntary bodies and public nursing homes run by the HSE. Complaints to the Ombudsman can be made in relation to a wide range of issues, including adult social care, unfair decisions, misleading advice, failures to follow procedures, communicate clearly, provide a promised service or fairly manage complaints.

[9.48] Complaints in relation to private healthcare are excluded from the remit of the Ombudsman. Since 2005, the Ombudsman has the power to investigate complaints under the Disability Act 2005 concerning failures by public services to provide accessible buildings, services and information. Since August 2015, the Ombudsman can deal with complaints in relation to administrative actions of private nursing homes that receive public funding.

[9.49] The Ombudsman can conduct an investigation upon receipt of a complaint in relation to a reviewable agency.[69] The complainant must first have used an internal complaint procedure, if available, including any appeal procedures.[70] The complaint is examined to establish whether it is within the remit of the Office. The specific powers of the Ombudsman in relation to conducting an examination or an investigation are set out in section 7 of the Ombudsman Act 1980. The Ombudsman may investigate any action by, or on behalf of, a reviewable agency in the performance of administrative functions and may carry out a preliminary examination. The Ombudsman is concerned with:

(a) whether an action has, or may have, adversely affected an eligible person; and

(b) whether the action was or may have been:

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[67] Health Service Executive*, Confidential Recipient Annual Report 2021* (2022) at page 9.

[68] Health Service Executive*, Confidential Recipient Annual Report 2021* (2022) at page 9.

[69] The Ombudsman can also initiate an investigation without having received a report.

[70] Section 4(5)(b)(iii) of the Ombudsman Act 1980.

(i) taken without proper authority;

(ii) taken on irrelevant grounds;

(iii) the result of negligence or carelessness;

(iv) based on erroneous or incomplete information;

(v) improperly discriminatory;

(vi) based on an undesirable administrative practice;

(vii) a failure by a reviewable agency to give reasonable assistance and guidance to an eligible person under section 4A of the Ombudsman Act 1980; or

(viii) otherwise contrary to fair or sound administration.[71]

[9.50] If the Ombudsman finds that the eligible person was adversely affected and one of the conditions in (b)(i)-(viii) applies in respect of the action and the reviewable agency did not take steps to rectify this, the Ombudsman can make a recommendation to the agency to review what it has done, change its decision, or offer an appropriate remedy. While the recommendations of the Ombudsman are not binding on an agency, they are followed in the majority of cases.[72] If a recommendation is not accepted by a reviewable agency, the Ombudsman can report such non-acceptance to the Oireachtas, and the matter can be referred to the relevant Oireachtas Committee.

3. Reporting models in other jurisdictions

[9.51] The reporting models in place in other jurisdictions range from permissive reporting to various types of mandated reporting, including universal mandatory reporting, reporting for mandated persons, and a reportable incidents model. The table below provides a summary of the reporting models in certain jurisdictions. Certain jurisdictions were, at the time of writing, considering proposals or drafting new legislation in relation to reporting models. Where the table highlights any proposed legislation, the relevant jurisdiction has been categorised according to the existing reporting model at the time of writing this Report.

[71] Section 4(2) of the Ombudsman Act 1980.

[72] Ombudsman, *Developing and Optimising the Role of the Ombudsman* (2011) <https://www.ombudsman.ie/publications/submissions-and-proposals/developing-and-optimising/> accessed on 6 April 2024.

Jurisdiction	Legislation	Is a duty owed? By whom?	When does the duty arise?
Universal mandatory reporting			
Nova Scotia (Canada)	Section 5(1) of the Adult Protection Act	Every person who has information.	Every person who has information indicating that an adult is in need of protection shall report the information to the minister.
Newfoundland & Labrador (Canada)	Adult Protection Act 2014 (as amended)	All individuals, regardless of whether the information was obtained under privilege.[73]	Anyone who believes that an adult may be an adult in need of protective intervention must immediately report all information to the provincial director, a social worker or a peace officer.
Reporting by mandated persons or office-holders			
Scotland Reporting by mandated public bodies or office-holders.	Section 5(3) of the Adult Support and Protection (Scotland) Act 2007.	The following public bodies and office-holders: (a) the Mental Welfare Commission; (b) the Care Inspectorate; (c) Healthcare Improvement Scotland;	Where a relevant public body or office-holder knows or believes a person is an adult at risk and that action is required to protect the person from harm.

[73] Newfoundland and Labrador, Adult Protection Act 2021, Part II, s. 12; this obligation has been in place since the Adult Protection Act commenced in 2014: see Newfoundland and Labrador, Point in Time Adult Protection Act 2014, Part II, s. 12 <https://www.assembly.nl.ca/legislation/sr/pointintime/pitstatutes/pita04-01.20190627.htm> accessed on 6 April 2024.

		(d) the Public Guardian; (e) local authorities; (f) the chief constable of the Police Service of Scotland; (g) the relevant health board; and (h) any other public body or office-holder as the Scottish Ministers may specify by order.	
Wales Duty to report adults at risk	Section 128 of the Social Services and Well-being (Wales) Act 2014	The following public bodies and office-holders: (a) the local policing body and chief officer of police for the police area; (b) any relevant local authority; (c) the Secretary of State, in specified circumstances;	Reasonable cause to suspect that a person is an adult at risk.

		(d) specified providers of probation services; (e) a relevant local health board; (f) a relevant NHS Trust; (g) the Welsh Ministers, to the extent that they are discharging certain functions; and (h) such person, or a person of such description, as regulations may specify.	
Permissive reporting (statutory)			
South Australia (Australia) Permissive reporting on a statutory basis.	Section 22 of the Ageing and Adult Safeguarding Act 1995.	No duty.	Permissive reporting by any person of suspicion that a vulnerable adult is at risk of abuse. The South Australian Law Reform Institute recommended in 2022 that a mandatory assessment and voluntary reporting system is preferred.[74]

[74] South Australian Law Reform Institute, *Autonomy and Safeguarding are not Mutually Inconsistent: A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)*

British Colombia (Canada)	Section 46 of the British Columbia Adult Guardianship Act 1996.	Anyone who has information.	When a person has information indicating that an adult is abused or neglected, the person may report the circumstances to a designated agency.
Permissive reporting (non-statutory)			
Northern Ireland Currently permissive on a non-statutory basis. There is a proposal to introduce reporting for mandated persons and office-holders.	The drafting of the Adult Protection Bill is currently in progress.	A duty on Health and Social Care Trusts, the Police Service of Northern Ireland, the Public Health Agency, the Regulation and Quality Improvement Authority and independent providers commissioned or contracted to provide health or social care services.	Where there is a belief that there is reasonable cause to suspect that an adult meets the criteria of an adult at risk and in need of protection.[75]
Victoria (Australia) Currently permissive reporting on a	Proposed adult	Individuals, agencies and their staff, including financial institutions.	Proposals for permissive reporting on a statutory basis, with statutory protection for reporters from any negative

(Report 17, September 2022) at para 5.1.4 <https://law.adelaide.edu.au/ua/media/2202/salri-aas-report.pdf> accessed on 6 April 2024.

[75] The Northern Irish Department of Health has proposed to define an "adult at risk and in need of protection" as a person aged 18 or over: (a) who exposure to harm through abuse, neglect or exploitation may be increased by their personal characteristics and/or life circumstances; (b) who is unable to protect their own well-being, property, assets, rights or other interests; and (c) where the action or inaction of another person or persons is causing, or is likely to cause, him/her to be harmed.

non-statutory basis.	safeguarding legislation.[76]		consequences of making a report).
England Permissive reporting on a non-statutory basis.	Permissive (non-statutory).	No duty.	N/A
Reportable incidents model			
Australia (Federal) Reportable incidents model	The Aged Care Act 1997 (as amended).	Residential care facilities and providers of professional home care and flexible care services in the community.	Unreasonable use of force, sexual assault by staff, psychological or emotional abuse, unexpected deaths, stealing or financial coercion by a staff member only, neglect, use of restrictive practices and unexplained absences.
British Colombia (Canada) Duty to report applying to designated agencies who believe that an offence has been committed.	Section 50 of the British Columbia Adult Guardianship Act 1996.	Designated agency that receives a report under section 46 of the British Columbia Adult Guardianship Act 1996.	If a designated agency has reason to believe that a criminal offence has been committed about an adult about whom a report is made under section 46 of the British Columbia Adult Guardianship Act 1996, the agency must make a report to the police.
England Reportable incidents	Regulation 18 of the Care Quality Commission	Registered persons in respect	Reportable incidents include any abuse or allegation of abuse in relation to a service user

[76] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 104 <https://www.publicadvocate.vic.gov.au/resource/file?id=277> accessed on 6 April 2024.

model in designated settings.	(Registration) Regulations 2009.	of regulated activity.	and any incident which is reported to, or investigated by, the police.

[9.52] Some of the reporting models outlined above are considered in further detail below in order to identify the advantages and disadvantages of each model, in particular those that have been updated since the publication of the Issues Paper in January 2020.

(a) Scotland

[9.53] The Adult Support and Protection (Scotland) Act 2007 provides a framework for adult protection in Scotland, which consists of a number of duties, including a duty to report,[77] a duty to cooperate,[78] a duty to make inquiries,[79] and a duty to have regard to the importance of providing advocacy and other services.[80] The duty to report applies to certain designated public bodies and office-holders such as the Mental Welfare Commission, all councils or local authorities, the Public Guardian, the chief constable of the Police Service of Scotland, and other public bodies and office-holders as prescribed by Scottish Ministers.[81] Section 5(3) of the Adult Support and Protection (Scotland) Act 2007 mandates reporting where such bodies and office-holders know or believe that a person is an adult at risk and action is required to protect that person from harm.[82] The accompanying Code of Practice provides that, even where the public body or office-holder is in doubt, the referral should be made and treated as a referral by the receiving authority.[83] Upon receiving a referral, the receiving authority in Scotland has a duty to make inquiries and may take such investigative measures as are deemed

[77] Section 5(3) of the Adult Support and Protection (Scotland) Act 2007.

[78] Section 5(2) of the Adult Support and Protection (Scotland) Act 2007.

[79] Section 4 of the Adult Support and Protection (Scotland) Act 2007.

[80] Section 6 of the Adult Support and Protection (Scotland) Act 2007; Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 14 <https://researchrepository.ucd.ie/server/api/core/bitstreams/01900f8a-4958-49c9-8d59-f61791b36853/content> accessed on 6 April 2024.

[81] Section 5(1) of the Adult Support and Protection (Scotland) Act 2007.

[82] Section 5(3) of the Adult Support and Protection (Scotland) Act 2007.

[83] The Scottish Government, Adult Support and Protection (Scotland) Act 2007: Code of Practice (28 July 2022) at page 27 <https://www.gov.scot/publications/adult-support-protection-scotland-act-2007-code-practice-3/documents/> accessed on 6 April 2024.

necessary to assess whether the adult is an adult at risk of harm and to determine what action should be taken to protect them.[84]

(b) England

[9.54] The Care Act 2014 is described as a permissive reporting system.[85] However, where an English local authority has reasonable cause to suspect that an adult in the area needs care and support, is experiencing, or is at risk of, abuse or neglect and that adult is unable to protect themselves against such abuse or neglect, the local authority must make enquiries to decide appropriate action.[86] While reporting is permissive, once a safeguarding concern is reported or referred to a local authority, the local authority must gather information and consider whether there is reasonable cause to believe that an adult with care and support needs is experiencing, or is at risk of, abuse or neglect.[87] If the local authority determines that there is reasonable cause to suspect that the adult is experiencing, or is at risk of, abuse or neglect, it is under a duty to make enquiries and take further action.

(c) Northern Ireland

[9.55] At the time of writing, Northern Ireland has a system of permissive reporting. However, consideration has been given to the introduction of a general statutory duty to report adult protection concerns. The Adult Safeguarding Prevention and Protection in Partnership Policy provides guidance for reporting concerns that an adult is, or may be, at risk of being harmed or in need of protection.[88] The Policy states that a report should be made to the Health and Social Care ("HSC") Trust Adult Protection Gateway Service if there is a clear and immediate risk of harm from abuse, neglect or exploitation, or to the Police Service of Northern Ireland

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[84] The Scottish Government, Adult Support and Protection (Scotland) Act 2007: Code of Practice (28 July 2022) at page 27.

[85] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018).

[86] Section 42 of the Care Act 2014 (England).

[87] Section 42 of the Care Act 2014 (England); Association of Directors of Adult Social Services, *A framework for making decisions on the duty to carry out safeguarding adults enquiries: Advice Note* (July 2019) at page 5 <https://www.adass.org.uk/media/7326/adass-advice-note.pdf> accessed on 6 April 2024.

[88] Department of Health, Social Services and Public Safety (Northern Ireland) and Department of Justice (Northern Ireland), *Adult Safeguarding: Prevention and Protection in Partnership* (July 2015) at page 7 <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/adult-safeguarding-policy.pdf> accessed on 6 April 2024.

("PSNI") if a crime is alleged or suspected.[89] Similar to the situation in the Republic of Ireland, Northern Ireland has a number of duties to report across existing legislation that may be relevant in certain adult safeguarding scenarios. However, there is no general duty to report adult safeguarding concerns.[90]

[9.56] In 2020, the Department of Health in Northern Ireland published a consultation document on legislative options to inform the development of an Adult Protection Bill.[91] The publication posed questions to consultees regarding the introduction of a statutory duty to report. The document highlighted the findings of an independent review into a specific incident,[92] which noted that "confusion about what to report" has meant that "the culture within which safeguarding is operating has resulted in the 'risk averse' practice of reporting everything".[93]

[9.57] Proposals to introduce a mandatory duty to report received widespread support from consultees. However, concerns were raised in relation to potential over-reporting and the need for additional resourcing and training to effectively implement such a duty.[94] Following this positive response, the Department of Health in Northern Ireland published its draft proposals for ministerial

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[89] Department of Health, Social Services and Public Safety (Northern Ireland) and Department of Justice (Northern Ireland), *Adult Safeguarding: Prevention and Protection in Partnership* (July 2015) at page 37; Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (July 2021) at para 2.27 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 6 April 2024.

[90] Department of Health (Northern Ireland), *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland* (17 December 2020) at para 2.29 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/consultation-document-adult-protection-bill.pdf> accessed on 6 April 2024.

[91] Department of Health (Northern Ireland), *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland* (17 December 2020) at para 2.29.

[92] Department of Health (Northern Ireland) and Adult Social Care and Health Management Associates, *Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home Evidence Paper 1 Adult Safeguarding within a Human Rights Based Framework in Northern Ireland* (September 2020) <https://www.health-ni.gov.uk/sites/default/files/publications/health/Adult-Safeguarding-Briefing-%20Dunmurry-Manor-Review-Team-Sept-2020.pdf> accessed on 6 April 2024.

[93] Department of Health (Northern Ireland) and Adult Social Care and Health Management Associates, *Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home Evidence Paper 1 Adult Safeguarding within a Human Rights Based Framework in Northern Ireland* (September 2020) at page 13; Department of Health (Northern Ireland), *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland* (17 December 2020) at para 2.34.

[94] Department of Health (Northern Ireland), *Adult Protection Bill Consultation Analysis Report* (5 July 2021) at page 5 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/consultation%20documant-adult%20protection%20bill.pdf> accessed on 6 April 2024.

consideration in July 2021.[95] These draft proposals include the introduction of reporting obligations for specific groups of people across health and social care in cases where there is reasonable cause to suspect that an adult meets the criteria of "an adult at risk and in need of protection".[96]

[9.58] Additionally, it is proposed to provide for statutory guidance in the Adult Protection Bill to explain the duty to report and make the legislation more accessible.[97] The Department of Health in Northern Ireland has identified that consideration should be given to the additional resources and training required to implement a duty to report.[98]

(d) Australia (Federal)

[9.59] At the federal level in Australia, there is no reporting model in place that mandates the reporting of concerns of actual or suspected abuse or neglect or at-risk adults in general. Federal legislation focuses on the regulation of services provided to older people. The Aged Care Act 1997, as amended, sets out a framework of federal laws that protect the rights of older people in government-funded care. The Aged Care Act 1997 establishes a model of mandatory reporting on providers of residential care and professional care services in the community.[99] In April 2021, the Serious Incident Response Scheme commenced, which "complements existing provider obligations under the [Aged Care] Act [1997] and strengthens responsibilities for providers to prevent and manage incidents, focusing on the safety and wellbeing of older Australians".[100] The Serious Incident Response Scheme extends to residential aged care, home care and flexible care delivered in homes or community settings. Section 54-3 of the Aged Care Act 1997 outlines the reportable incidents that are required to be notified to the Aged Care Quality and Safety Commission under the Serious Incident Response Scheme, which include the following incidents:

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[95] Department of Health, *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (July 2021) <https://www.health-ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 6 April 2024.

[96] Department of Health, *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (July 2021).

[97] Department of Health, *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland* (2020) at para 2.47 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/consultation-document-adult-protection-bill.pdf> accessed on 6 April 2024.

[98] Department of Health (Northern Ireland), *Adult Protection Bill Consultation Analysis Report* (5 July 2021) at page 5.

[99] Section 54-3 of the Australian Aged Care Act 1997.

[100] Australian Department of Health and Aged Care, *2021-22 Report on the Operation of the Aged Care Act 1997* at page 95.

(a) unreasonable use of force against a care recipient;

(b) unlawful sexual contact, or inappropriate sexual conduct, inflicted on a care recipient;

(c) psychological or emotional abuse of a care recipient or unexpected death of a care recipient;

(d) stealing from, or financial coercion of, a care recipient by a staff member of the provider;

(e) neglect of a care recipient;

(f) inappropriate use of restrictive practices; and

(g) unexplained absence of a care recipient from the service.

[9.60] The duty to report applies to providers of residential care services and providers of flexible care in a residential setting. A report must be made if any of the aforementioned reportable incidents have occurred, are alleged to have occurred, or are suspected to have occurred involving a victim, or an alleged victim, who is a residential care recipient in connection with the provision of residential care or flexible care in a residential setting.[101] The period of time provided to report a reportable incident depends on whether an incident is categorised as Priority 1 or 2.

(e) Victoria (Australia)

[9.61] Although the State of Victoria has been described as having "the most comprehensive approach to safeguarding with legislation to protect and support older people, people with capacity issues and individuals who are at risk from family members",[102] the State of Victoria nevertheless recognised the need for specialised adult safeguarding legislation in a report by the Office of the Public Advocate in 2022. The report found that the "patchwork" of different agencies, with specific roles limited to the regulation of services, was difficult to navigate

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[101] Aged Care Quality and Safety Commission, *Serious Incident Response Scheme: Guidelines for residential aged care providers* (Version 1.8, October 2022) at page 21 <https://www.agedcarequality.gov.au/sites/default/files/media/SIRS-guidelines-for-residential-aged-care-providers.pdf> accessed on 6 April 2024. The Aged Care Quality and Safety Commission refer to people receiving aged care as "aged care consumers" or "consumers".

[102] Health Information and Quality Authority and Mental Health Commission, *Adult Safeguarding: Background document to support the development of national standards for adult safeguarding, Dublin: Health Information and Quality Authority* (2018) at para 3.6.2.

and the lack of a "central point for service providers and the public to report concerns about abuse, neglect or exploitation of an at-risk adult" was a concern in the existing framework.[103] The report highlighted system failures of adults at risk of harm and made recommendations to ensure the State of Victoria does "not lose sight of any adult in our community who may be at risk of experiencing violence, abuse or neglect."[104]

[9.62] In particular, the report recommended that:

(a) adult safeguarding legislation should be enacted to allow for a clear pathway of reporting abuse of at-risk adults to an established safeguarding agency;[105]

(b) reporting should not be mandatory; and

(c) statutory protections should be introduced to "protect reporters from any negative consequences of making a report".[106]

(f) Nova Scotia (Canada)

[9.63] Adult Protection Services in Nova Scotia are governed by the Adult Protection Act 1989, as amended in 2014. Section 5(1) of the Adult Protection Act states:

> 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.[107]

[9.64] The corresponding Adult Protection Policy Manual elaborates on the purpose of section 5 of the Adult Protection Act, stating that the intention of a duty to report is to "alleviate any reluctance on the part of health professionals and lay people to report their suspicions of self-neglect, abuse and/or neglect of adults who reasonably and probably are unable to protect themselves".[108] The Adult

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[103] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 6.

[104] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 6.

[105] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 15.

[106] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 104.

[107] Section 5(1) of the Adult Protection Act 2014.

[108] Department of Health and Wellness (Nova Scotia), *Adult Protection Policy Manual* (10 October 2022) at para 2.3 <https://novascotia.ca/dhw/ccs/documents/Adult-Protection-Policy-Manual.pdf> accessed on 6 April 2024.

Protection Act does not cover financial abuse. If an individual suspects an adult who cannot protect themselves due to diminished physical or mental capacity has been financially abused, the person must report that to the police under the Criminal Code of Canada.[109]

[9.65] The policy document outlines that an "Adult Protection" worker will consider court action against an individual if they have evidence that:

(a) information concerning an adult in need of protection was knowingly and intentionally not reported to "Adult Protection";

(b) information was reported maliciously; or

(c) a contravention of the Adult Protection Act occurred.[110]

[9.66] The relevant Minister has a duty to make inquiries upon receipt of a report. If there are reasonable and probable grounds to believe an adult is in need of protection, an assessment must be made.[111]

[9.67] Under sections 16 and 17 of the Adult Protection Act, a failure to report is an offence,[112] "punishable on summary conviction and is liable to a fine of not more than one thousand dollars or imprisonment for not more than one year, or both".[113] The Protection for Persons in Care Act 2004 imposes mandatory reporting duties on health facility administrators[114] and service providers,[115] intended to protect people living in residential care. Section 6 of the 2004 Act states that any person "may" report suspected abuse.[116]

[9.68] There are no annual reporting requirements placed on the Health and Wellness department of Nova Scotia regarding figures related to either the Adult Protection Act or the 2004 Act. Accordingly, there is very little commentary on the effectiveness of the 1989 Act, the 2004 Act and universal mandated reporting in Nova Scotia.

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[109] Department of Health and Wellness (Nova Scotia), *Adult Protection Policy Manual* (10 October 2022) at para 2.3.

[110] Department of Health and Wellness (Nova Scotia), *Adult Protection Policy Manual* (10 October 2022) at para 2.3.1.

[111] Section 6 of the Adult Protection Act 2014 (Nova Scotia).

[112] Section 16 of the Adult Protection Act 2014 (Nova Scotia).

[113] Section 17 of the Adult Protection Act 2014 (Nova Scotia).

[114] Section 4 of the Protection for Persons in Care Act 2004 (Nova Scotia).

[115] Section 5 of the Protection for Persons in Care Act 2004 (Nova Scotia).

[116] Section 6 of the Protection for Persons in Care Act 2004 (Nova Scotia).

(g) Newfoundland and Labrador (Canada)

[9.69] The Adult Protection Act commenced in 2014[117] and the current version of the Act has been in place since 2021. Since 2014, the Adult Protection Act has imposed a legal obligation on "a person who reasonably believes that an adult may be an adult in need of protective intervention" to report all information to the provincial director, a social worker or a peace officer.[118] The duty to report applies to information which is subject to solicitor-client privilege.[119] The supporting policy manual states that the obligation to report is immediate:

> a legal obligation exists for all individuals in the province of Newfoundland and Labrador to immediately report situations of possible abuse, neglect or self-neglect where an adult may lack capacity and may be in need of protective intervention.[120]

[9.70] Section 37 of the Adult Protection Act provides for offences committed in contravention of the Act, which includes a failure by an individual to comply with the obligation to report:

> a person who contravenes this Act or the regulations is guilty of an offence and is liable on summary conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding one year in default of payment or to both a fine and imprisonment.[121]

[9.71] 2021 legislation amended the Adult Protection Act to legislate for investigation timelines, to ensure the Adult Protection Act reflected indigenous and cultural considerations specific to Newfoundland and Labrador, and to ensure regional health authority staff can intervene and support adults for an interim period with

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[117] See Newfoundland and Labrador, Point in Time Adult Protection Act 2014, Part II, section 12 <https://www.assembly.nl.ca/legislation/sr/pointintime/pitstatutes/pita04-01.20190627.htm> accessed on 6 April 2024; Newfoundland and Labrador, Point in Time Adult Protection Act 2019, Part II, section 12 <https://www.assembly.nl.ca/legislation/sr/pointintime/pitstatutes/pita04-01.20221214.htm#12> accessed on 6 April 2024.

[118] Newfoundland and Labrador, Adult Protection Act 2021, Part II, section 12(1).

[119] Newfoundland and Labrador, Adult Protection Act 2021, Part II, section 12(5).

[120] Department of Children, Seniors and Social Development (Government of Newfoundland and Labrador), *Adult Protection Act Provincial Policy Manual 2019* (27 September 2023) at page 25 <https://www.gov.nl.ca/cssd/files/Adult-Protection-Policy-Manual-2022.pdf> accessed on 6 April 2024.

[121] Department of Children, Seniors and Social Development (Government of Newfoundland and Labrador), *Adult Protection Act Provincial Policy Manual 2019* (27 September 2023) at page 22.

the court's authority.[122] Some of these amendments were made on foot of a Five-Year Report on the Adult Protection Act, which was published in 2020.[123] The relevant Government minister is obliged to perform a statutory review of the Adult Protection Act, its regulations and principles every 5 years, with the view to considering areas for improvement.[124] The 2020 report includes figures on the number of reports received between 2014 and 2019 and how those proceedings progressed.[125]

[9.72] In its overview, the report states that between 2014 and 2019, 1,671 reports were received.[126] Reports undergo an initial screening by social workers of the regional health authority. Between 2014 and 2019, 1,345 reports were accepted and evaluated. A significant 83% of reports came from "the community". Of the reports received and evaluated, only 85 reports (6.3%) proceeded to investigation.[127] A further 34.9% of reports evaluated resulted in the adult being offered supportive services to mitigate risk.[128]

[9.73] Of the 85 reports that proceeded to investigation, 55% of investigations resulted in no further intervention and 39% resulted in the provision of professional or supportive services. [129] 7 cases resulted in an emergency intervention. The court granted an order to conduct an investigation under section 25 of the Adult

[122] "Proposed Changes to Adult Protection Act Under Review" *VOCM Local News Now* (5 November 2021) <https://vocm.com/2021/11/05/adult-protection-act-review/> accessed on 6 April 2024.

[123] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) <https://www.gov.nl.ca/cssd/files/Adult-Protection-Act-Five-Year-Report_Final.pdf> accessed on 6 April 2024.

[124] Newfoundland and Labrador, Adult Protection Act 2021, Part II, section 11.

[125] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 9.

[126] The population of Newfoundland and Labrador was estimated to be 531,948 on 1 January 2023: Newfoundland & Labrador, Department of Finance, "Population stood at 531,948 as of January 1, 2023" <https://www.gov.nl.ca/fin/economics/eb-population/> accessed on 6 April 2024. The population stood of Newfoundland and Labrador at 529,426 in 2016: Newfoundland & Labrador Statistics Agency, Department of Finance <https://www.stats.gov.nl.ca/Statistics/Topics/population/PDF/Annual_Pop_Prov.PDF> accessed on 6 April 2024.

[127] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020).

[128] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 11.

[129] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at pages 10-11.

Protection Act in 6 cases and a warrant was exercised to remove the adult to a place of safety in 3 cases.[130]

[9.74] If a report is accepted for an evaluation, the Adult Protection Act states that a social worker, with the consent of the adult who is or may be in need of protective intervention, shall commence an evaluation within 5 days, to be completed within 10 days.[131] Staff of the regional health authorities indicated in the Five-Year Report that these timeline expectations were difficult to meet[132]because of difficulties contacting clients, geographical distances travelled to complete evaluations and adverse weather conditions.

[9.75] Resourcing was also identified in the Five-Year Report as a "significant challenge".[133] Social workers highlighted that adult protection work and its expected timelines required social workers to disproportionately focus their time on adult protection cases, to the detriment of their regular clients.[134]

[9.76] Other figures worth noting include the following:

(a) 80% of reports accepted were for adults aged 60 years or older;[135]

(b) 31% of reports accepted were for alleged abuse or neglect occurring in the adult's own home;[136]

(c) 44.1% of reports accepted were assessed as low risk, with 6% assessed as extremely high-risk, necessitating immediate response;[137] and

[130] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 12.

[131] Newfoundland and Labrador, Adult Protection Act 2021, Part II, section 13(2)(a)-(b).

[132] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 19.

[133] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 19.

[134] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 17.

[135] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 7.

[136] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 7.

[137] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 9.

(d) the most common source of accepted report of alleged abuse or neglect came from family members (38.3%) and the adult themselves (31.8%).[138]

[9.77] Overall, the Five-Year Report summarised that stakeholder feedback was largely positive and that the Adult Protection Act is a "robust piece of legislation".[139]

(h) Comparative conclusions

[9.78] There is much to learn from the experiences of reporting models in other jurisdictions. Regardless of what model of reporting is proposed, there must be a clear definition of an adult at risk of harm in Ireland.[140] A comprehensive reporting model must be focused on the harm it seeks to prevent. To do so, there must be clarity on who is most likely to be affected by harm. While clarity on this point is important for every aspect of adult safeguarding, it is particularly important in the context of reporting where individuals considering making a report must be confident that the alleged victim is an adult at risk of harm and adult safeguarding legislation applies. In Scotland and England, statutory guidance is published to provide clarity on interpretation of the relevant legislation.

(i) Reporting thresholds

[9.79] The Commission's review of the legislation in other jurisdictions has highlighted the benefits of providing clarity and guidance on the thresholds at and above which a report is required to be made. The thresholds vary across jurisdictions. Donnelly points out the contrast between the differing objectives of jurisdictions in their approach to reporting models.[141] For some jurisdictions, such as Nova Scotia, a "paternalistic approach" is taken to protect adults at risk of harm whereby a low threshold of harm is required to be reported by any individual, regardless of profession or setting.[142] In other jurisdictions, the objective of reporting mechanisms is to safeguard the at-risk adult while preventing harm. Chapter 3 of this Report outlines the guiding principles to underpin adult safeguarding in Ireland. These principles empower at-risk adults to live autonomously and without intrusion by the State which may affect their right to

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[138] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 10.

[139] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 30.

[140] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 27.

[141] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 27.

[142] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 27.

self-determination. Thresholds for reporting requirements must be informed by these guiding principles.

(ii) Use of resources

[9.80] Another point that deserves analysis, when comparing experiences of reporting models in other jurisdictions, is the use of resources. The level of resources required to facilitate the receipt and investigation of reports under a universal mandatory reporting model, where over-reporting is likely to be prevalent, may be more than is required in a jurisdiction that has mandatory reporting with specified limitations and thresholds.[143] Significant funding and resources would be required to address the volume of reports received under a system whereby the general public would be required to report any concern.

(iii) Maintaining reporting data

[9.81] Maintaining and publishing anonymised data on reports made, and actions taken, in response to reports contributes to transparency and institutional learning. From an institutional learning perspective, the Newfoundland & Labrador Adult Protection Act includes a provision requiring the relevant government minister to perform a statutory review of the Act, its regulations and principles every 5 years to consider areas for improvement. The first Five-Year Evaluation made on foot of this requirement provides statistics on universal mandatory reporting in the jurisdiction. In contrast, Nova Scotia, a jurisdiction with the same reporting model, has no such requirement of the relevant minister to perform a review or publish figures. [144] This means that it is difficult to review the effectiveness of the legislation, the pressure on resources, and the need for reform.

4. Gaps in existing reporting regimes

[9.82] It is important that a regime for reporting suspected or actual abuse or neglect of at-risk adults is comprehensive in nature because gaps may lead to undetected instances of abuse or neglect, or further abuse or neglect, of at-risk adults.

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[143] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 4; Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at page 17.

[144] In 2021, a Private Members Bill was introduced to amend the Adult Protection Act in Nova Scotia. The Bill, as introduced, required the Minister to maintain records of the number of reports made under section 5(1), the universal reporting mandate. It further required records to be maintained of the details of the reporter and the action taken in response. The Bill also proposed that the Minister should be required to reflect those records maintained in annual reports to be brought to the House of Assembly. The Bill has not progressed after the first sitting.

Although Ireland has reporting obligations in place for specified instances of abuse, there is no existing regime of reporting suspected or actual abuse or neglect of at-risk adults more broadly. It is therefore helpful to review what is not covered by existing legislative or professional code provisions in order to provide a clearer picture of the current reporting system in Ireland. Comparative analysis from other jurisdictions is provided, where appropriate, to help identify gaps in the current reporting system.

(a) Community

[9.83] In relation to concerns of actual or suspected abuse arising in the community, there are a number of offences that are not included in Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012[145] which regularly arise in an adult safeguarding context. These include:

(a) concerns of actual or suspected coercion under section 9 of the Non-Fatal Offences against the Person Act 1997; and

(b) offences of endangerment under section 13 of the Non-Fatal Offences against the Person Act 1997.

[9.84] These offences, and the conducted captured by these offences, are not captured by section 2 and Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012. As recommended in section 8(c)(i) of this Chapter, the Commission intends to address this by recommending the creation of new offences and the inclusion of those new offences, as well as certain existing offences, in Schedule 2 to the 2012 Act.

[9.85] However, there is a lack of evidence on the utility of the offence in section 3(1) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012. According to information obtained from the Garda Síochána's Analysis Service which reflected data up to 3 April 2024, there are no recorded instances of a person being charged or summonsed for an offence contrary to section 3 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.[146] While this may indicate that the 2012 Act is successful in ensuring that people do not withhold

[145] See the discussion of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 in section 2(a)(i) of this Chapter.

[146] It is also worth noting that according to information obtained from the Garda Síochána's Analysis Service which reflected data up to 3 April 2024, there are also no recorded instances of a person being charged or summonsed for an offence contrary to section 2 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

information, there is some evidence of low awareness among medical, health and social care professionals of their obligations under the 2012 Act. As aforementioned, recent participatory action research examining attitudes and awareness of adult safeguarding practice in the Irish acute hospital context has found that some hospital staff (including nurses, doctors and health and social care professionals) are not aware of their information sharing requirements under the 2012 Act.[147] In a recent participatory action research study, which surveyed 100 hospital staff including nurses, doctors and health and social care professionals, only 66 members of staff were aware of their information sharing requirements under the 2012 Act.[148] Awareness of the law is a core aspect of effective adult safeguarding. For law to shape behaviour and lead to the safeguarding of at-risk adults, people whose conduct the law tries to influence must be aware of the law.

(b) Professional homecare service provision

[9.86] Currently, the only reporting requirements for incidents occurring in the provision of private homecare services are reporting requirements specified in tender agreements for HSE-funded homecare services or, if the incident meets the threshold of an offence, reporting requirements under the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, as previously discussed. HSE-managed homecare services fall under the HSE's National Policy and Procedures.[149]

[9.87] In 2022, the Department of Health proposed that professional home support providers will be required by regulations, which are proposed to be made under the Health (Amendment) (Licensing of Professional Home Support Providers) Bill, to have a procedure in place for reporting suspected abuse of service users to the relevant health professionals and authorities.[150] It is proposed that this procedure should be made in accordance with the service provider's safeguarding policy.[151]

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[147] Donnelly, Casey, Lynch, Deaveney, Scanlon, McKenzie, "Using Participatory Action Research to Examine Attitudes and Awareness of Adult Safeguarding Practices in the Acute Hospital Context" (September 2023) Vol 52 Issue Supplement 3 Age and Ageing at page 70.

[148] Donnelly, Casey, Lynch, Deaveney, Scanlon, McKenzie, "Using Participatory Action Research to Examine Attitudes and Awareness of Adult Safeguarding Practices in the Acute Hospital Context" (September 2023) Vol 52 Issue Supplement 3 Age and Ageing at page 70.

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

[150] Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (2022), Draft Regulation 10 <https://www.gov.ie/en/consultation/81506-public-consultation-on-draft-regulations-for-providers-of-home-support-services/> accessed on 6 April 2024.

[151] Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (2022), Draft Regulation 10.

The Draft Regulations for Providers of Home Support Services, which set out this proposal, do not include any proposals for consequences or sanctions for breaching the proposed duty.[152]

[9.88] The draft regulations propose that service providers will be required to report complaints relating to a matter that a reasonable person would consider might pose a risk to the health or safety of a service-user. The service providers will be required to immediately report such complaints to the "Commissioner of services"[153] and HIQA.[154] There is no proposed sanction for the failure to comply with the proposed duty.

(c) Designated centres under the Health Act 2007

[9.89] HIQA is a services regulator. HIQA's functions in relation to setting standards, monitoring compliance and inspections apply in respect of designated centres, including nursing homes and residential centres for people with disabilities. On foot of a report of an incident under the relevant regulations made under the Health Act 2007, HIQA may commence an investigation of the safety, quality and standards of a service if it believes, on reasonable grounds, that there is a serious risk to the health or welfare of a person in receipt of such services.[155] The potential risk may be the result of any act, omission or negligence on the part of a service provider or a person in charge of a designated centre.[156]

[9.90] However, it is important to note that HIQA does not have the power to investigate or assess individual incidents, or to implement measures to safeguard individuals on foot of a report or investigation. This is a significant gap, and results in a situation where the only body to which designated centres must make reports is not empowered to directly investigate or assess individual incidents that may give rise to such reports. Even if there was a statutory requirement to report to the HSE's National Safeguarding Office, the HSE's Safeguarding and Protection Teams have no powers to assess safeguarding concerns in privately managed or funded centres. It is a significant gap that there are no reporting

[152] Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (2022), Draft Regulation 10.

[153] The proposed definition of "Commissioner of services" is: "the person or body designated by the Minister for Health, to determine the number of hours or days home support that a service provider is to provide a service user". See Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (2022), Draft Regulation 2.

[154] Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (Department of Health 2022), Draft Regulation 18.

[155] Section 9(1) of the Health Act 2007.

[156] Section 9 of the Health Act 2007.

requirements to a body to empower it to assess, investigate and respond to individual incidents of actual or suspected abuse or neglect across all settings.

[9.91] Furthermore, there are gaps under the current regulatory system. Designated centres are only required to report non-serious injuries and recurring patterns of theft or burglary on a quarterly basis. Even if a report leads to an investigation of a service by HIQA, a few months may pass after an incident has occurred before it is reported and subsequently investigated. This is unsatisfactory from a safeguarding perspective. It is desirable for measures to be reported and identified quickly to prevent further abuse or harm of at-risk adults. Additionally, it is arguable that a duty to report should apply more broadly than to the person in charge of a designated centre, because there may be some instances where the person in charge may allegedly be causing concern to at-risk adults or may be reluctant to report incidents.

(d) Services provided under sections 38 and 39 of the Health Act 2004

[9.92] Service arrangements between the HSE and relevant service providers under sections 38 and 39 of the Health Act 2004 consist of standard clauses and schedules and set out categories of reportable incidents that are required to be reported to the HSE.[157] These categories are limited, resulting in gaps in terms of incidents that may be of concern but which are not reportable incidents under the Health Act 2004. For example, the categories of reportable incidents under the Health Act 2004 do not include:

(a) injuries which result in the minor disability of a person because only incidents resulting in a serious disability are reportable incidents;

(b) non-serious injury/disability of a patient or other person resulting from a physical assault that occurs within, or on the grounds of, a healthcare service facility;

(c) theft from, or financial coercion of, a resident or in-patient;

(d) psychological or emotional abuse;[158]

[157] HSE, Section 38 Documentation <https://www.hse.ie/eng/services/publications/non-statutory-sector/section-38-documentation.html> accessed on 10 April 2024; HSE, Section 39 Documentation <https://www.hse.ie/eng/services/publications/non-statutory-sector/section-39-documentation.html> accessed on 10 April 2024.

[158] In comparison, reporting of incidents of psychological or emotional abuse in such services is required in Australia under the Aged Care Act 1997.

(e) use of restrictive practices, unless they result in the death or serious disability of a patient;[159]

(f) unexplained absences or repeated unexplained absences of residents/in-patients from the grounds of a healthcare service facility, unless they result in the death or serious disability of a patient; and

(g) neglect or malnourishment.[160]

(e) Conclusion

[9.93] Gaps in reporting regimes are problematic. While relevant professionals and others may have knowledge or a belief that offences and harms may or have been committed, there is no clear pathway for that information to come to the attention of the appropriate authorities. Ireland has some reporting obligations for specific offences directly or indirectly related to at-risk adults. However, gaps still remain. Where a certain type of abuse or neglect is not criminalised, or where withholding information about a certain type of abuse or neglect is not a criminal offence, there is often no reporting obligation attached to such type of abuse or neglect.

[9.94] Under the Health Act 2007, when a report is made regarding an incident in a service or an incident by a service provider, the service can be audited as a whole. However, HIQA does not have the power to investigate the individual incident. This can be problematic for a number of reasons, in particular because the current system does not facilitate early intervention in respect of screenings of reports of individual incidents to ensure that individuals receive the safeguarding supports they need and do not suffer further harm. As aforementioned, it is a significant gap that there are no reporting requirements to a body to empower it to assess or investigate individual incidents of actual or suspected abuse or neglect across all settings. It is vital to the establishment of a comprehensive adult safeguarding framework in Ireland that adequate reporting requirements are in place to provide for the spectrum of actual and potential harms to at-risk adults across all settings.

[9.95] Furthermore, certain settings wherein at-risk adults receive care, including privately-funded professional homecare services, do not have any reporting requirements. This is particularly concerning in the case of professional

[159] In comparison, designated centres under the Health Act 2007 are required to report all uses of restrictive procedures to HIQA, as outlined above.

[160] In comparison, reporting of neglect in such services is required in Australia under the Aged Care Act 1997.

homecare, where many at-risk adults receive services and may not have the capacity to report or communicate instances of harm themselves.

5. Mandatory reporting

[9.96] Currently, there is no legal requirement on any individual to report suspected or actual harm, abuse or neglect of an at-risk adult, unless it reaches or surpasses the threshold for an offence listed under Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012. As previously noted, there are, however, reporting obligations imposed by existing legislation which may, given the nature of a particular case, be relevant to at-risk adults. However, there is no legal framework specifically designed to provide for a duty to report actual or suspected harm of an at-risk adult. This leaves gaps in the legislation whereby a case of actual or suspected harm to an at-risk adult does not fall under any existing reporting requirements, and there is no specified duty to report.

[9.97] Mandatory reporting in relation to adult safeguarding requires designated categories of people to report suspicions of abuse or neglect of at-risk adults. In jurisdictions where there is mandatory reporting by specified persons 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 of harm and that action is required to protect the adult. Ireland has existing mandatory reporting requirements in the context of abuse or neglect of children. The Commission is in no way likening adults at risk to children. However, lessons can be learned from child safeguarding, which in Ireland is a much more embedded concept than adult safeguarding.

(a) Mandatory reporting of concerns of child abuse in Ireland

[9.98] As discussed above, Ireland already has a system of mandatory reporting in relation to the actual or suspected abuse of a child. A system of mandated reporting was introduced for concerns of abuse of children under the Children First Act 2015 ("2015 Act") in December 2017.[161] Mandated persons are required, as soon as practicable, to report any knowledge, belief or reasonable suspicion, on the basis of knowledge they have received, acquired or become aware of in the course of their employment or profession as a mandated person, that a child has been harmed, is being harmed or is at risk of being harmed.[162] The persons mandated for the purposes of the 2015 Act are set out in Schedule 2 to the Act. Mandated persons include, among others, specified health and social

[161] Section 14 of the Children First Act 2015.

[162] Section 14 of the Children First Act 2015. Mandated persons are required to make such reports to the Child and Family Agency.

professionals, probation officers, teachers, members of the Garda Síochána, guardians *ad litem*[163] appointed in accordance with section 26 of the Child Care Act 1991, and persons employed in various capacities, including managers of domestic violence shelters and managers of homeless provision or emergency accommodation facilities.[164] Supporting documents are available on the Child and Family Agency's website to provide guidance on reporting procedures and obligations.[165]

[9.99] Once the Child and Family Agency has received a report, its first consideration is the immediate safety of the child involved.[166] If the child is not in immediate danger, the report is screened to establish whether the child's needs require an intervention by the Child and Family Agency or would be better dealt with by other relevant support services such as pre-schools, schools, youth projects, the Gardaí, public health nurses or local community family support services.[167] Where it is determined that a case requires an assessment, a social worker is assigned to meet and talk to the child, the family and relevant professionals to gather and analyse information to determine the:

(a) danger or risks of harm to the child;

(b) factors that are making it harder to keep the child safe;

(c) strengths or safety that are present in the family; and

(d) things that need to change for the child and family.[168]

[9.100] Mandated persons may be obliged to assist the Child and Family Agency in assessing a concern. Under section 16(2) of the 2015 Act, mandated persons are obliged to comply with a request from the Children and Family Agency to provide it with information regarding an assessment on foot of a report

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163 The term 'guardian ad litem' literally translates as 'guardian for the suit' and refers to a court-appointed guardian who is in place for the duration of a court case.

164 Section 2 and Schedule 2 of the Children First Act 2015.

165 Child and Family Agency, Publications and Forms <https://www.tusla.ie/children-first/publications-and-forms/> accessed on 6 April 2024.

166 Child and Family Agency, A Guide for the Reporting of Child Protection and Welfare Concerns (2017) at page 12 <https://www.tusla.ie/uploads/content/4214-TUSLA_Guide_to_Reporters_Guide_A4_v3.pdf> accessed on 6 April 2024.

167 Child and Family Agency, A Guide for the Reporting of Child Protection and Welfare Concerns (2017) at page 12.

168 Child and Family Agency, A Guide for the Reporting of Child Protection and Welfare Concerns (2017) at page 12.

received.[169] Depending on the Child and Family Agency's final analysis, an appropriate response is chosen from early intervention, child welfare, child protection or alternative care.[170]

[9.101] Prior to the introduction of mandatory reporting, there were over 18,000 referrals to the Child and Family Agency in 2015[171] and over 19,087 referrals in 2016.[172] In 2018, after the introduction of mandatory reporting in December 2017, there were 24,815 referrals related to child protection concerns.[173] 12,610 of these referrals were mandated reports.[174] Of the 25,427 child protection referrals in 2019, 12,214 were classified as mandatory referrals.[175] This represents a year-on-year increase in the overall number of referrals received in the years immediately following the introduction of mandatory reporting in December 2017. As of 5 October 2022, there had been 19,893 child welfare and protection referrals to date in 2022. 10,615 (54%) of these were child welfare referrals and 7,421 (37%) were child protection referrals.[176] This indicates that as of 6 October 2022, there were 1,857 (9%) referrals without a report type recorded. The figures as of 6 October 2022 are consistent with the higher proportion of child welfare concerns seen in previous years. The Child and Family Agency stated that the increase in the total referrals to Child Protection and Welfare Services (56,561 in 2019, including the 25,427 child protection referrals referenced above) was most likely caused by a combination of factors, including mandatory reporting and the increase in the number of children in Ireland.[177] However, the Child and Family

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[169] Section 16(2) of the Children First Act 2015.

[170] Child and Family Agency, A Guide for the Reporting of Child Protection and Welfare Concerns (2017) at page 12 <https://www.tusla.ie/uploads/content/4214-TUSLA_Guide_to_Reporters_Guide_A4_v3.pdf> accessed on 6 April 2024.

[171] Hosford, "There were 56,000 reports of child abuse in three years" *Thejournal.ie* (9 March 2017) <https://www.thejournal.ie/child-abuse-reports-3276951-Mar2017/> accessed on 6 April 2024.

[172] Deegan, "Nearly 20,000 reports of suspected child abuse were made to Tusla last year" *Thejournal.ie* (19 October 2017) <https://www.thejournal.ie/tulsa-received-52-child-protection-referrals-everyday-last-year-3654883-Oct2017/> accessed on 6 April 2024.

[173] Child and Family Agency, Annual Review on the Adequacy of Child Care and Family Support Services Available (2020) at page 25 <https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2019_v2.0_Nov_2021_.pdf> accessed on 6 April 2024.

[174] Child and Family Agency, Annual Review on the Adequacy of Child Care and Family Support Services Available (2020) at page 25.

[175] Child and Family Agency, Annual Review on the Adequacy of Child Care and Family Support Services Available (2020) at page 23.

[176] Child and Family Agency Data Hub, Performance and Activity Data <https://data.tusla.ie/> accessed on 6 April 2024.

[177] Child and Family Agency, *Annual Review on the Adequacy of Child Care and Family Support Services Available 2019* (2020) at page 23.

Agency also stated that, although difficult to conclude with absolute certainty given the multitude of factors at play, the increased proportion of child protection referrals (of the total number of referrals to Child Protection and Welfare Services) received in 2018 and 2019 was most likely caused by the introduction of mandatory reporting.[178]

(b) Arguments in favour of mandated reporting

[9.102] There are arguments for and against a system of reporting that includes a duty to report. These arguments are set out below.

(i) Increased detection of abuse through an increase in referrals

[9.103] Supporters of mandatory reporting argue that such a system may result in a greater number of cases being referred to adult safeguarding or protection services, or law enforcement officers, and in turn that the occurrence of abuse of at-risk adults will be more effectively detected. [179] Critics of this argument claim that mandatory reporting will increase the number of unsubstantiated claims and place a burden on resources.[180] However, a counter argument to this claim is that even if an increase in unsubstantiated claims does occur, the increase in the detection of genuine cases of abuse outweighs the increase in unsubstantiated claims.[181] Safeguarding Ireland addressed concerns of over-reporting by emphasising that "the development of a culture where people are awake to safeguarding issues and are willing to report them far outweighs the risks attaching to over-reporting or reporting incidents that ultimately lack a real basis for concern."[182] In Newfoundland and Labrador, a 5 year Evaluation into the impact of the Adult Protection Act indicated that 6.3% of total reports progressed to an adult protection investigation.[183] 93.6% were evaluated but did not proceed

<https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2019_v2.0_Nov_2021_.pdf> accessed on 6 April 2024.

[178] Child and Family Agency, *Annual Review on the Adequacy of Child Care and Family Support Services Available 2019* (2020) at page 24. It should be noted that the Child and Family Agency also emphasised that the categorisation of those referrals as children protection referrals (rather than child welfare referrals) was based on the categorisation of the referrer and not the social worker and could change following assessment of the referral by a social worker.

[179] McGregor, Mooney, "Weighing up the impact of mandatory reporting", RTE Brainstorm 11 Dec 2017; Hyman, *Mandatory Reporting of Domestic Violence by Health Care Providers: A Policy Paper* (Family Violence Prevention Fund 1997).

[180] Melton, 'Mandated Reporting: A Policy Without Reason' (2005) 29 Child Abuse & Neglect 9.

[181] Yelas, 'Mandatory Reporting of Child Abuse and the Public/Private Distinction' (1992) 7 Auckland University Law Review 788.

[182] Safeguarding Ireland, *Identifying Risks and Sharing Responsibilities* (May 2022) at page 186.

[183] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at para 5.1.8.

to investigation. However, 34.9% of reports resulted in the provision of adult supportive services, such as counselling or home supports, to mitigate any risk.[184]

(ii) Deterrence of potential perpetrators due to the increased likelihood of detection

[9.104] Proponents of mandated reporting argue that this model is an appropriate reflection of society's strong stance against abuse, an attitude that could itself deter potential perpetrators.[185] Mandatory reporting provides an increased threat to potential perpetrators of the exposure of their abuse. This threat of exposure may be sufficient to deter and prevent future harms.[186] Furthermore, it has been argued that the increased likelihood of detection results in perpetrators being brought "into the justice system and away from more prospective victims."[187]

(iii) Increased awareness of signs of abuse and neglect linked to training in reporting obligations

[9.105] Adequate training in identifying signs of abuse is necessary for mandated persons to feel confident in identifying signs of abuse and neglect. Individuals who have completed training would be better equipped to identify 'red flags' of actual or suspected abuse.[188] In addition to increased awareness of signs of abuse due to training, mandated persons would have guidance on what does and does not require reporting, which should result in reduced numbers of unnecessary reports and improved effectiveness of the system.[189] Safeguarding

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[184] Centre for Health Information (Newfound & Labrador), Adult Protection Act Five-Year Review (September 2020) at para 5.1.8.

[185] Pomerance, "Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marq Bene & Soc Welfare L Rev 439 at 445, citing Kohn, "(In)justice: A Critique of the Criminalization of Elder Abuse" (2012) 49 Am Crim L Rev 1, 2–3.

[186] Geiderman and Marco, "Mandatory and permissive reporting laws: obligations, challenges, moral dilemmas, and opportunities" (2020) J Am Coll Emerg Physicians Open at page 41 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7493571/pdf/EMP2-1-38.pdf> accessed on 6 April 2024.

[187] Pomerance, "Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marq Bene & Soc Welfare L Rev 439 at 445, citing Kohn, "(In)justice: A Critique of the Criminalization of Elder Abuse" (2012) 49 Am Crim L Rev 1, 2–3 at 18.

[188] Pomerance, "Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marq Bene & Soc Welfare L Rev 439 at 461, citing Velick, "Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse" (1995) 3 Elder LJ 165 at 181.

[189] Pomerance, "Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marq Bene & Soc Welfare L Rev 439 at 461 citing Velick, "Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse" (1995) 3 Elder LJ 165 at 181.

Ireland has noted that there may be circumstances where staff are unsure whether something they witnessed warrants a report or further action.[190] The provision of support and training to staff would help to dispel staff's uncertainty and clarify what requires the making of a report.

(iv) The possible facilitation of early intervention, allowing for prevention of further abuse or neglect, less intrusive interventions, and a lower impact of abuse or neglect on individuals

[9.106] In favour of mandated reporting, it has been argued that mandated reporting may facilitate early intervention, allowing for the prevention of abuse or neglect, less intrusive interventions, and a lower impact of abuse or neglect on individuals. This argument is convincing because it applies to a reportable incidents model where reporting is linked to a specified setting, enabling targeted early intervention measures in circumstances where the setting may be the subject of multiple reports.[191] However, an argument based on early intervention can only be relied on if services are adequately provided for post-report intervention.

(c) Arguments against mandated reporting

(i) The potential for interference with a person's rights to privacy and autonomy

[9.107] An important principle of adult safeguarding is the autonomy of the at-risk adult. One objection to mandatory reporting is based on concern for the rights to privacy and self-determination of the person who is potentially being abused.[192] Potential interference with autonomy was raised as an issue at consultation stage of the Adult Protection Bill in Northern Ireland. A minority of consultees were concerned that the introduction of mandatory reporting "would remove an individual's ability to make their own decisions".[193] However, that consultation received broad support for the introduction of mandatory reporting with "clearly defined thresholds and consideration given to additional resources and training

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[190] Safeguarding Ireland, *Identifying Risks and Sharing Responsibilities* (May 2022) at page 188.

[191] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 40.

[192] Donnelly and O'Brien, "Adult Safeguarding Legislation—The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52 British Journal of Social Work 3677-3696 citing Mackay, Notman, McNicholl, Fraser, McLaughlan and Rossi, "What Difference does the Adult Support and Protection (Scotland) 2007 make to social work service practitioners' safeguarding practice" (2012) 14(4) The Journal of Adult Protection at pages 197–205 and Donnelly, "Mandatory reporting and adult safeguarding: a rapid realist review" (2019) 21(5) The Journal of Adult Protection at pages 241–51.

[193] 9% of respondents took this view. See Department of Health (Northern Ireland), *Adult Protection Bill Consultation Analysis Report* (5 July 2021) at page 20.

required".[194] Chapter 4 of this Report proposes a rights-based adult safeguarding framework and discusses the rights to privacy and autonomy, their link to the right to protection of the person, and when rights can be permissibly interfered with to achieve the objective of safeguarding the health, safety or welfare of an at-risk adult.

(ii) Risk of loss of trust in, and damaged relationships with, health or social care professionals who report in compliance with obligations and a decline in adults seeking professional advice

[9.108] Some submissions received in response to the Issues Paper noted that mandatory reporting may have the unintended consequence of preventing adults from seeking help and assistance. Individuals may be concerned that the sharing of information in a discussion with a health or social care professional may require that professional to make a report.[195] Consequently, the individual involved may lose trust in these professionals and avoid seeking professional help.

[9.109] Some consultees stated that requirements for reporting of historic child abuse cases by counsellors, to whom adults made a historic disclosure, since the commencement of the 2015 Act has resulted in a decline in adult survivors of child abuse seeking professional advice. In *McGrath v HSE*, the applicant, who is the Director of Counselling within the HSE, argued that mandatory reporting of historic child abuse cases by the counsellors of adult survivors prevented individuals from seeking counselling.[196] *McGrath* dealt with the proper interpretation of the mandatory reporting obligation in section 14(1)(a) of the 2015 Act. A Child Protection and Welfare Policy, published by the HSE on 14 November 2019, stated that disclosure of retrospective child abuse must be reported to the Child and Family Agency. Mr McGrath challenged the policy and stated that the word "child", as used within section 14(1)(a) of the 2015 Act, refers only to a person who is a "child", as defined in the 2015 Act, at the time that the mandated person referred to in section 14(1) receives, acquires or becomes aware of the information referred to in that section. The HSE, however, contended that the word "child" includes any person who was harmed when they were a child, even though that person may now be an adult. The High Court

[194] 77% of respondents took this view. See Department of Health (Northern Ireland), *Adult Protection Bill Consultation Analysis Report* (5 July 2021) at page 5.

[195] Pomerance, "Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marq Bene & Soc Welfare L Rev 439 at 446 citing Thompson, "The White Collar Police Force: "Duty To Report" Statutes in Criminal Law Theory" (2002) 11 Wm & Mary Bill Rts J 3, 19–22 at page 23-24; Lee, "Mandatory Reporting of Elder Abuse: A Cheap but Ineffective Solution to the Problem" (1985) 14 Fordham Urb LJ 723, 731 at page 750.

[196] *Tom McGrath v The Health Service Executive* [2022] IEHC 541 (Unreported, 3 October 2022).

rejected Mr McGrath's argument.[197] Mr McGrath appealed the decision to the Court of Appeal. On appeal, Mr Justice Binchy concluded that the word "child" in section 14(1)(a) of the 2015 Act refers to a person who is a child at the time that the mandated person receives, acquires or becomes aware of the information referred to in the section.[198] The Court of Appeal held that the High Court fell into error in concluding that section 14(1)(a) of the 2015 Act requires mandated persons to notify the Child and Family Agency where an adult discloses past harm suffered as a child and where that harm falls within the definition of "harm" in section 2 of the 2015 Act.[199]

[9.110] *McGrath* involved the interpretation of a statutory provision in the child care context and was not concerned with any policy determination as to whether reporting of historic abuse is appropriate. While it was concerned only with statutory interpretation, the case is useful for the purposes of the Commission's consideration of whether mandated reporting should be introduced in the adult safeguarding context. This is because it highlights the motivations of the HSE's Director of Counselling in challenging the interpretation of the provisions of the 2015 Act, which related to the argument that the HSE's interpretation of the 2015 Act as requiring historic reporting had resulted in a decline in adult survivors of child abuse seeking counselling.

[9.111] It is relevant to consider the motivations of Mr McGrath in this case and the views of consultees on the impact of requirements on counsellors to report disclosure of historic abuse in examining whether mandated persons should be required to report present-day harm to at-risk adults, or present-day harm and historic harm to at-risk adults. A small number of consultees pointed to the distress experienced by many adult survivors of historic child abuse when they learn that their identity, and the fact that they had a report made by a counsellor on their behalf, is likely to be shared not only with the Garda Síochána but also with the perpetrator of the abuse, even in circumstances when the adult survivor does not wish to give a full interview to the Child and Family Agency about that abuse as part of the Agency's child abuse substantiation process.[200] One consultee stated

[197] *Tom McGrath v The Health Service Executive* [2022] IEHC 541 (Unreported, 3 October 2022) at paras 56 to 58.

[198] *Tom McGrath v The Health Service Executive* [2023] IECA 298 (Unreported, 8 December 2023) at para 80.

[199] *Tom McGrath v The Health Service Executive* [2023] IECA 298 (Unreported, 8 December 2023) at para 101.

[200] Child and Family Agency, *Child Abuse Substantiation Procedure (CASP)* (Version 1.3 May 2023) <https://www.tusla.ie/uploads/content/Child_Abuse_Substantiation_Procedure_(CASP).pdf> accessed on 6 April 2024; Child and Family Agency, *Child Abuse Substantiation Procedure (CASP): A leaflet for adults disclosing that they were abused as a child*

that this distress, which is usually based on well-founded fears of what the abuser might do in order to retaliate or intimate, has escalated into suicidal ideation in some cases. It was also stated that it has resulted in withdrawal from the counselling and therapy process in many cases. The consultee added that even where counselling and other interventions continue, the therapeutic process may be compromised by the adult survivor's fear that anything they say will result in another mandated report and in their personal information being shared with their abuser against their will.

[9.112] The Commission has carefully considered the views of consultees and the motivations of the HSE's Director of Counselling in taking a legal challenge to the relevant provisions of the 2015 Act. The Commission is of the view that if mandated reporting obligations are introduced in respect of harm to at-risk adults, there should be a limit on the reporting obligations of mandated persons so that such persons are only required to report present-day harm of persons who are at-risk adults at both of the following times:

(a) the time of the harm; and

(b) the time when the mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that they have received, acquired or become aware of in the course of their employment or profession as a mandated person, that an at-risk adult has been harmed, is being harmed or is at risk of being harmed.

[9.113] The Commission believes that if mandated persons were required to report both present-day harm and historic harm to at-risk adults, there is a risk that at-risk adults may lose trust in mandated persons and avoid seeking help and support to protect themselves from harm at particular times. Limiting mandated reporting obligations to current risks of harm would seek to mitigate against this risk, but would ensure that safeguards could be put in place following reporting of present-day risks to adults who need support to protect themselves from harm. Reporting of present-day actual or suspected harm to an at-risk adult could be important to ensure that other at-risk adults can be protected from a potential present-day abuser; this is particularly important where abusers may have regular access to adults who are, or may be, at-risk adults such as in services settings.

(iii) Risk that reporting may lead to institutionalisation of older adults where a caregiver or family member is allegedly causing concern

[9.114] Empirical research undertaken in 2002 claims to have identified a link between mandatory reporting schemes and the increased institutionalisation of older

<https://www.tusla.ie/uploads/content/45406_TUSLA_-_Adult_PMD_Leaflet_AW.pdf> accessed on 6 April 2024.

adults.[201] If a report is made alleging the abuse of an at-risk adult by their sole caregiver, such a report may result in the admission of the at-risk adult to a residential care centre, and would likely affect the relationship between them. In jurisdictions that include self-neglect within the definition of that which is required to be reported, mandated persons may have to make a report about an individual who is no longer able to care for themselves independently, leading to the institutionalisation of that at-risk adult, potentially against their own will.[202] While there are numerous sources that acknowledge increased risk of institutionalisation as a consequence of interventions such as reporting,[203] one source indicates that more research is needed to further explore this link.[204] However, in the absence of community services for victims of abuse, the argument has been made that adult protection service workers or adult safeguarding social workers may conclude that in difficult situations, such as where the sole caregiver or family member of an at-risk adult is the person allegedly causing concern to the at-risk adult, the only real solution is to place the at-risk adult in a residential care setting.[205]

(iv) The monetary costs of implementing a model of mandatory reporting

[9.115] One of the arguments against mandatory reporting is the costs of undertaking preliminary screenings of the additional reports that may result from a requirement to mandatorily report, which could lead to resources being diverted away from other support services.[206] This concern was reflected in some consultees' responses to the Issues Paper. Other arguments related to cost and

[201] Lachs, Williams, O'Brien and Pillemer, "Adult Protective Service Use and Nursing Home Placement" (2002) 42(6) The Gerontologist 734-739; Senior Rights Victoria, *Should Victoria have Mandatory Reporting of Elder Abuse* (2018) at page 7.

[202] Bernal, "Do I Really Have to? An Examination of Mandatory Reporting Statutes and the Civil and Criminal Penalties Imposed for Failure to Report Elder Abuse" (2017) 25 Elder LJ 133 at page 156.

[203] See also, Schmidt, Akinci and Magill, "Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse than Certified Guardians with Other Work Experience" (2011) 7(2) NAELA Journal 171 at 194; Schmidt, "Medicalization of Aging: The Upside and the Downside" (2011) 13(1) Marquette Elder's Advisor 55; Teaster et al, "Wards of the State: A National Study of Public Guardianship" (2007) 37 Stetson L Rev 193.

[204] Marcum, Mendiondo, Teaster, Wangmo and Schmidt, "Program and Ward Characteristica and Cost Savings of Public Guardianship: An Evaluation of the Florida Public Guardianship Program" (2017) 28(2) University of Florida Journal of Law & Public Policy at page 351 <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1498&context=jlpp> accessed on 6 April 2024.

[205] Lachs, Williams, O'Brien and Pillemer, "Adult Protective Service Use and Nursing Home Placement" (2002) 42(6) The Gerontologist 734-739 at page 738.

[206] Aisworth, "Mandatory Reporting of Child Abuse: Does it really make a difference?" (2002) 7(1) Child and Family Social Work 57.

resources and referred to the risk of over-reporting under a mandatory reporting model and the potential consequences of reporting in circumstances where intervention is ultimately not necessary.[207]

(v) Concerns regarding over-reporting (a resulting rise in unsubstantiated reports) that would direct resources away from addressing abuse

[9.116] As mentioned above, one of the arguments in favour of mandated reporting is that it may lead to an increased rate of detection through an increase in reports being made. However, the counter argument is that mandated reporting may lead to an increase in unsubstantiated reports.

[9.117] In relation to concerns about a resulting rise in unsubstantiated reports, the Commission understands that when the mandatory reporting provisions in the 2015 Act were commenced, such provisions did not lead to a sudden or significant increase in unsubstantiated reports because the existence of national guidance and awareness raising prior to the commencement of such provisions meant that reports were already being made in line with national guidance. However, there is an absence of such national guidance and awareness raising on the making of reports in relation to at-risk adults. In the absence of guidance on the making of reports in relation to at-risk adults, a number of unsubstantiated reports may be made, which could, but may not necessarily be, higher than the amount of unsubstantiated reports made after the mandatory reporting provisions in the 2015 Act were commenced, which had the benefit of being preceded by published guidance and awareness raising.

(vi) The duplication of reporting requirements

[9.118] Consultees raised concerns in relation to the duplication of incident reporting requirements in health and social care services. This can result in situations where notification of incidents to up to five different agencies is required. For example, if an individual was injured in a HSE-funded mental health facility, there are separate requirements for reports to be made to the HSE, HIQA, the Mental Health Commission, the Health and Safety Authority, and the State Claims Agency. This can lead to an excessive burden on the staff of a HSE-funded mental health facility, particularly as some reporting requirements, such as certain notification requirements under the Health Act 2007, require a report to be made within 3 days of the incident.

[207] Aisworth, "Mandatory Reporting of Child Abuse: Does it really make a difference?" (2002) 7(1) Child and Family Social Work 57.

(d) Weighing arguments for and against mandatory reporting

[9.119] There are compelling arguments for and against the introduction of mandatory reporting in the adult safeguarding context in Ireland. These arguments are set out below.

(i) The potential for interference with a person's rights to privacy and autonomy

[9.120] Arguably, the strongest argument against the introduction of a model of mandatory reporting is the potential interference with the autonomy and privacy rights of the at-risk adult.[208] These concerns may be alleviated by ensuring that the proposed model of reporting is not generalised but rather is specific to the harm it aims to prevent.[209] A universal model of reporting that requires the general public to make a report without receiving adequate training on signs of abuse, or without having the experience of working with at-risk adults, may unjustly interfere with the autonomy of individuals who are considered to be at-risk. Universal mandatory reporting models "tend to support protectionist, risk averse practices which may contravene human rights".[210]

[9.121] In contrast, a model of reporting that limits reporting requirements to professionals with training and experience of working with at-risk adults, who are only required to report after a specified threshold of harm has been met or exceeded in the course of their employment or profession as a mandated person, would reduce the number of unsubstantiated claims which, in turn, would reduce unnecessary interference into the lives of at-risk adults. These safeguards against arbitrary, unsubstantiated reports would allow independent adults to live autonomously, without fear of mandatory reporting based on their age, appearance or condition.

(ii) Loss of trust in, and damaged relationships with, health or social care professionals who report in compliance with mandated reporting

[9.122] Any risk of a loss of trust in health professionals, or reluctance of at-risk adults to seek help for fear their circumstances will be reported, are serious concerns which weigh against the introduction of mandatory reporting. Every effort should be made to encourage individuals to seek help, when needed, and to talk to a

[208] See also Chapter 4 which discusses a rights-based adult safeguarding framework.

[209] See Donnelly, "Mandatory reporting and adult safeguarding: a rapid realist review" (2019) The Journal of Adult Protection 21(5).

[210] See Donnelly, "Mandatory reporting and adult safeguarding: a rapid realist review" (2019) The Journal of Adult Protection 21(5) at page 10, citing Harbison, *Contesting Elder Abuse and Neglect: Ageism, Risk, and the Rhetoric of Rights in the Mistreatment of Older People* (University of British Columbia Press 2017).

professional. According to the Department of Children, Equality, Disability, Integration and Youth, and the Child and Family Agency, the experience of mandatory reporting under the 2015 Act is that most people understand the need for a report to be made. Moreover, it is explained to all parties involved that mandatory reporting is part of the working relationship. The Commission appreciates that the impact of mandatory reporting on at-risk adults may be different to the impact of mandatory reporting on children and their families. However, this highlights the need for public awareness of the obligations on certain professionals to report.

[9.123] The argument that individuals may be deterred from seeking help, for fear that a report would be made, stems from reporting in domestic violence cases wherein a report may be perceived as making matters worse because it may result in a spouse or partner seeking retribution for the making of such report by further abusing the victim, or may destabilise the family relationship and effect children.[211] There are important distinctions to be made between reporting in domestic violences cases, including adult safeguarding concerns involving family members or friends, and reporting adult safeguarding concerns that arise in specified care settings, including residential centres for people with disabilities and nursing homes. Persons resident in such settings, or who receive professional care in home care settings, may be more isolated due to being unable to live independently and being cared for behind closed doors, resulting in them potentially having access to fewer people to whom they could self-report abuse of harm. In such care settings, abuse is most likely perpetrated by a staff member or a peer. However it must also be acknowledged that persons who live independently could be just as, if not more, isolated and unable to self-report than persons resident in such settings, or in receipt of professional care in home care settings.

[9.124] The policies and procedures of care providers should provide that a report of alleged abuse or neglect at or above a certain threshold will result in the removal of the access of the person allegedly causing concern to the at-risk adult, at least temporarily, in order to allow for an initial screening. Knowledge that the access of a person allegedly causing concern to the alleged victim will be removed upon receipt of a report should alleviate any concerns that seeking help could result in the person allegedly causing concern seeking retribution by engaging in further abuse. The introduction of any legislative provisions for mandatory reporting should be accompanied by appropriate public awareness campaigns to ensure that individuals are informed when they decide to seek help from a professional.

[211] Moskowitz, "Saving Granny from the Wolf: Elder Abuse and Neglect-The Legal Framework" (1998) 31 Connecticut Law Review 77 at page 154.

(iii) Concerns regarding over-reporting (a resulting rise in unsubstantiated reports) that would direct resources away from addressing abuse

[9.125] Adult safeguarding legislation, in particular provisions for mandatory reporting, must be specific, limited in their application, and contain appropriate thresholds. Fears of burdening the system with over-reporting and excessive costs are legitimate fears if provisions for mandatory reporting are not specific to the harm such reporting seeks to prevent. This applies to the concern of the duplication of reporting requirements. Proposed legislation to introduce mandatory reporting must specify that reporting is not required from a mandated person if it is the case that another mandated person has already made a report. Another way that over-reporting and the risk of unsubstantiated reports can be mitigated is to limit the obligation to report to professionals who, in the course of their employment, regularly provide care to at-risk adults. The provision of training on the identification of signs of abuse would further assist mandated persons in making reasoned decisions about whether to report, thereby reducing the likelihood of over-reporting or unsubstantiated claims. One of the arguments for the introduction of mandated reporting, namely increased awareness of signs of abuse, could alleviate concerns against the introduction of mandatory reporting.

(iv) The duplication of reporting requirements

[9.126] In relation to consultees' concerns that mandatory reporting would result in the duplication of reporting, one regulatory body who responded to the Issues Paper suggested that a body could be appointed as a central agency for the purposes of receiving reports. Existing software systems that enable bodies to make a report, and which are capable of being accessed by multiple public bodies or authorities, could be adapted to act as a central report processing platform. Any mandated reporting provisions could also specify that a mandated person would not be required to make a report to the same body twice (for example to the HSE, under service arrangements, in addition to any new reporting requirements to the proposed Safeguarding Body, if any).

[9.127] Additionally, in relation to the duplication of reporting, the Government published an information note following the enactment of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.[212] The note addressed a possible link between the 2012 Act and the then Children First Bill, which was subsequently enacted as the 2015 Act. The note stated that the Government brought two separate and distinct

[212] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2 <https://assets.gov.ie/123633/14417853-a45d-4e72-a553-2b86d4fd2a55.docx> accessed on 6 April 2024.

measures in recognition of the very separate and distinct roles of the Garda Síochána and the HSE (now the Child and Family Agency in respect of children) with regard to the protection of children and "vulnerable persons".[213]

[9.128] The note stated that only the Gardaí can investigate a criminal offence against a child or "vulnerable person". The note contrasted this position with the role of the HSE (now the Child and Family Agency in respect of children), which it identified was to provide the necessary supports and monitoring of children at risk.[214] The note stated that the 2012 Act addresses the role of the Garda Síochána and requires that any person who has evidence to suggest that a person has committed a serious offence against a child or "vulnerable person" must provide the Gardaí with such information in order for the Gardaí to investigate the alleged offence.[215] In contrast, the note explained that the Children First Bill would address the role of the HSE and would require relevant persons, in a position to assess children at risk of abuse, to provide the HSE (now the Child and Family Agency in respect of children) with the information necessary to monitor, and provide supports to, a child who may have been abused.[216]

[9.129] The note also stated that any criminal investigation will be conducted in a parallel investigation by the Gardaí.[217] The distinction between the rationale for the 2012 Act provisions and the provisions for mandated reporting in the 2015 Act could be likened to the distinction between the purpose of the 2012 Act and proposals for mandated reporting of actual or suspected harm, abuse or neglect of at-risk adults under adult safeguarding legislation.

[9.130] Increased public and professional awareness of signs of abuse is an essential first step in the process of providing improved supports to individuals who may need support to protect themselves from harm at a particular time. Providing adequate training to professionals mandated to report should facilitate early intervention and reduce unsubstantiated reports. However, it is important to note that while mandatory reporting of concerns can facilitate intervention, a comprehensive adult safeguarding model requires adequate resourcing of services to support at-risk adults to protect themselves from harm at particular times.

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[213] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2.

[214] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2.

[215] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2.

[216] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2.

[217] Department of Justice, *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 Information Note & Application* (2012) at page 2.

6. Statutory protection for those who report actual or suspected abuse or neglect in good faith

[9.131] Individuals should be encouraged to report actual or suspected abuse or neglect in good faith. One way to encourage people to report is to ensure their protection from any potential civil and criminal liability, or other potentially damaging consequences, arising from their making of a report. The majority of consultees who responded to the Issues Paper supported the introduction of statutory protection for those who report actual or suspected abuse or neglect of at-risk adults in good faith. Consultees cited a fear of legal repercussions as a reason why people do not report suspected or actual abuse. One consultee's submission highlighted particular fears among professionals of reporting suspected abuse. The consultee stated that currently, if a professional makes a report of suspected abuse of an at-risk adult, they run the risk of being sued by the relatives of the at-risk adult. Negative consequences arising from reporting, such as the threat of a defamation action or the loss of employment, were highlighted as concerns by those who considered reporting actual or suspected abuse or neglect.

(a) The Protected Disclosures Act 2014

[9.132] The Protected Disclosures Act 2014 protects workers in the public, private and not-for-profit sectors from penalisation if they make a disclosure about wrongdoing that comes to the attention of the worker in a work-related context.[218] Workers can report wrongdoing internally to their employer or externally to a third party, such as a prescribed person. Persons who make protected disclosures (sometimes called 'whistleblowers') are protected from penalisation. This means they should not be treated unfairly or lose their job because they have made a protected disclosure under the Protected Disclosures Act 2014. This is relevant to the consideration of reporting of actual or suspected abuse or neglect of at-risk adults because a small number of consultees cited a fear of losing their job if they were to make a report.

[9.133] A matter is not a wrongdoing that can be covered by a protected disclosure if it is a matter which it is the function of a worker or their employer to detect, investigate or prosecute and does not consist of, or involve, an act or omission by the employer.[219] This could mean, for example, that health or social care workers tasked with safeguarding adults and screening safeguarding concerns would not be protected under the Protected Disclosures Act 2014 if they were to identify actual or suspected abuse or neglect of an at-risk adult by a family member and

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[218] Section 5(2) of the Protected Disclosures Act 2014, as amended by the Protected Disclosures (Amendment) Act 2022. Workers include board members, shareholders, job applicants and volunteers.

[219] Section 5(5) of the Protected Disclosure Act 2014.

report it to the HSE, because such a report would not constitute a protected disclosure. It is clear from consultees' responses to the Issues Paper that there is concern about the lack of protection when reporting in such situations.

[9.134] There are also situations in which members of the public may have cause to report actual or suspected abuse or neglect which comes to their attention outside of a work-related context. In this regard, it is notable that reports of wrongdoing outside of a work-related context fall outside the scope of the Protected Disclosures Act 2014.

(b) Statutory protection for persons reporting child abuse

[9.135] Statutory protections for reporting child abuse exist in the Protections for Persons Reporting Child Abuse Act 1998 ("1998 Act"). The 1998 Act sets out two types of protection for those who report child abuse concerns to designated authorities. Section 3 of the 1998 Act provides for the protection, from civil liability, of "a person" who has reported child abuse. This protection does not apply if it can be shown that the person who made the report had not acted reasonably and in good faith.[220] The 1998 Act also provides for the protection of employees who report child abuse. Section 4(1) of the 1998 Act prohibits employers from penalising an employee for forming an opinion on, and making a report of, child abuse.[221]

[9.136] It is important to note that the 1998 Act was in force for many years before the introduction of mandated reporting under the 2015 Act.[222] The 2015 Act introduced an obligation on mandated persons to, as soon as practicable, report any knowledge, belief or reasonable suspicion, on the basis of knowledge they have received, acquired or become aware of in the course of their employment or profession as a mandated person, that a child has been harmed, is being harmed or is at risk of being harmed.[223] This is a relevant point to note because prior to the 2015 Act, although there was no mandated duty to report, statutory protections for reporting applied to all persons who made a report of, or assisted in an investigation into, child abuse. In other words, the statutory protection applied to all persons who made a report and when mandatory reporting was

[220] Section 3 of the Protections for Persons Reporting Child Abuse Act 1998.

[221] Section 4(1A) provides that section 4(1) does not apply to a communication that is a protected disclosure within the meaning of the Protected Disclosures Act 2014.

[222] The Protections for Persons Reporting Child Abuse Act 1998 commenced in its entirety on 23 January 1999. Sections 14-17 and 19 of the Children First Act 2015 commenced on 11 December 2017. Section 18 of the Children First Act 2015 commenced on 1 May 2016.

[223] Section 14 of the Children First Act 2015. Mandated persons are required to make such reports to the Child and Family Agency.

introduced, the statutory protection continued to apply to anyone who reported, regardless of whether or not that individual was mandated to do so.

(c) Statutory protections in other jurisdictions

(i) Australia

a. Australian Law Reform Commission

[9.137] The Australian Law Reform Commission recommended in 2017 that adult safeguarding laws in Australia should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of the report, be:

(a) liable civilly, criminally or under an administrative process;

(b) found to have departed from standards of professional conduct;

(c) dismissed or threatened in the course of their employment; or

(d) discriminated against with respect to employment or membership in a profession of trade union.[224]

b. Queensland

[9.138] Section 248B of the Guardianship and Administration Act 2000 in Queensland provides for the protection of a person from liability for providing information to the public advocate.[225] This protection exists despite any other law that would otherwise prohibit the provision of information. Section 248B(3) of the 2000 Act provides that a person who acts honestly in the provision of information to the public advocate will not be subject to civil, criminal or administrative liability.[226] The section also provides that a person cannot be found to have breached any professional code of ethics, or be found to have departed from professional

[224] Australian Law Reform Commission, *Elder Abuse— A National Legal Response* (ALRC Report 131) (2017), recommendation 14-7.

[225] Queensland's Public Advocate is an independent position that works on behalf of adults with impaired decision-making capacity to "promote and protect the rights, including protecting them from neglect, exploitation, and abuse; encourage the development of services and programs to help them reach the greatest degree of autonomy; and promote, monitor, and review the provision of services to them". See The Public Advocate, The Role of the Public Advocate <https://www.justice.qld.gov.au/public-advocate/about-the-public-advocate/what-the-public-advocate-does> accessed on 6 April 2024.

[226] Section 248B(3) of the Guardianship and Administration Act 2000 (Queensland).

standards, by virtue of the fact that they provided information to the public advocate.[227]

c. Victoria

[9.139] In August 2022, the Office of the Public Advocate in Victoria published a report on adult safeguarding laws and practices. The purpose of the report was to identify ways in which the safeguarding of at-risk adults could be improved in Victoria.[228] Regarding reporting specifically, the report recommended that, although reporting should not be mandatory, legislation "should seek to protect reporters from any negative consequences of making a report".[229]

(ii) Canada

a. British Columbia

[9.140] In British Columbia, the Adult Guardianship Act 1996 ("1996 Act") provides for measures to protect the identity of a person who makes a report of abuse or neglect.[230] The 1996 Act also provides that no action for damages may be brought against a person for making a report unless the person made the report falsely and maliciously.[231] Under section 46(4) of the 1996 Act:

> A person must not:
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten dismissal or otherwise threaten a person,
>
> (c) discriminate against a person with respect to employment or a term or condition of employment or membership in a profession or trade union, or
>
> (d) intimidate, coerce, discipline or impose a pecuniary or other penalty on a person

[227] Section 248B(4) of the Guardianship and Administration Act 2000 (Queensland).

[228] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 9.

[229] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 104.

[230] Section 46(2) of the Adult Guardianship Act 1996 (RSBC 1996, c 6) (British Columbia) <https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-6/latest/rsbc-1996-c-6.html> accessed on 6 April 2024.

[231] Section 46(3) of the Adult Guardianship Act 1996 (RSBC 1996, c 6) (British Columbia).

> because the person makes a report or assists in an investigation under [Part 3 of the 1996 Act].[232]

b. Nova Scotia

[9.141] The Adult Protection Act in Nova Scotia imposes a universal reporting duty on all persons, who have information that indicates that an adult is in need of protection, to report such information to the Minister of Community Services. Section 5(2) of the Adult Protection Act supports this duty by preventing any action from being taken against a person who, on the basis of reasonable and probable cause, furnishes relevant information, provided that such information was not furnished maliciously. [233]

(d) Conclusion

[9.142] The provision of statutory protection is widespread across other jurisdictions as a means to encourage reporting and to protect those who report. The Commission discusses its recommendations on a form of statutory protection, and the reasons underpinning such recommendations, below.

7. Rights of at-risk adults and third parties

[9.143] Reporting of actual or suspected abuse or neglect of at-risk adults is an important aspect of adult safeguarding. There are benefits to the existence of reporting requirements. However, mandated reporting requirements can also have negative consequences. Reports of actual or suspected abuse or neglect may have significant rights implications for both at-risk adults and third parties, including the individuals who are allegedly causing the abuse or neglect.

[9.144] Reporting may serve to vindicate the constitutional rights of at-risk adults who are alleged to be victims of abuse or neglect. Reporting may also vindicate their rights under the European Convention on Human Rights. However, it may also interfere with their rights, in particular their constitutional rights to privacy, autonomy and bodily integrity, for example, where reports are made against their express wishes. Reporting may also interfere with the rights of individuals who are allegedly causing concern, in particular their constitutional rights to privacy, to work and earn a livelihood, and to a good name.[234] There may also be consequences for the rights of third parties, who may be requested to participate in an assessment of whether an at-risk adult has been harmed, is being harmed

[232] Section 46(4) of the Adult Guardianship Act 1996 (RSBC 1996, c 6) (British Columbia).

[233] Section 5(2) of the Adult Protection Act 1989 (RSNS 1989, c 2) (Nova Scotia).

[234] These rights are discussed in more detail in Chapter 4.

or is at risk of being harmed, on foot of a report of actual or suspected abuse or neglect.

[9.145] However, these rights are not absolute and may be permissibly interfered with in certain situations. The legitimacy of an interference is analysed using a proportionality framework.[235] Any proposed reporting requirement must be scrutinised to ensure it is necessary, proportionate and restricts constitutional rights to the minimum degree possible to achieve the legitimate aim of safeguarding the safety, health and welfare of the at-risk adult.

[9.146] In considering whether to recommend the introduction of both a statutory protection for those who report in good faith and a model of mandated reporting, the Commission has carefully considered the various rights implications of such proposals.

[9.147] The Commission's aim is to develop a rights-based framework for adult safeguarding that effectively balances empowerment and prevention. The Commission is mindful that a model of mandatory reporting that is not subject to appropriate limitations or thresholds could have a disproportionate impact on the autonomy of at-risks adults. Analysis of the various reporting models has therefore been undertaken with regard to the guiding principles underpinning the Commission's proposals, as set out in Chapter 3.

[9.148] The Commission has also analysed the various reporting models by reference to the proportionality framework. The objective of mandatory reporting is to ensure that abuse and neglect is recognised and addressed, and that further abuse and neglect is prevented. The Commission is of the view that this objective is of sufficient importance to warrant the override of constitutional rights in certain situations, provided that such override is necessary, proportionate and restricts constitutional rights to the minimum degree possible, and where the objective of mandatory reporting relates to adult safeguarding concerns that are pressing and substantial in a free and democratic Irish society. In deciding whether to introduce a model of reporting as the means to achieve this objective, and in the development of the parameters of the proposed model, the Commission has borne in mind that the means used to achieve this objective must:

(a) be rationally connected to the objective and must not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible; and

[235] In Chapter 4, the Commission proposes a rights-based adult safeguarding framework.

(c) be such that the effects on rights are proportionate to the objective.[236]

8. Proposed model for the reporting of actual or suspected abuse or neglect of at-risk adults

[9.149] In analysing the various reporting models to determine the appropriate option(s) in the Irish context, the Commission has drawn on consultees' submissions to the Issues Paper and consultees' experiences shared with the Commission throughout the consultation process. The majority of consultees who responded to the Issues Paper[237] supported the introduction of a form of mandatory reporting. There were mixed responses as to the specific type of mandatory reporting that consultees wished to see introduced. Notably, strong views were expressed by some consultees, who opposed the introduction of mandatory reporting.

[9.150] Detailed analysis of the existing reporting regime was completed to identify any gaps, as discussed above. A review of the reporting regimes in a number of other jurisdictions was undertaken to complement the analysis of the gaps in the Irish reporting regimes and to establish whether any learnings could be drawn from the experiences in other jurisdictions. From the experiences of Scotland, Nova Scotia, Newfoundland and Labrador, and from recent consultations conducted in Northern Ireland, it appears there is a trend among these jurisdictions toward legislative provision for mandatory reporting in specified circumstances. Reporting models vary from jurisdiction to jurisdiction and while it can be helpful to review the experiences of implementing models in other jurisdictions, it is important for any recommendations to be focused on the most appropriate model for the Irish context.

[9.151] Careful consideration was given to the available domestic and international literature on reporting models, including analysis of the arguments for and against mandatory reporting. The Commission is mindful that there is a lack of conclusive research studies on the impact of mandatory reporting requirements in respect of abuse or neglect of at-risk adults.

[9.152] To determine whether any of the gaps in the current Irish reporting regime need to be filled, the Commission sought to identify any evidence of under-reporting in recent years. There is significant evidence of under-reporting and failures to

[236] See the discussion of this framework (as set out in *Heaney v Ireland* [1994] 3 IR 593 (Costello J) at page 607) in Chapter 4 wherein the Commission proposes a rights-based adult safeguarding framework.

[237] 62% of those who responded to the questions on a reporting model.

report in residential care settings in particular.[238] Failures to report are particularly concerning where they result in significant institutional abuse over a prolonged period of time. An example of such failures to report is the 'Brandon' case in County Donegal, as outlined in the summary report of the National Independent Review Panel's review of the management of 'Brandon' (the "Brandon Report").[239] The Brandon Report's key findings included that sustained sexual abuse of multiple residents occurred with the full knowledge of staff and management of the facility over a prolonged period of time.[240] The abuse was eventually brought to light by the actions of a whistle-blower who approached a public representative. The Brandon Report noted that HIQA identified failures to report and investigate allegations of abuse.[241] Having considered the views of consultees, relevant literature and the findings of reports of relevant investigations and inspections, the Commission is concerned that instances of actual or suspected harm to at-risk adults may be falling outside existing reporting regimes and resulting in preventable harm going undetected.

[9.153] Although Ireland has existing legislation that provides for offences of withholding information in specified circumstances and that imposes, for example, duties on specified persons to report notifiable incidents in designated centres under the Health Act 2007, none of the existing offences or obligations are designed to allow for social work-led responses to concerns of the actual or suspected abuse or neglect of individual at-risk adults, including to allow for social work-led enquiries and safeguarding plans to be put in place, as necessary.

[9.154] Most importantly, there is a need for clear and accessible reporting pathways, obligations and adequate training, as has been recognised in various jurisdictions.

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[238] Donnelly and O'Brien, "Falling Through the Cracks: The case for change. Key developments and next steps for Adult Safeguarding in Ireland" (University College Dublin 2019); "HSE concern at sex assaults on residents of care centres" *The Irish Independent* (28 May 2023) <https://www.independent.ie/irish-news/crime/hse-concern-at-sex-assaults-on-residents-of-care-centres/a529684932.html> accessed on 6 April 2024; "'Unexplained bruises' on residents at HSE-run home - HIQA" *RTÉ* (17 May 2023), <https://www.rte.ie/news/ireland/2023/0517/1384060-hiqa-ireland/> accessed on 6 April 2024; The Journal, "Dossier of concerns about treatment of service users of Mayo charity sent to health watchdog" (23 February 2023) <https://www.thejournal.ie/western-care-mayo-6001034-Feb2023/?utm_source=shortlink> accessed on 6 April 2024.

[239] National Independent Review Panel, *Independent Review of the Management of Brandon: The National Independent Review Panel – Brandon Report for Publication* (HSE 2021).

[240] National Independent Review Panel, *Independent Review of the Management of Brandon: The National Independent Review Panel – Brandon Report for Publication* (HSE 2021) at page 9.

[241] National Independent Review Panel, *Independent Review of the Management of Brandon: The National Independent Review Panel – Brandon Report for Publication* (HSE 2021) at page 9.

[9.155] There are many potential advantages to a system of mandatory reporting of actual or suspected harm including that mandatory reporting may prevent further abuse or neglect of a victim or other at-risk adults by an alleged perpetrator, or it may uncover and bring an end to institutional abuse. However, a model of mandatory reporting that is not subject to appropriate limitations or thresholds could have a disproportionate impact on the numbers of reports received. Significant increases in reports of safeguarding concerns would likely have an impact on the timelines for report screenings, which could have a serious impact in cases where at-risk adults are the victims of abuse or neglect and need urgent supports or intervention. Resources required to support at-risk adults who have been abused or neglected, or to support at-risk adults to protect themselves from harm at particular times, may be diverted to screening additional reports received. Such resourcing impacts are particularly likely given the current resourcing context wherein there have been delays in undertaking preliminary screenings of safeguarding concerns due to under-resourcing.[242] Where an increase in reports results in a significant increase in unsubstantiated reports, any benefits of additional reports being made could be disproportionate to the harm caused by the extension of timelines and the diversion of resources to screen such reports. A system of mandated reporting could effectively safeguard at-risk individuals if it were to be appropriately resourced. It is therefore important that measures aimed at the prevention of over-reporting and the reduction of unsubstantiated reports are considered as part of any proposals to introduce additional reporting requirements. As outlined in section 5(d), the Commission has considered the need for such measures, which is reflected in the recommendations regarding proposed reporting thresholds and training below.

(a) Retention of the current reporting regime without reform

[9.156] Having considered consultees' views, analysed gaps in the current reporting regime and reviewed available literature, the Commission does not believe that the current reporting regime should be retained without any legal reforms. A significant majority of the consultees who responded to the Issues Paper favoured some change to the current regime. Most consultees favoured the introduction of a form of statutory protection, from civil liability or other consequences, for those who report actual or suspected abuse or neglect in good faith. For reasons outlined above and below, the Commission is persuaded of the merits of introducing a form of statutory protection. As set out above, the Commission is concerned about under-reporting and failures to report,

[242] O'Reilly, 'Between the lines of adult safeguarding in the HSE' *The Medical Independent* (3 February 2022) <https://www.medicalindependent.ie/in-the-news/news-features/between-the-lines-of-adult-safeguarding-in-the-hse/> accessed on 6 April 2024.

particularly in residential care settings, and believes that some legal reforms are required to encourage reporting.

(b) The introduction of universal mandatory reporting

[9.157] The introduction of universal mandatory reporting would require all individuals, regardless of their profession or setting, to report actual or suspected abuse or neglect of an at-risk adult. It would result in a requirement to report that is applicable to the general public, who do not receive training on identifying signs of abuse or neglect or subconscious biases relating to an at-risk adult's characteristics or disability that may lead an individual to make a report unnecessarily.

[9.158] The Commission is concerned that requiring people who do not work in specified professions or occupations to report could result in an increase in unsubstantiated reports, which could impose an excessive burden on already limited resources. This is particularly concerning in the context of the resourcing constraints outlined above. The Commission is further concerned that, in the context of the limited resources available, the screening of unsubstantiated reports could result in resources being diverted away from the provision of safeguarding supports, social work and social care services in circumstances where at-risk adults need support to protect themselves from harm at particular times. Therefore, the Commission recommends that universal mandatory reporting in the adult safeguarding context should not be introduced in Ireland.

R. 9.1 **The Commission recommends that** universal mandatory reporting in the adult safeguarding context should not be introduced in Ireland.

(c) Limited reforms of the current reporting regime

[9.159] The Commission considered whether limited reforms of the current reporting regime would be sufficient to improve the current regime. Such limited reforms include:

(a) the amendment of:

(i) Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 to insert additional offences; and

(ii) the relevant regulations under the Health Act 2007 to require persons other than a "person in charge" to report notifiable incidents to the Chief Inspector of Social Services; and

(b) the placing of permissive reporting of concerns of actual or suspected abuse of at-risk adults on a statutory basis.

[9.160] It is important to highlight that other than the placing of permissive reporting on a statutory basis, the above reforms could be introduced alongside any new reporting requirements in adult safeguarding legislation. The above reform options are discussed in further detail below.

(i) Amendment of Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012

[9.161] The relevant provisions of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 have been discussed above. In relation to concerns of actual or suspected abuse, there are a number of offences that are not included in Schedule 2 to the 2012 Act as offences against "vulnerable persons" for the purposes of an offence under section 3 of the 2012 Act, but which can arise in the adult safeguarding context.[243] These offences include the following offences which are proposed by the Commission in Chapter 19 and contained in the Commission's Criminal Law (Adult Safeguarding) Bill:

(a) the offence of intentional or reckless abuse, neglect or ill-treatment of a relevant person;

(b) the offence of exposure of a relevant person to a risk of serious harm or sexual abuse;

(c) the offence of coercive control of a relevant person; and

(d) the offence of coercive exploitation of a relevant person.

[9.162] The Commission is concerned that the lack of any convictions for withholding information under section 3 of the 2012 Act may suggest that the offence is one of limited utility. [244] However, the Commission observes that the absence of convictions does not, in and of itself, indicate that an offence is one of limited

[243] See para 9.83 above.

[244] According to information obtained from the Garda Síochána's Analysis Service on 11 April 2024, which reflected data up to 3 April 2024 inclusive, there are no recorded instances of a person being charged or summonsed for an offence contrary to section 3 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012. According to such information, there are also no recorded instances of a person being charged or summonsed for an offence contrary to section 2 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

utility. For example, a lack of convictions may suggest that information has not been withheld in order to comply with, or avoid a conviction under, section 3.

[9.163] The Commission is also concerned that there is some evidence of low awareness among medical, health and social care professionals of their duty to report in specified circumstances under the 2012 Act.[245] However, it could be argued that the existence of the offence, where persons are aware of it, may result in people making reports in circumstances where they would not otherwise report.

[9.164] The Commission recommends that the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 should be amended in Schedule 2 by the insertion of the following offences:

(a) the offence of coercion under section 9 of the Non-Fatal Offences against the Person Act 1997;

(b) the offence of endangerment under section 13 of the Non-Fatal Offences against the Person Act 1997;

(c) the offence of intentional or reckless abuse, neglect or ill-treatment of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024;

(d) the offence of exposure of a relevant person to a risk of serious harm or sexual abuse, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024;

(e) the offence of coercive control of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024; and

(f) the offence of coercive exploitation of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024.

R. 9.2 **The Commission recommends that** the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 should be amended in Schedule 2 by the insertion of the following offences:

(a) the offence of coercion under section 9 of the Non-Fatal Offences against the Person Act 1997;

(b) the offence of endangerment under section 13 of the Non-Fatal Offences against the Person Act 1997;

[245] See section 2(a)(i) above and Donnelly, Casey, Lynch, Deaveney, Scanlon, McKenzie, "Using Participatory Action Research to Examine Attitudes and Awareness of Adult Safeguarding Practices in the Acute Hospital Context" (September 2023) Vol 52 Issue Supplement 3 Age and Ageing at page 70.

(c) the offence of intentional or reckless abuse, neglect or ill-treatment of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024;

(d) the offence of exposure of a relevant person to a risk of serious harm or sexual abuse, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024;

(e) the offence of coercive control of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024; and

(f) the offence of coercive exploitation of a relevant person, as proposed by the Commission in the Criminal Law (Adult Safeguarding) Bill 2024.

(ii) Extending notification requirements under the Health Act 2007

[9.165] The service inspections completed by HIQA following a report or notification are valuable to the maintenance of standards in designated centres. Currently, regulations made under the Health Act 2007 require the following specified incidents to be notified to the Chief Inspector of Social Services:

(a) the unexpected death of any resident;

(b) any serious injury to a resident that requires immediate medical or hospital treatment;

(c) any unexplained absence of a resident from a designated centre;

(d) any allegation of misconduct by the registered provider or by a member of staff; and

(e) any occasion where the registered provider became aware that a member of staff is the subject of a review by a professional body.[246]

[9.166] The Commission recommends that the following regulations should be amended to extend the list of notifiable incidents to include financial coercion, patterns of neglect, and psychological or emotional abuse:

(a) the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31 and schedule 4, paragraph 7; and

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[246] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), schedule 4, para. 7(1); Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31(1).

(b) the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31 and schedule 4, paragraph 10.

R. 9.3 **The Commission recommends that** the following regulations should be amended to extend the list of notifiable incidents to include financial coercion, patterns of neglect, and psychological or emotional abuse:

(a) the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31 and schedule 4, paragraph 7; and

(b) the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013 (SI No 367 of 2013), regulation 31 and schedule 4, paragraph 10.

[9.167] The terms used in existing notifiable incidents in these regulations are not defined. The Commission does not believe it is necessary to define the wording used in the recommended additions to the list of notifiable incidents. However the meaning of "emotional abuse" is explained in Chapter 19.

[9.168] These amendments would allow HIQA to make a decision to conduct an inspection of a service on foot of a report that a relevant incident is alleged to have occurred in a designated centre. While individual incidents cannot be investigated by HIQA, a report could trigger an inspection of a service as a whole.

(iii) Amendment of the Mental Health Act 2001 (Approved Centres) Regulations 2006 to require certain incidents to be notified to the Inspector of Mental Health Services

[9.169] As mentioned in paragraph 9.21 above, some at-risk adults may be resident in approved centres under the Mental Health Act 2001. The Mental Health Act 2001 (Approved Centres) Regulations 2006 provide, in the regulation relating to risk management procedures, that the registered proprietor of an approved centre must notify the Mental Health Commission of incidents occurring in the approved centre with due regard to any relevant codes of practice issued by the Mental Health Commission which have been notified to the approved centre.[247] As aforementioned, it is notable that the relevant incidents are not specified in the regulations. However, "serious or untoward incidents or adverse events involving residents", residents absent without leave, suicide, self-harm, assault and

[247] Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006), regulation 32(3).

accidental injury to residents or staff are referenced in regulation 32(2) of the 2006 Regulations.

[9.170] The Commission recommends that the Mental Health Act 2001 (Approved Centres) Regulations 2006 should be amended to require the following incidents to be notified to the Inspector of Mental Health Services:

(a) the unexpected death of any resident;

(b) any serious injury to a resident that requires immediate medical or hospital treatment;

(c) any unexplained absence of a resident from an approved centre;

(d) any allegation of misconduct by the registered proprietor or a member of staff;

(e) any occasion where the registered proprietor became aware that a member of staff is the subject of a review by a professional body;

(f) any allegation of financial coercion by the registered proprietor or a member of staff;

(g) any allegation of patterns of neglect of a resident by the registered proprietor or a member of staff; and

(h) any allegation of psychological or emotional abuse of a resident by the registered proprietor or a member of staff.

R. 9.4 **The Commission recommends that** the Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No 551 of 2006) should be amended to require the following incidents to be notified to the Inspector of Mental Health Services:

(a) the unexpected death of any resident;

(b) any serious injury to a resident that requires immediate medical or hospital treatment;

(c) any unexplained absence of a resident from an approved centre;

(d) any allegation of misconduct by the registered proprietor or a member of staff;

(e) any occasion where the registered proprietor became aware that a member of staff is the subject of a review by a professional body;

(f) any allegation of financial coercion by the registered proprietor or a member of staff;

(g) any allegation of patterns of neglect of a resident by the registered proprietor or a member of staff; and

(h) any allegation of psychological or emotional abuse of a resident by the registered proprietor or a member of staff.

(iv) Conclusion

[9.171] The Commission believes that it is appropriate to propose the introduction of a limited form of mandatory reporting, as set out below. The Commission does not believe that the limited reforms to the current reporting regime proposed above would be sufficient. However, the Commission believes that there is merit to implementing the limited reforms to the current reporting regime in addition to the introduction of reporting by mandated persons in adult safeguarding legislation. The proposed introduction of provisions for reporting by mandated persons in adult safeguarding legislation is discussed in further detail below.

(d) Introduction of reporting by mandated persons

[9.172] The under-reporting of abuse or neglect of people living in residential care settings has been noted above.[248] The Commission is particularly concerned about such under-reporting because HIQA, the only body to whom designated centres under the Health Act 2007 must report specified incidents, has limited functions in this respect. HIQA only has the remit and powers to conduct inspections of services to ensure the maintenance of standards across settings.

[9.173] It is concerning that no agency has the power to investigate reports concerning individuals across community and residential care settings with an accompanying duty on appropriate persons to report to that body in specified circumstances. Conversely, in the context of child abuse, there is a reporting requirement to an agency which has the statutory powers to properly investigate the report. The 2015 Act provides for reporting in specified circumstances in relation to the harm of children. This allows the Child and Family Agency to assess reports to determine whether any further action is required in fulfilment of its statutory functions. Both inspections of care services and assessments of reports or cases of actual or suspected abuse or neglect of at-risk adults are required to maintain safe and responsive care settings and safeguard individuals. While it is important for services providing care to be inspected to ensure that safe standards of care are provided and maintained, it is equally important to assess reports and incidents or suspicions of harm to individuals in a timely manner. The Commission believes that a hybrid approach of service-wide and incident-specific

[248] See para 9.152 above.

reporting would provide a more comprehensive model of reporting for adult safeguarding concerns in Ireland.

[9.174] Accordingly, the Commission believes that the adult safeguarding framework would be enhanced by:

(a) amendments to the notification requirements under the Health Act 2007, as recommended above; and

(b) the introduction in adult safeguarding legislation of reporting requirements on mandated persons, accompanied by powers to assess reports of actual or suspected harm to at-risk adults.

[9.175] The Commission believes that early intervention and prevention of further abuse could be facilitated by requiring reporting of actual or suspected abuse of at-risk adults by mandated persons to a body that is empowered to assess such reports and to provide safeguarding supports in relevant cases. The Commission recommends that the appropriate body for the receipt and assessment of reports is the Safeguarding Body. The functions, duties and powers of the Safeguarding Body are discussed in Chapter 5.

R. 9.5 **The Commission recommends that** where a person listed in Schedule 2 (Mandated Persons) to the Adult Safeguarding Bill 2024 knows, believes or has reasonable grounds to suspect, on the basis of information that they have received, acquired or become aware of in the course of their employment or profession as a mandated person, that an at-risk adult has been harmed, is being harmed or is at risk of being harmed, they should be under a statutory duty to report, as soon as practicable, that knowledge, belief or suspicion, as the case may be, to the Safeguarding Body.

R. 9.6 **The Commission recommends that** the appropriate body for the receipt and assessment of reports is the Safeguarding Body.

[9.176] The proposed reporting requirements in adult safeguarding legislation would not impose additional obligations on the public. Rather, the Commission proposes that the proposed obligation to report would apply to prescribed persons in the course of their employment or profession as a mandated person. The Commission’s view is that the introduction of such reporting requirements would strengthen the capacity of the safeguarding framework to facilitate early intervention and prevent harm.

[9.177] The Commission considered whether a reporting requirement should only be imposed on specified professionals and role-holders in the course of their work in specified settings, such as nursing homes and residential centres for people with disabilities. Limiting a reporting requirement to actual or suspected harm in the

course of work in a specified setting would result in reporting being required by fewer people, in fewer circumstances.

[9.178] However, limiting reporting requirements to work in specified settings would lead to difficulties in the reporting of concerns of actual or suspected abuse or neglect of at-risk adults arising in the provision of homecare services. If mandatory reporting was limited to concerns arising in specified settings, those settings could include homecare provision, and any homes wherein such services are provided could be included in the definition of specified setting. However, reporting of concerns of actual or suspected abuse of at-risk adults in receipt of homecare would therefore only have to be reported where a mandated person is working in the specified setting – a home, in this situation. While this could conceivably extend to GPs, nurses or other mandated professionals in the course of their work conducting home visits, the duty to report would not extend to a GP who has concerns of abuse or neglect about a person in receipt of home care who attends a GP surgery for an appointment, for example. This is because only homes in which home care services are provided could be appropriately included in the definition of "specified setting". This could result in gaps in the reporting requirements and confusion about when a duty to report applies.

[9.179] Instead, the Commission believes that the approach taken in the 2015 Act is preferrable, whereby professionals and certain unregulated professionals are required to make a report during the course of their work as a mandated person, regardless of the setting wherein concerns of actual or suspected abuse or neglect arise. The Commission acknowledges that this may lead to a greater increase in the number of reports made than if reporting requirements were limited to specified settings. However, the Commission believes that this framework is more appropriate, particularly in the context of the provision of home care services and to ensure clarity on the applicability of reporting requirements.

[9.180] The Commission believes that the potential benefits of limited additional reporting requirements outweigh the potential disadvantages. A reporting requirement that would apply to relevant medical, health and social care professionals and others who work closely with adults, who may include at-risk adults, would help to increase the detection of abuse and prevent further harm. Medical, health and social care professionals and others who are mandated persons for the purposes of the 2015 Act already receive education and training on recognising signs of abuse or neglect and would therefore be more likely to accurately identify abuse or neglect and to make reports accordingly. This would likely result in fewer unsubstantiated reports. Potential negative consequences of mandatory reporting can largely be mitigated by ensuring that proposed legislation is not overly broad in its application. Restricting the application of reporting requirements to specified professionals or role-holders in the course of their employment or profession as a mandated person would ensure that

reporting requirements are both effectively targeted and aimed at the minimisation of over-reporting. The duplication of reporting requirements could be addressed by harnessing and adapting software to act as a central report processing platform to enable bodies to make a single report that could be accessed by other bodies.[249]

[9.181] The proposed measures to reduce unsubstantiated reports, address under-reporting in specific settings, and offset the potential impacts of multiple reporting requirements are important to ensure that the proposed reporting requirement effectively and efficiently encourages reporting and safeguards at-risk adults. The Commission's proposed reporting duty to apply to mandated persons is outlined in further detail below.

(i) Reporting thresholds

[9.182] In recommending such a model of reporting for mandated persons, it is necessary to determine the threshold to trigger a duty to report. A proposed threshold of reporting cannot be so low as to require a report to be made on the basis of any abstract concern of an individual's perceived 'vulnerabilities'. Furthermore, the proposed threshold for mandatory reporting must not be so high as to require the potential reporter to have witnessed the actual harm being perpetrated before making a report. It is important that an appropriate balance is struck between these two extremes. If the threshold is too low, there would likely be an excessive number of unsubstantiated reports because mandated persons may take a 'better safe than sorry' approach. If the threshold is too high, by requiring evidence of harm before a report is required, harm to at-risk adults would be detected in fewer cases. Establishing a clear threshold for reporting is necessary to ensure people are aware of their obligations and incidents are reported appropriately.

[9.183] The 2015 Act provides for a threshold whereby a mandated person is required to make a report where they "know, believe, or have reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware…" that a child has been, is being or is at risk of being harmed.[250] The Commission believes that this threshold achieves an appropriate balance between an obligation to report, based on a concern of risk, and an obligation to report only after a reporter has witnessed an incident, because it requires a mandated person's knowledge, belief or suspicion to be based on relevant information.

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[249] See paragraph 9.126 above.

[250] Section 14 of the Children First Act 2015.

[9.184] As set out in section 5(c)(ii) above, to ensure that reporting requirements are proportionate, the Commission believes that statutory provisions for mandatory reporting should be interpreted as meaning that mandated persons are required only to report harm of persons who are at-risk adults at both of the following times:

(a) the time of the harm; and

(b) the time when the mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that they have received, acquired or become aware of in the course of their employment or profession as a mandated person, that an at-risk adult has been harmed, is being harmed or is at risk of being harmed.

[9.185] The Commission recommends that the following threshold should apply to the proposed requirement to report in adult safeguarding legislation:

> 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 of harm:
>
> (a) has been harmed;
>
> (b) is being harmed; or
>
> (c) is at risk of being harmed,
>
> he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Safeguarding Body.

R. 9.7 **The Commission recommends that** the following threshold should apply to the proposed requirement to report in adult safeguarding legislation:

> 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 a mandated person, that an adult at risk of harm:
>
> (a) has been harmed;
>
> (b) is being harmed; or
>
> (c) is at risk of being harmed,

he or she shall, as soon as is practicable, report that knowledge, belief or suspicion, as the case may be, to the Safeguarding Body.

[9.186] For the purposes of the reporting threshold in the 2015 Act, "harm" in relation to a child is defined as:

(a) assault, ill-treatment or neglect of the child that seriously affects or is likely to seriously affect the child's health, development or welfare; or

(b) sexual abuse of the child,

whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise.[251]

[9.187] The Commission recommends that an analogous definition of "harm" should be adopted as the definition of "reportable harm" in the threshold for the proposed reporting requirement in adult safeguarding legislation. For the purposes of the threshold of "reportable harm" that would trigger the reporting requirement on a mandated person where such person knows, believes or has reasonable grounds to suspect that an adult at risk of harm has been harmed, is being harmed, or is at risk of being harmed, the Commission recommends that "reportable harm" should be defined as follows:

(a) assault, ill-treatment or neglect in a manner that seriously affects, or is likely to seriously affect, health, safety or welfare;

(b) sexual abuse; or

(c) serious loss of, or damage to, property by theft, fraud, deception or coercive exploitation,

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

R. 9.8 **The Commission recommends that** "reportable harm" should be defined in adult safeguarding legislation as:

"Reportable harm" means:

(a) assault, ill-treatment or neglect in a manner that seriously affects, or is likely to seriously affect, health, safety or welfare;

(b) sexual abuse; or

[251] Section 2 of the Children First Act 2015.

(c) serious loss of, or damage to, property by theft, fraud, deception or coercive exploitation,

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

(e) Exclusions from reporting requirement in certain circumstances

(i) Exclusion of self-neglect from reporting requirement in certain circumstances

[9.188] Self-neglect often gives rise to adult safeguarding concerns.[252] The Commission acknowledges that adults have the right to make decisions about their lives, including their personal welfare, and that a balance must be struck between prevention, protection and empowerment in the development of an adult safeguarding framework.

[9.189] The Commission recognises that mandated reporting requirements must reflect the presumption of capacity and a person's right to make unwise decisions. Mandated persons should not be required to report actual or suspected self-neglect in all circumstances. However by design, the definition of "at-risk adult", or "adult at risk of harm", includes adults who cannot freely choose to protect themselves from harm at particular times. This would include an adult subject to coercion or undue influence by a third party, and would also include a self-neglecting adult who does not have capacity to make decisions about their care or welfare at a particular time where a mandated person knows, believes or has reasonable grounds to suspect that they are self-neglecting.

[9.190] "Neglect" in the above definition of "reportable harm" should not be interpreted as including self-neglect, and indeed the definition of "neglect" in the Commission's Adult Safeguarding Bill 2024 focuses on a person's failure to protect or provide for an adult under their care, and would not lend itself to being interpreted as including self-neglect.

[9.191] However, the Commission recommends that "reportable harm" should be construed as including self-neglect where a mandated person has:

(a) assessed an adult who is reasonably believed to be an adult at risk of harm as lacking capacity; or

(b) a belief, based on reasonable grounds, that the adult who is reasonably believed to be an adult at risk of harm lacks capacity,

[252] Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014), section 3.

to make personal care or welfare decisions at the particular point in time when the mandated person knows, believes or has reasonable grounds to suspect that the adult is self-neglecting.

[9.192] As recommended in Chapter 2, the Commission recommends that:

(a) "self-neglect" should be defined in adult safeguarding legislation as:

> the inability, unwillingness or failure of an adult to meet his or her basic physical, emotional, social or psychological needs, which is likely to seriously affect his or her wellbeing;

and

(b) statutory guidance should be provided in relation to the definition of "self-neglect", which should include guidance on:

(i) safeguarding adults at risk of harm who are self-neglecting; and

(ii) engaging with, and offering optional social care supports to, adults who are self-neglecting and who have capacity to choose to self-neglect.

[9.193] The Commission believes that this construction of "reportable harm" would strike the correct balance between the autonomy of adults to make what might be considered by some to be unwise decisions and safeguarding the health, safety and welfare of adults who do not have capacity to make decisions about their personal care and welfare at a particular time. The Commission believes that a clause should be included in the relevant adult safeguarding legislative provisions to state that other than in the circumstances outlined above, the reporting of self-neglect should be excluded from the proposed duty to report.

R. 9.9 **The Commission recommends that** "reportable harm" should be construed in adult safeguarding legislation as excluding "self-neglect" other than where a mandated person has:

(a) assessed an adult who is reasonably believed to be an adult at risk of harm as lacking capacity; or

(b) a belief, based on reasonable grounds, that the adult who is reasonably believed to be an adult at risk of harm lacks capacity,

to make personal care or welfare decisions at the particular point in time when the mandated person knows, believes or has reasonable grounds to suspect that the adult is self-neglecting.

(ii) Exclusion from reporting obligations where a capacitous victim or alleged victim does not wish for a report to be made

[9.194] The Commission is mindful of a person's right to make unwise decisions and their rights to privacy and autonomy. With these rights in mind, the Commission has examined whether adult safeguarding legislation could appropriately provide an exclusion to a mandated person's requirement to make a report to the Safeguarding Body in the following circumstance:

(a) where the mandated person knows or is of the opinion, based on reasonable grounds, that an at-risk adult has decision-making capacity in relation to their care and welfare at a particular point in time;

(b) where the at-risk adult, who has decision-making capacity under paragraph (a), has made known to the mandated person their view that the knowledge, belief or suspicion, or information relating to it, should not be disclosed to the Safeguarding Body and the mandated person relied upon that view;

(c) where the mandated person knows or is of the opinion, based on reasonable grounds, that the at-risk adult is deciding of their own free will, without undue influence or duress, to state that they do not want a report to be made to the Safeguarding Body.

[9.195] Although such an exclusion could go towards respecting the autonomy of an at-risk adult who does not want the alleged harm to be reported, the operation of such an exclusion could create significant difficulties in practice. It may not be possible for a mandated person to assess the alleged victim's capacity, particularly where the mandated person does not have sufficient or direct access to the at-risk adult, or where the capacity of a person in receipt of care may fluctuate throughout the day. It may also be difficult to accurately assess whether an alleged victim is making the decision about non-reporting freely, under duress or out of fear of retribution.

[9.196] Furthermore, where a report is not made because a capacitous adult freely states that they do not want a report to be made, the alleged perpetrator could continue to abuse others undetected. In the interest of broader public safety, this provides a strong argument against the provision of an exclusion from the mandatory reporting duty where a capacitous person states that they do not want a report to be made. The need to safeguard persons other than the alleged victim from a potential perpetrator, or to investigate whether the alleged harm occurred, could arguably outweigh the provision of an exclusion that would respect the autonomy of an alleged victim. It is worth recalling that certain incidents of abuse or neglect occurring in residential centres for people with disabilities and residential centres for older people are notifiable under the

Health Act 2007, regardless of whether or not an alleged victim has consented to the making of a report.

[9.197] However, the Commission also recognises the importance of autonomy of capacitous individuals and their right to make what may be considered by others to be unwise decisions. On that basis, the Commission is of the view that where the circumstance outlined in paragraph 9.193(a)-(c) applies, the mandated person should be excluded from the obligation to make a report to the Safeguarding Body. The Commission believes that this strikes an appropriate balance between autonomy of the at-risk adult and the objective of reporting obligations to prevent harm.

R. 9.10 **The Commission recommends that** adult safeguarding legislation should state that a mandated person should not be required to make a report to the Safeguarding Body in the following circumstance:

(a) where the mandated person knows or is of the opinion, based on reasonable grounds, that an adult at risk of harm has decision-making capacity in relation to their care and welfare at a particular point in time;

(b) where the adult at risk of harm, who has decision-making capacity under paragraph (a), has made known to the mandated person his or her view that the knowledge, belief or suspicion, or information relating to it, should not be disclosed to the Safeguarding Body and the mandated person relied upon that view;

(c) where the mandated person knows or is of the opinion, based on reasonable grounds, that the adult at risk of harm is deciding of their own free will, without undue influence or duress, to state that they do not want a report to be made to the Safeguarding Body.

(iii) Avoiding duplication

[9.198] It is important to avoid duplication of reports from multiple mandated persons related to the same concern of harm where a mandated person's knowledge, believe or suspicion originates from information received from another mandated person. In a facility providing services to adults, who may include at-risk adults, different mandated persons may come into contact with the same at-risk adult. It would be unnecessary for every mandated person providing care to a particular at-risk adult to be required to make a report regarding the same knowledge, belief or suspicion of harm. The 2015 Act foresaw this duplication and excludes a mandated person from the requirement to report in circumstances where

information of harm to an at-risk adult has been obtained by a mandated person from another mandated person.[253]

[9.199] The Commission believes that a provision similar to section 14(4) of the 2015 Act should be included in adult safeguarding legislation. Section 14(4) states, amongst other things, that a mandated person shall not be required to make a report to the Child and Family Agency under section 14(1) where the sole basis for the mandated person's knowledge, belief or suspicion is as a result of information they have acquired, received or become aware of from another mandated person or a person, other than a mandated person, who has reported jointly with a mandated person. The inclusion of a provision similar to section 14(4) in adult safeguarding legislation is intended to avoid duplicate reporting. An example of such a provision can be found in the Commission's Adult Safeguarding Bill 2024.

R. 9.11 **The Commission recommends that** a provision similar to section 14(4) of the Children First Act 2015, which avoids the need for duplicate reporting by mandated persons, should be included in adult safeguarding legislation.

(f) Mandated persons

(i) Introduction

[9.200] The Commission proposes that mandated persons, for the purposes of the proposed reporting requirement in adult safeguarding legislation, should include persons in specified professions and roles who know, believe or suspect that an at-risk adult has been, is being, or is at risk of being harmed on the basis of information that they have received, acquired or become aware of in the course of their employment or profession as a mandated person.

[9.201] If the proposed reporting requirement were to apply to only a designated person or office-holder in specified services or settings, the Commission would be concerned that some cases of abuse or neglect may go undetected in circumstances where:

(a) employees, residents or clients of the service provider do not bring concerns or allegations to the attention of the designated person;

(b) concerns or allegations involve the designated person; or

[253] Section 14(4) of the Children First Act 2015.

(c) the designated person does not report concerns or allegations to the appropriate authority due to potential reputational or regulatory consequences for the service provider.

[9.202] When drafting the 2015 Act, it was considered that limiting the application of a duty to report to specified professionals and role-holders would improve the quality of reports, because such persons would have the necessary qualifications, training and experience to accurately recognise harm and make a thorough report.

[9.203] In 2022, 57% of all referrals made to the Child and Family Agency in relation to child protection or child welfare concerns were from members of the Garda Síochána, social workers and teachers. Members of the Garda Síochána were the most common source of referrals, accounting for 36% (21,919) of referrals, with social workers accounting for 12% (7,493) and teachers accounting for 9% (5,313).[254] Mandated persons accounted for 87% (53,591) of all referrals in 2022.[255] The reporting data published by the Child and Family Agency for recent years shows that individuals employed and trained in occupations or professions that, by nature of their work, are in close contact with, and have a greater understanding of, persons potentially at risk, are most likely to report. The same is likely to apply in respect of the reporting of actual or suspected harm of at-risk adults. The Commission therefore believes that it is logical and sensible for the duty to report to apply to persons in professions and positions of responsibility who work or come into contact with adults, who may include at-risk adults.

(ii) Schedule of mandated persons

[9.204] The Commission recommends that for the purposes of the reporting duty, certain persons should be prescribed as mandated persons in a schedule to adult safeguarding legislation. The full list of persons who the Commission believes should be prescribed as mandated persons is contained in Schedule 2 to the Commission's proposed Civil Law (Adult Safeguarding) Bill 2024. Furthermore, the Commission believes that all relevant professionals and role-holders designated as mandated persons should be subject to the proposed reporting requirement in the course of their employment or profession as a mandated person, which should capture all types of work or voluntary arrangements.

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[254] Child and Family Agency, Quarterly Service Performance and Activity Report: Quarter 4 2022 at page 14 <https://www.tusla.ie/uploads/content/Q4_2022_Service_Performance_and_Activity_Report_V1.2.pdf> accessed on 6 April 2024.

[255] Child and Family Agency, Quarterly Service Performance and Activity Report: Quarter 4 2022 at page 14.

R. 9.12 **The Commission recommends that** mandated persons for the purposes of the duty to report actual or suspected abuse or neglect of at-risk adults should be prescribed in a schedule to adult safeguarding legislation.

[9.205] In addition to registered medical, health and social care professionals and specified senior role-holders, the Commission recommends that members of the Garda Síochána should be prescribed as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation. By virtue of their role in society, a member of the Garda Síochána is likely to receive, acquire or become aware of information that may give rise to knowledge, belief or suspicion that an at-risk adult has been harmed, is being harmed or is at risk of being harmed.

R. 9.13 **The Commission recommends that** members of the Garda Síochána should be prescribed as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation.

[9.206] The Commission considered whether individuals working in unregulated professions should be subject to the proposed reporting requirement where they are employed as a senior role-holder, such as a manager in a service or facility that provides services to adults, who may include at-risk adults. Certain centre managers are subject to an existing reporting requirement under Schedule 2 to the 2015 Act. The Commission proposes that senior managers in specified types of services should be mandated to report actual or suspected abuse or neglect of an at-risk adult because, by virtue of their managerial position in a setting providing services to adults, who may include at-risk adults, they possess a degree of control over the service and its staff.

[9.207] The Commission understands that professional home support providers are soon to be regulated in Ireland and that the Health (Amendment) (Licensing of Professional Home Support Providers) Bill is currently being drafted.[256] According to the Government Legislation Programme for Spring 2024, the heads of the Bill are currently being drafted.[257] The Bill intends to provide a regulatory framework comprising of primary legislation for the licensing of professional home support providers, secondary legislation in the form of regulations, and HIQA national standards with the aim of ensuring that all service users are provided with high

[256] Department of Health, *Draft Regulations for Providers of Home Support Services – Public Consultation Document – June 2022* (2022), available at <https://www.gov.ie/en/consultation/81506-public-consultation-on-draft-regulations-for-providers-of-home-support-services/> accessed on 9 April 2024.

[257] Department of An Taoiseach, *Government Legislation Programme for Spring 2024* (16 January 2024) at page 10 <https://www.gov.ie/en/publication/edb3c-government-legislation-programme-2024/> accessed on 6 April 2024.

quality care.[258] A definition of "professional home support provider" or "home support provider" in adult safeguarding legislation should reflect any similar definition included in the Health (Amendment) (Licensing of Professional Home Support Providers) Bill to regulate the licensing of professional home support providers.

[9.208] The Commission recommends that managers of refuge accommodation services for victims of domestic, sexual or gender-based violence, and accommodation centres for people in the internal protection process, should be prescribed as mandated persons in adult safeguarding legislation. This would mean that if there was an at-risk adult in these types of services, the manager of the facility would be required to report actual or suspected abuse or harm of that at-risk adult if the threshold for reporting was met. The Commission has included managers of these services because some adults who receive services in these facilities may fall within the definition of "at-risk adult" or "adult at risk of harm". Managers of these facilities are subject to the reporting requirement under the 2015 Act.

[9.209] Moreover, the Commission believes that managers of substance misuse and homelessness services should be prescribed as mandated persons for the purpose of the proposed reporting duty in adult safeguarding legislation. In its submission in response to the Issues Paper, HIQA highlighted that its remit and powers do not extend to the inspection or assessment of homecare services, day services, care services to people in group or sheltered living arrangements, accommodation services for people seeking international protection, homelessness services, and substance misuse services.[259] HIQA expressed its belief that safeguarding legislation should impose a duty to safeguard on providers of those services in addition to services regulated by HIQA and the Mental Health Commission.[260] In Chapter 7, the Commission recommends that a list of "relevant services" should be prescribed in a schedule to adult safeguarding legislation for the purposes of the safeguarding duties proposed to be introduced in legislation and imposed on providers of relevant services. The full list of "relevant services" is contained in Chapter 7.

[258] Department of An Taoiseach, Government Legislation Programme for Spring 2024 (16 January 2024) at page 10.

[259] HIQA, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' - Response by the Health Information and Quality Authority* (May 2020) at page 15 <https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf>

[260] HIQA, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' - Response by the Health Information and Quality Authority* (May 2020) at page 15.

[9.210] The Commission recommends that, in the interest of consistency, it would be appropriate for managers of those types of centres to be included as mandated persons for the purposes of a duty to report in adult safeguarding legislation.

R. 9.14 **The Commission recommends that** managers of the following types of services should be prescribed as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation:

(a) a day service for adults;

(b) a professional home support provider;

(c) a centre which provides refuge accommodation services for victims of domestic, sexual or gender-based violence;

(d) a homeless provision or emergency accommodation facility;

(e) an accommodation centre for people seeking international protection (direct provision); and

(f) an addiction or substance misuse service.

[9.211] At the time of writing, certain professionals who provide health or social care services to adults, who may include at-risk adults, do so in professions that are not yet regulated. In Chapter 18, the Commission recommends that the government consider the regulation of currently unregulated occupational groups. The Commission welcomes the opening of the register for social care workers on 30 November 2023. The Commission further welcomes the announcement by CORU of its preparation to regulate the psychology profession.[261] Following a detailed risk assessment by CORU, it has been decided that the specialisms of clinical, counselling and educational psychology will be prioritised for regulation. The Psychologists Registration Board is currently drafting the standards of proficiency for each specialism and a consultation process will take place in Q2 2024. CORU expects to open the register for these three divisions by spring 2025.

[9.212] Having regard to the impact that mandatory reporting may have on the relationships between psychologists, psychotherapists, addiction counsellors and their clients, the Commission believes that psychologists, psychotherapists and addiction counsellors should not be included in the schedule of mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation.

[261] CORU, Update on Statutory Regulation of Psychologists (January 2024) <https://www.coru.ie/about-us/registration-boards/psychologists-registration-board/update-on-statutory-regulation-of-psychologists/> accessed on 6 April 2024.

[9.213] Due to the nature of their work involving contact with adults who may be, or have contact with, at-risk adults, the Commission recommends that probation officers should be included in the schedule of mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation. Such officers are included in Schedule 2 to the Commission's Adult Safeguarding Bill 2024.

R. 9.15 **The Commission recommends that** probation officers within the meaning of section 1(1) of the Criminal Justice (Community Service) Act 1983 should be included in the schedule of mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation.

[9.214] Many organisations employ safeguarding officers or other persons to perform the adult safeguarding functions of the organisations. Such organisations include religious, sporting, advocacy, charitable, recreational, cultural and educational bodies and organisations offering services to adults, who may include at-risk adults. The Commission recommends that such officers or other persons employed in such roles should be prescribed as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation. Such persons are included in Schedule 2 to the Commission's Adult Safeguarding Bill 2024.

R. 9.16 **The Commission recommends that** the schedule of mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation should include:

(a) safeguarding officers or other persons (howsoever described) who are employed for the purpose of performing the adult safeguarding function of religious, sporting, advocacy, charitable, recreational, cultural and educational; and

(b) other bodies and organisations offering services to adults, who may include adults at risk of harm.

[9.215] The Commission has considered whether members of the clergy or similar religious representatives or pastoral care workers of a church or other religious communities should be prescribed as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation. Such persons are mandated persons for the purposes of the duty to report in respect of harm to children in the 2015 Act. The Commission understands the rationale for their inclusion as mandated persons in the 2015 Act and recognises that, historically, such persons held roles in caring for older people in nursing homes run by religious orders, for example. However, the Commission considers that such persons are less involved in the provision of services to adults, who may be at-risk adults, than would have historically been the case. Therefore, it may be less

relevant for such persons to be subject to the proposed duty to report. However, the Commission believes that if the Government considers it appropriate or if necessity is demonstrated, such persons should be designated as mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation.

(iii) Training for mandated persons

[9.216] Providing training on identifying signs of harm to at-risk adults and on the thresholds of the proposed duty to report to all mandated persons would reduce the number of unsubstantiated claims and improve the quality of reports. The Child and Family Agency has made online training available for all persons mandated to report for the purposes of the duty to report in the 2015 Act. The Commission recommends that:

(a) similar training should be provided to all persons mandated to report under the proposed duty to report in adult safeguarding legislation; and

(b) mandated persons should be required to complete that training, and any refresher training, within specified periods of time to be determined by the relevant Minister.

[9.217] In response to the Issues Paper, HIQA noted that the implementation of any training measures should not be a 'once-off' obligation but instead should be part of a wider programme of regular and periodic training. HIQA noted that regular and periodic training is important to ensure that training:

(a) is in line with best practice and best available evidence; and

(b) brings about cultural change in people's attitudes and treatment of abuse in the context of adult safeguarding.

[9.218] The Commission recommends that regular training should be provided to mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation to ensure that training is in line with best practice and best available evidence and brings about cultural change in people's attitudes and treatment of abuse in the context of adult safeguarding.

R. 9.17	**The Commission recommends that** regular training should be provided to mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation.

(g) Consequences of a failure to report

[9.219] To promote compliance, a duty to report must be accompanied by some form of sanction to apply where there has been a failure by a mandated person to make a

report to the Safeguarding Body. Although the Commission believes that there must be consequences in instances where an individual with a duty to report fails to do so, the Commission does not propose that the consequence should be the imposition of a criminal sanction. The Commission believes that a defence against consequences being imposed for a breach of reporting obligations should be available where a mandated person can demonstrate that they did not know, believe or have reasonable grounds to suspect, on the basis of information that they had received, acquired or become aware of in the course of their employment or profession as a mandated person, that an at-risk adult:

(a) had been harmed;

(b) was being harmed; or

(c) was at risk of being harmed.

[9.220] The defence may not be impermissibly relied upon to shirk reporting obligations and in this regard, it is useful to note that the Commission recommends in Chapter 5 that the Safeguarding Body should have all such powers as are necessary or expedient for, or incidental to, the performance of its functions, which may include the making of such enquiries as it considers appropriate. This could, for example, include the making of an enquiry to determine whether there were, at a particular time, reasonable grounds for believing that an at-risk adult had been harmed, was being harmed, or was at-risk of being harmed.

[9.221] While the Heads of the Children First Bill included an offence of failing to comply with a duty to report, such an offence was not included in the Bill, as initiated, and attempts to move an amendment to introduce such an offence were not supported by the Government.[262] The then Minister for Children and Youth Affairs stated that legal advice provided to the Government advised that the imposition of criminal sanctions would be unnecessary and may result in over-reporting by mandated individuals due to a fear of attracting criminal sanction.[263] Instead, the Government opted to rely on administrative sanctions, such as the option to report a mandated person to their employer or to the fitness to practise

[262] Houses of the Oireachtas, *Children First Bill 2014: Report and Final Stages (Dáil) – 14 July 2015 (*2015) at <https://www.oireachtas.ie/en/debates/debate/dail/2015-07-14/37/> accessed on 6 April 2024; Houses of the Oireachtas, *Children First Bill 2014: Second Stage – 21 July 2015* (2015) at <https://www.oireachtas.ie/en/debates/debate/seanad/2015-07-21/5/> accessed on 6 April 2024.

[263] Houses of the Oireachtas, *Children First Bill 2014: Second Stage* (21 July 2015) <https://www.oireachtas.ie/en/debates/debate/seanad/2015-07-21/5/> accessed on 6 April 2024.

committee of the relevant profession, while committing to keeping the potential introduction of criminal sanctions under review.[264]

[9.222] The Commission understands from its consultation with relevant stakeholders, including the Department of Children, Equality, Disability, Integration and Youth and the Child and Family Agency, that administrative sanctions are considered to appropriately address instances where a mandated person has not reported instances of abuse under the 2015 Act. The Commission also understands that there is no appetite to introduce criminal sanctions at this time. A HSE guidance document on Information for Mandated Persons indicates that while there are no criminal sanctions for a failure to report under the 2015 Act, "the following consequences may apply: (a) HR/disciplinary procedures; (b) fitness to practice [sic] complaint to the professional's regulatory body; and (c) information may be passed to the National Vetting Bureau of An Garda Síochána".[265]

R. 9.18 **The Commission recommends that** a failure by a mandated person to report under adult safeguarding legislation should not result in the imposition of a criminal sanction.

(i) Regulated Professionals

[9.223] For regulated professionals mandated to report, the most appropriate means of addressing a failure to report is through a fitness to practise complaint to the professional's regulatory body. Most professionals, who would be mandated to report actual or suspected abuse of at-risk adults under the Commission's proposals, are regulated by the Health and Social Care Professionals Council ("CORU"), with doctors, nurses, pharmacists and dentists regulated by the Medical Council, the Nursing and Midwifery Board of Ireland, the Pharmaceutical Society of Ireland and the Dental Council of Ireland respectively. Each profession regulated by CORU has a corresponding registration board that develops codes of professional conduct and ethics, as appropriate, for that profession.[266] Complaints against individual members of a particular profession must be based on alleged non-compliance with the standards provided in that profession's Code of Professional Conduct and Ethics. The threshold for CORU to take action, in

[264] Houses of the Oireachtas, *Children First Bill 2014: Second Stage* (21 July 2015); Houses of the Oireachtas, *Children First Bill 2014: Report and Final Stages (Dáil) – 14 July 2015 (*2015) at <https://www.oireachtas.ie/en/debates/debate/dail/2015-07-14/37/> accessed on 6 April 2024.

[265] HSE Children First National Office, *Information for Mandated Persons* (March 2023) <https://www.hse.ie/eng/services/list/2/primarycare/childrenfirst/resources/mandated-persons.pdf> accessed on 6 April 2024.

[266] See CORU, Codes of Professional Conduct and Ethics <https://www.coru.ie/health-and-social-care-professionals/codes-of-professional-conduct-and-ethics/codes-of-professional-conduct-and-ethics.html> accessed on 6 April 2024.

response to a complaint, is reached where the incidents complained of are "serious and raise a concern about the registrant's ability to practise [their] profession."[267]

[9.224] Currently, most Codes of Professional Conduct and Ethics under CORU and other regulatory bodies refer to a general duty to "comply with requirements for the protection of children and vulnerable adults."[268] If a legal obligation on mandated persons to make a report were to be introduced and complemented by a general provision of compliance with duties in the relevant code of professional conduct and ethics, and a regulated professional failed to make a report, that individual would be found to have breached the relevant code of professional conduct and would be subject to a fitness to practise inquiry.

[9.225] To allow for a fitness to practise inquiry to be instigated in a case of an alleged breach of a duty to report, the Commission recommends that each code of professional conduct and ethics relevant to mandated professionals should include provisions about reporting and compliance with relevant legal obligations that are uniform to all of the codes. Such provisions would be similar to those that are common to all of the codes of the health and social care professions regulated under CORU. This would ensure that mandated professionals would be aware of the duties imposed on them, and that regulatory proceedings could be brought for non-compliance with a relevant code where a regulated professional fails to comply with the proposed reporting requirement.

R. 9.19 **The Commission recommends that** each code of professional conduct and ethics relevant to mandated persons who are registered medical, health or social care professionals should include provisions on reporting and compliance with relevant legal obligations that are uniform to all of the codes.

(ii) Unregulated Professionals working in a relevant setting

[9.226] As set out above, the Commission proposes that certain unregulated professionals, including senior management and persons in charge of settings where at-risk adults receive care, should be subject to the proposed duty to report in adult safeguarding legislation.

[267] See CORU, Fitness to Practise Complaints <https://www.coru.ie/public-protection/fitness-to-practise/about-fitness-to-practise/> accessed on 6 April 2024.

[268] See, for example, Medical Council, *Guide to Professional Conduct & Ethics for Registered Medical Practitioners* 9th edition (1 January 2024); CORU, Occupational Therapists Registration Board Code of Professional Conduct and Ethics (2019) at page 6 <https://coru.ie/files-codes-of-conduct/otrb-code-of-professional-conduct-and-ethics-for-occupational-therapists.pdf> accessed on 6 April 2024.

[9.227] Senior management in a relevant centre may not necessarily be regulated professionals and therefore may not be subject to professional codes of conduct and ethics. In relation to unregulated professionals, a failure to report could be addressed through an internal disciplinary or human resources investigation. However, these options may not be suitable in a setting such as a private nursing home where the manager mandated to report may also be the owner of the centre, who would have full or partial oversight over such an investigation.

[9.228] Existing regulations made under the Health Act 2007 provide that the person in charge of a designated centre is obliged to notify the Chief Inspector of Social Services when a notifiable incident occurs.[269] Where there are no notifiable incidents required to be reported, the registered provider[270] concerned is required to report that to the Chief Inspector of Social Services at the end of each 6-month period.[271] It is an offence under the Health Act 2007 for a registered provider to fail to comply with duties set out in regulations.[272]

[9.229] The Commission believes that failures to report by mandated persons who are not registered medical, health or social care professionals should be addressed by internal disciplinary procedures, where possible and appropriate. In circumstances where it may not be possible or appropriate, the Commission does not propose to introduce an offence as an alternative. The Commission believes that it would be unjust to introduce an offence for failures to report by persons who are unregulated professionals where the same failure by a regulated professional is addressed through the relevant fitness to practise procedure of their regulated profession. Instead, the Commission recommends that failures to report by mandated persons who are not relevant regulated professionals should be addressed by notifying relevant authorities such as HIQA or the Mental Health Commission, the HSE and the National Vetting Bureau of the Garda Síochána who will consider this information when inspecting centres, considering funding, and processing vetting applications respectively.

[269] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31(1).

[270] Section 2(1) of the Health Act 2007 defines "registered provider" in relation to a designated centre as the person whose name is entered in a register as the person carrying on the business of the designated centre.

[271] Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013), regulation 31(4).

[272] Section 79(2)(c) of the Health Act 2007.

R. 9.20 **The Commission recommends that** failures to report by mandated persons who are not registered medical, health or social care professionals should be addressed by:

(a) internal disciplinary procedures, where possible and appropriate;

(b) notifications to the Health Information and Quality Authority so that failures to report can be taken into account in the inspection of designated centres and relevant social care services under the Health Act 2007;

(c) notification to the Health Service Executive, which should be considered in light of any funding arrangements in place for the relevant setting under section 38 or section 39 of the Health Act 2004; or

(d) notification of the breach of a duty to report to the National Vetting Bureau of the Garda Síochána.

[9.230] The option exists to make a referral concerning a mandated person's failure to report to the National Vetting Bureau of the Garda Síochána, which could impact a mandated person's career or job prospects. The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 requires "scheduled organisations" to inform the National Vetting Bureau where, as a result of an investigation, inquiry or regulatory process, that scheduled organisation is concerned that the person subject to the investigation, inquiry or regulatory processes may:

(a) harm any child or vulnerable person;

(b) cause any child or vulnerable person to be harmed;

(c) put any child or vulnerable person at risk of harm;

(d) attempt to harm any child or vulnerable person; or

(e) incite another person to harm any child or vulnerable person.[273]

[9.231] Schedule 2 to the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 lists the organisations required to notify specified information to the National Vetting Bureau. These include the HSE, the Teaching Council, the Medical Council, the Nursing and Midwifery Board of Ireland, the Dental Council, CORU, the Mental Health Commission, the Pharmaceutical Society of Ireland, the Pre-Hospital Emergency Care Council, HIQA, the National Transport Authority,

[273] Section 19(1) of The National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

the Garda Síochána Ombudsman Commission and the Child and Family Agency.[274]

[9.232] It is mandatory for individuals to be Garda vetted if their work or activity at a relevant organisation involves access to children or "vulnerable persons".[275] Individuals required to be vetted include employees, contractors and unpaid volunteers. When the National Vetting Bureau receives information from one of the above listed organisations regarding a finding or allegation of harm by a person who is subsequently the subject of a vetting disclosure application, the Chief Bureau Officer must determine whether that specified information should be disclosed. The Chief Bureau Officer will consider a number of matters, including the relevance of the type of work concerned and the rights of the applicant.[276]

[9.233] Garda vetting has been cited as one of the easiest ways to protect "people who may be vulnerable".[277] When a scheduled organisation informs the Chief Bureau Officer of a finding or allegation of harm by an individual subject to a vetting application, the individual may be prevented from engaging in activities, including employment, that relate to children or "vulnerable persons".[278]

[9.234] The Commission believes that the Safeguarding Body should be empowered to make referrals to the National Vetting Bureau. The HSE is listed in Schedule 2 to the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 as an organisation that is required to notify specified information to the National Vetting Bureau. In this regard, the Commission notes in Chapter 6 that if the Government decides that the Safeguarding Body should be established as an independent organisation or in an existing organisation other than the HSE, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 should be amended in Schedule 2 to include the Safeguarding Body in the list of bodies required to report to the National Vetting Bureau of the Garda Síochána.

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[274] Schedule 2 to The National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

[275] Part 3 of The National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

[276] Section 15(4)(a)-(g) of The National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

[277] Health Information and Quality Authority and Mental Health Commission, *Adult Safeguarding: Background document to support the development of national standards for adult safeguarding, Dublin: Health Information and Quality Authority* 2018 at page 26.

[278] An Garda Síochána, Vetting Procedure: Specified Information <https://vetting.garda.ie/VettingProcedure/SpecifiedInformation> accessed on 6 April 2024.

(h) Provision of assistance by mandated persons to the Safeguarding Body

[9.235] In any particular case, certain professionals will work in close proximity to an at-risk adult and will be familiar with that adult's circumstances. Even where that professional is not the person who made a report to the Safeguarding Body, they may have information that could help to assess the risk to the at-risk adult. This assistance could be crucial to ensuring that the Safeguarding Body takes the appropriate course of action on foot of a report in relation to that at-risk adult.

[9.236] The provision of assistance would allow the Safeguarding Body, upon receipt of a report from a mandated person, to request a mandated person, whom it believes, based on reasonable grounds, may be in a position to assist it for the purposes of exercising its functions, to provide it with such information and assistance as it may reasonably require and is, in its opinion, necessary and proportionate in all of the circumstances of the case. In response to such a request, a mandated person could provide information and assistance to the Safeguarding Body in order to assist with determining whether an adult who is the subject of that report, or any other at-risk adult, has been harmed, is being harmed, or is at risk of being harmed.

[9.237] Where the Child and Family Agency receives a mandated report under the 2015 Act, it may request that any mandated person provide information and assistance for the purposes of assessing whether a child who is the subject of that report, or any other child, has been harmed, is being harmed or is at risk of being harmed.[279] Where the Child and Family Agency makes such a request of a mandated person, the person must, as soon as practicable, comply with the request.[280]

[9.238] The Commission understands that the provision for assistance is very useful where there is an ongoing investigation and there are pieces to a safeguarding puzzle that can only be filled by, or with the information or assistance of, certain persons.

[9.239] Such a provision could form a useful tool in the Safeguarding Body's toolkit for investigating reports of actual or suspected abuse or neglect, even in the absence of reporting for mandated persons. Accordingly, the Commission recommends that adult safeguarding legislation should provide that where the Safeguarding Body receives a report from a mandated person, it should be permitted to take such steps as it considers necessary to exercise its functions under adult safeguarding legislation which may include, but are not limited to, a request to

[279] Section 16(1) of the Children First Act 2015.

[280] Section 16(2) of the Children First Act 2015.

any mandated person whom it believes, based on reasonable grounds, may be in a position to assist it for those purposes, to provide it with such information and assistance as it may reasonably require and is, in its opinion, necessary and proportionate in all of the circumstances of the case.

R. 9.21 **The Commission recommends that** adult safeguarding legislation should provide that where the Safeguarding Body receives a report from a mandated person, it should be permitted to take such steps as it considers necessary to exercise its functions under adult safeguarding legislation which may include, but are not limited to, a request to any mandated person whom it believes, based on reasonable grounds, may be in a position to assist it for those purposes, to provide it with such information and assistance as it may reasonably require and is, in its opinion, necessary and proportionate in all of the circumstances of the case.

(i) Statutory protection

[9.240] The Commission believes that the introduction of a statutory protection applying to the reporting of actual or suspected abuse or neglect of at-risk adults by any person who reports reasonably and in good faith would alleviate fears about potential consequences of reporting, and would encourage reporting.

[9.241] Almost all consultees who responded to the Issues Paper in relation to statutory protection stated that such protection should be introduced for those who report concerns in good faith.[281] If an individual is considering making a report of actual or suspected abuse of an at-risk adult, they may have certain concerns as to the potential consequences of making that report. It is important that individuals are encouraged to make a report, if required, and are not prevented from doing so by fears of civil action or other consequences. Individuals are more likely to make a report if they know that they will be protected from any civil liability or from penalisation by their employer for making the report. This was acknowledged by the Irish Working Group on Elder Abuse who recommended the enactment of legislation to protect "both members of the public and health and social care staff from negative consequences of reporting abuse or suspected abuse".[282]

[9.242] Statutory protections for those reporting actual or suspected abuse of at-risk adults in good faith are in place in other jurisdictions, including Queensland,[283]

[281] As discussed in section 6 above.

[282] Commissioner for Older People for Northern Ireland, *A review of the adult safeguarding framework in Northern Ireland, the UK, Ireland and* Internationally (2014) at page 33, citing Irish Working Group on Elder Abuse, *Protecting our future: Report of the Working Group on Elder Abuse* (2002).

[283] Section 248B of the Guardianship and Administration Act 2000 (Queensland).

British Columbia[284] and Nova Scotia,[285] as outlined in further detail above. In Victoria, the Office of the Public Advocate recommended in 2022 that adult safeguarding legislation should seek to protect "reporters" from any negative consequences of making a report.[286]

[9.243] Having considered consultees' experiences and submissions, the Commission is satisfied that statutory protection for those who make a report in relation to the abuse of children under the Protections for Persons Reporting Child Abuse Act 1998 has had a positive impact on decisions to make a report. Consultees have reported that the model of statutory protection in the context of reporting child abuse is working well to encourage individuals to report and dissuade fears of consequential liability. Upon the strength of consultees' experiences and submissions, the Commission recommends that protections for reporting should be introduced to protect those who report in good faith from civil liability and penalisation by an individual's employer.

[9.244] The Commission recommends that this statutory protection should apply to all persons and not just to mandated persons for the purposes of the proposed duty to report in adult safeguarding legislation. Any person who considers making a report of harm to an at-risk adult, regardless of whether or not they are a mandated person, should not be discouraged from doing so by a threat of liability or penalisation by their employer.

[9.245] The Commission recommends the introduction of a statutory protection to apply to anyone who makes a report of actual or suspected harm of at-risk adults, provided the report is made reasonably and in good faith.

[9.246] The Commission believes that adult safeguarding legislation should provide for such a protection regardless of whether such legislation provides for a duty on mandated persons to report.

[9.247] Moreover, the Commission notes that the introduction of a statutory provision permitting good faith reporting of actual or suspected abuse or neglect of at-risk adults by all persons requires careful consideration. Consideration should be given to the interplay between the introduction of a permissive statutory reporting provision and:

(a) the offences of withholding information under existing legislation, in particular the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012; and

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[284] Sections 46(3), 46(4) and 64(1)(a) of the Adult Guardianship Act 1996 (British Columbia).

[285] Section 5(2) of the Adult Protection Act 1989 (Nova Scotia).

[286] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (18 August 2022) at page 104.

(b) the introduction of a mandated reporting requirement on mandated persons.

[9.248] The majority of consultees who responded to the Issues Paper indicated a preference for permissive reporting to be placed on a statutory basis if further provisions to mandate reporting of actual or suspected abuse or neglect of at-risk adults were not introduced. A statutory model of permissive reporting would involve legislative provisions to allow or permit all persons to report actual or suspected abuse or neglect. In this Chapter, the Commission makes recommendations which, if implemented, would result in the introduction of further provisions to mandate the reporting of actual or suspected abuse or neglect of at-risk adults, which would likely address consultees' concerns without having to place permissive reporting on a statutory basis. Moreover, the Commission notes that a disadvantage of the permissive reporting model is that it could allow the decision to report to be subjective, and dependent on professional ideology.[287] Legal provisions allowing all persons to report actual or suspected harm of at-risk adults could have the effect of the general public believing that they should report anything that might appear suspicious even if those suspicions may be founded on lack of knowledge or biases. The Commission is concerned that legal provisions allowing all persons to report could result in an increase in unsubstantiated reports, which could impose an excessive burden on already limited resources. The Commission believes that a statutory protection for those who choose to report in good faith would be preferable. Accordingly, the Commission recommends that a system of permissive reporting in the adult safeguarding context should not be introduced on a statutory basis.

R. 9.22 **The Commission recommends that** statutory protection should be introduced in adult safeguarding legislation that is applicable to anyone who makes a report of actual or suspected harm of an at-risk adult, provided the report is made reasonably and in good faith.

R. 9.23 **The Commission recommends that** a system of permissive reporting in the adult safeguarding context should not be introduced on a statutory basis.

(i) Conditions for applicability of protection

[9.249] The Commission recommends that statutory protection should extend to any person who makes a report of actual or suspected harm where a report is made reasonably and in good faith. The provision for protection from penalisation by

[287] Donnelly and O'Brien "Speaking Up Against Harm: Options for Policy and Practice in the Irish Context" (University College Dublin March 2018) at page 39.

an individual's employer would apply only in circumstances in which the provisions of the Protected Disclosures Act 2014 would not apply to the making by a worker of a report of actual or suspected harm of an at-risk adult.

(ii) Accompanying offence of false reporting

[9.250] If a form of statutory protection were to be introduced in adult safeguarding legislation for those reporting actual or suspected harm in good faith, an accompanying offence of false reporting could deter people from seeking to inappropriately benefit from statutory protection by seeking to assert that they were acting in good faith in making a report, when in fact they made a report in bad faith.

[9.251] False reporting of child abuse is an offence under the Protections for Persons Reporting Child Abuse Act 1998.[288] A person is guilty of an offence if, knowing the statement to be false, they make a statement to an appropriate person that:

(a) a child has been or is being assaulted, ill-treated, neglected or sexually abused; or

(b) a child's health, development or welfare has been or is being avoidably impaired or neglected.[289]

[9.252] While the Commission understands the rationale for the offence in the Protections for Persons Reporting Child Abuse Act 1998, the Commission believes that criminal sanctions should not be introduced for false reporting of harm of at-risk adults. In forming this belief, particular weight has been placed on the purpose of reporting requirements, which is to is to encourage reporting. The threat of criminal sanction may discourage individuals from making a report, due to a fear that the report would transpire to be false, such as where the individual's concerns for an at-risk adult are mere suspicions, and a related fear that the individual may be perceived to have knowingly made a false report. The Commission is satisfied that where it can be proven that an individual knowingly made a false report, that matter should be dealt with through the withdrawal or exclusion of the statutory protection that the Commission has proposed should apply to the making of a good faith report of actual or suspected harm of an at-risk adult. Where it can be proven that an individual knowingly made a false report, the statutory protection will not apply and the individual may face civil or criminal liability. This would be comparable to the removal of qualified privilege in a case of defamation where a statement is found to have been made

[288] Section 5 of the Protections for Persons Reporting Child Abuse Act 1998.

[289] Section 5(1) the Protections for Persons Reporting Child Abuse Act 1998.

maliciously.[290] The exclusion from the statutory protection of persons reporting actual or suspected harm where a person knowingly makes a false report is achieved by the inclusion of the requirement for a report to be made reasonably and in good faith.

(j) Preparatory work to facilitate the implementation of mandated reporting

[9.253] The Commission understands from its consultations with organisations, including the Department of Children, Equality, Disability, Integration and Youth and the Child and Family Agency, that the successful implementation of mandated reporting in respect of actual or suspected harm to children has been largely attributable to the time afforded for preparation prior to the commencement of the relevant provisions of the 2015 Act. Such preparation included the drafting and publication of national guidance, the development of an e-learning training module ,and the development of a reporting portal on the Child and Family Agency's website to provide a safe and efficient way for mandated persons to make reports. The Child and Family Agency also engaged with external groups, such as mandated persons under the 2015 Act, and addressed queries, concerns and questions about the reporting obligations. The preparatory work was viewed by the Department of Children, Equality, Disability, Integration and Youth and the Child and Family Agency as very important because it allowed for systems to be implemented to: (a) ensure that mandated persons understood their obligations, including the reporting threshold; (b) prevent over-reporting; and (c) ensure the system would not be overwhelmed by an increase in reports.

[9.254] In its submission on the Issues Paper, the Department of Health suggested that rather than providing for a uniform system of mandatory reporting across diverse sectors in adult safeguarding legislation, which would be commenced alongside other provisions of the legislation, it may be prudent to review the options for mandated reporting provisions after new adult safeguarding structures have had a number of years to become embedded in Ireland. The Department of Health further submitted that this would allow time for analyses to emerge in relation to the impact of mandatory reporting provisions in relation to the child protection framework in Ireland over a number of years. The Commission understands that in the six years since their introduction, the mandated reporting provisions in relation to the reporting of actual or suspected harm of children have been viewed by consultees, including the Department of Children, Equality, Disability, Integration and Youth and the Child and Family Agency, as being successful, and that data indicates that such provisions have been successful.

[290] Section 19 of the Defamation Act 2009.

[9.255] However, the Commission believes, based on consultees' experiences, that sufficient preparatory work prior to the commencement of mandatory reporting provisions would have a significant impact on ensuring the successful implementation of mandated reporting.

[9.256] The Commission believes that, having regard to the lead-in time required for the commencement of mandated reporting provisions and the need to ensure the successful introduction of mandated reporting in Ireland, the Government should conduct preparatory work. Such preparatory work may include drafting guidance and resources, developing training and e-learning programmes, and raising awareness. The Commission believes that consideration should also be given to the lessons to be learned from the introduction of mandated reporting in respect of actual or suspected harm of children under the 2015 Act.

[9.257] In response to the Issues Paper, the Department of Children, Equality, Disability, Integration and Youth noted that any published guidance or resources should be broad enough to serve as a resource for anyone who has a reasonable concern about an at-risk adult and who seeks guidance on how to address such concern. The Department further noted that this broad approach, in relation to the drafting of guidance, was taken when drafting Children First: National Guidance for the Protection and Welfare of Children.[291]

[9.258] However, if it is decided to postpone the commencement of mandated reporting provisions in adult safeguarding legislation to allow for further preparation, the Commission believes that it would be unnecessary to postpone the commencement of the provision for protection from civil liability or penalisation by their employers for all persons who report in good faith, because this recommendation and provision is envisaged to apply regardless of whether mandated reporting is introduced in legislation.

R. 9.24 **The Commission recommends that**, having regard to the lead-in time required for the commencement of mandated reporting provisions and the need to ensure the successful introduction of mandated reporting in Ireland, the Government should conduct preparatory work which may include the following:

(a) drafting guidance and resources;

(b) developing training and e-learning programmes; and

(c) raising awareness.

[291] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (2017) <https://www.tusla.ie/uploads/content/Children_First_National_Guidance_2017.pdf> accessed on 6 April 2024.

CHAPTER 10 POWERS OF ENTRY TO AND INSPECTION OF RELEVANT PREMISES

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1. Introduction

[10.1] Adult safeguarding issues can arise across various settings. The Safeguarding Body must, therefore, have adequate powers to identify such issues and to assess the health, safety and welfare of at-risk adults across a range of settings. To assess the health, safety and welfare of at-risk adults in some settings, including residential centres for older people and residential centres for adults with disabilities, this includes powers of entry or access to those settings, and powers to assess what is happening in those settings. This chapter examines such powers.

[10.2] As is discussed in detail below, these powers of entry would be primarily exercised by the Safeguarding Body, through its "authorised officers".[1] "Authorised officers" means the persons appointed by the Safeguarding Body for the purposes of exercising statutory functions or powers on the Safeguarding Body's behalf. If the Commission's recommendations in Chapters 5 and 6 were adopted, such authorised officers would be qualified social workers.

2. Existing powers of entry to and inspection of relevant premises in Ireland

(a) Existing powers of entry of HIQA to designated centres

[10.3] Under Part 9 of the Health Act 2007, the Chief Inspector of Social Services and any authorised persons appointed by HIQA have powers of entry and inspection to allow for the exercise of HIQA's inspection and investigation functions. The Health Act 2007 provides for the Chief Inspector and authorised persons to have a right of entry in some cases and to apply to the District Court for a warrant for entry in other cases.[2] It also provides for various powers upon entry, such as inspection and interview powers. However, in accordance with HIQA's functions, these powers only apply to "designated centres" as defined under the Act. This includes residential centres for older people (nursing homes) and residential centres for adults with disabilities.

(b) Existing powers of entry of the Mental Health Commission to approved centres

[10.4] Under Part 3 of the Mental Health Act 2001, the Inspector of Mental Health Services and Assistant Inspectors of Mental Health Services appointed by the

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1 The Safeguarding Body is discussed in Chapters 5 and 6. The exercise of other functions or powers or "interventions" by authorised officers of the Safeguarding Body and members of the Garda Síochána are discussed in Chapters 11, 12 and 13.

2 See sections 73 to 75 of the Health Act 2007.

Mental Health Commission ("MHC") have powers to visit and inspect certain places to facilitate the exercise of the MHC's regulatory functions. In accordance with the MHC's functions, these powers are limited to approved centres as defined under the Act or other premises where mental health services are being provided.[3]

(c) Existing powers of entry of the HSE Safeguarding and Protection Teams to relevant settings

[10.5] As is discussed in detail in Chapter 6, the HSE's Safeguarding and Protection Teams (the "HSE's SPTs") have responsibility for safeguarding reports and concerns arising in HSE managed and funded older people's services and disability services, and to reports of actual or suspected abuse in respect of adults living in the community. The HSE's SPTs enter these HSE owned or funded services in line with the application of the HSE's Safeguarding Vulnerable Persons at Risk of Abuse National Policy and Procedures[4] to investigate reports of actual or suspected abuse of at-risk adults in such services. However, they have no statutory powers to do so, so entry is contingent on compliance.

(d) Gaps in powers of entry to relevant settings

[10.6] Although the HSE's SPTs are responsible for responding to adult safeguarding concerns in limited settings, they have no statutory powers of entry to facilitate their work.[5] Instead, the HSE's SPTs rely on the cooperation of the relevant premises and services. The HSE's SPTs also have no policy or legislative basis for entering private facilities including private nursing homes, which account for 80% of all nursing home beds in Ireland.[6] This is particularly significant as HIQA has no remit to investigate individual reports or cases of abuse or neglect, including cases arising in services that it regulates.[7] Similarly, the powers of the MHC are limited in relation to the services it regulates.[8] The powers of HIQA and the MHC are regulatory, and are directed at inspecting and improving the quality of services. They are not adult safeguarding-specific.

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[3] Section 51 of the Mental Health Act 2001.

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

[5] See the detailed discussion on this in Chapter 6.

[6] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (2022) at pages 47, 70, 96 and 106.

[7] This gap has been identified by stakeholders – see Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (2022) at page 51.

[8] The functions and powers of HIQA and the MHC are discussed in more detail in Chapter 6.

3. Powers of entry to relevant premises in other jurisdictions

(a) Scotland

[10.7] In Scotland, England and Wales, local authorities have responsibility for providing social care services to at-risk adults, including safeguarding social work services within the local authority or local council's area.

[10.8] The Adult Support and Protection (Scotland) Act 2007 allows persons authorised by the local council, who are often social workers, to enter any place, without a requirement for a warrant, for the purpose of enabling or assisting a council officer conducting inquiries to decide whether the council needs to do anything in order to protect an "adult at risk".[9] Council officers may also enter any adjacent place for the same purpose.

[10.9] Council officers, and any person accompanying them, are empowered to privately interview any adult found in a place visited under the Act. If a health professional is conducting the visit, or is accompanying the council officer conducting the visit, the health professional can carry out a medical examination, if the person consents.[10] Visits under these provisions can only take place at reasonable times.[11] Force cannot be used to gain access, and refusal of access is not an offence.[12]

[10.10] Where council officials are met with resistance when exercising the power to enter any place under section 7, they have the option to seek a warrant to enter "any specified place".[13] Entry by execution of a warrant is done in the presence of a police officer. Reasonable force can be used for entry, where necessary, if the police officer considers force to be reasonably required in order to fulfil the objective of the visit.[14]

[10.11] The criteria for granting warrants for entry require the sheriff[15] to be satisfied, by evidence on oath:

(a) that a council officer has been, or reasonably expects to be—

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9 Section 7 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

10 Section 9 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

11 Section 36(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

12 Sections 36(4) and 36(5) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

13 Section 37(1)(a) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

14 Section 37(1)(b) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

15 In Scotland a sheriff acts as a judge in criminal and civil cases that can result in sentences up to five years or an unlimited fine.

(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.[16]

[10.12] In urgent cases, a warrant for entry in respect of a visit under section 7 of the 2007 Act may be sought from a justice of the peace,[17] in accordance with section 40.

[10.13] To help with their investigation, council officers may require "any person holding health, financial or other records relating to an individual whom the officer knows or believes to be an adult at risk to give the records, or copies of them, to the officer".[18] They can make this request during a visit or at any other time.[19] If the request is made at such other times, it must be made in writing.[20] Any records provided can be inspected by the officer or any other person considered appropriate by the officer, having regard to the contents of the records.[21] The purpose of examining the records is to enable or assist the council to decide whether it needs to take action to protect an "adult at risk" from harm, by utilising any of its powers under the 2007 Act or otherwise. Only health professionals are permitted to inspect health records. However, persons who are not health professionals are authorised to examine such records to determine whether they are health records.[22]

(b) Wales

[10.14] The Social Services and Well-being (Wales) Act 2014 provides Welsh local authorities with a power of access to "any premises (including a private dwelling)within a local authority's area".[23] The order that is sought to permit access is called an adult protection and support order ("APSO"). The justice of the

[16] Section 38(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[17] In Scotland, ustices of the peace are lay magistrates who are appointed from the local community and trained in criminal law and procedure. They sit in court with a legally qualified adviser and deal with summary criminal cases. They can impose custodial sentences of up to 60 days and fines up to £2,500.

[18] Section 10(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[19] Section 10(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[20] Section 10(3) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[21] Section 10(4) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[22] Section 10(5) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[23] Section 127(1) of the Social Services and Well-being (Wales) Act 2014.

peace may make an APSO if satisfied, among other things, that the authorised officer has reasonable cause to suspect that a person in a premises within a local authority's area is an adult at risk.[24]

[10.15] An authorised officer (defined as a local authority worker who has undergone specialist training) can apply to a justice of the peace for an APSO which provides powers of access.[25] An APSO is granted to allow access to a premises for the purposes 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.[26]

[10.16] A police officer may accompany an authorised officer when carrying out an APSO, and the police officer may use reasonable force if necessary to fulfil the purpose of an APSO.[27]

(c) Northern Ireland

[10.17] Since the publication of the Commission's Issues Paper,[28] the Department of Health in Northern Ireland has conducted a consultation on legislative options to inform the development of an Adult Protection Bill for Northern Ireland.

[10.18] The Department of Health in Northern Ireland sought views on whether a legal power for a health and social care professional to enter a premises, accompanied by a member of the Police Service of Northern Ireland ("PSNI"), should be introduced to support a new duty to make enquiries.[29] Such a power would apply in a situation where a health or social care professional "has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection; and that professional is unable to gain access to the adult in the adult's dwelling (or another premises) to speak with the adult in private to ascertain if they are making decisions freely."[30]

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[24] Section 127(4) of the Social Services and Well-being (Wales) Act 2014.

[25] Section 127(1) of the Social Services and Well-being (Wales) Act 2014.

[26] Section 127(2) of the Social Services and Well-being (Wales) Act 2014.

[27] Section 127(7) of the Social Services and Well-being (Wales) Act 2014.

[28] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019).

[29] Department of Health (Northern Ireland), *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland – Consultation Document* at 2.48.

[30] Department of Health (Northern Ireland), *Legislative options to inform the development of an Adult Protection Bill for Northern Ireland – Consultation Document* at 2.48.

[10.19] The Department of Health in Northern Ireland published its Draft Final Policy Proposals for Ministerial Consideration in relation to the Adult Protection Bill in July 2021. The Department of Health stated that the draft Bill will introduce a new power of access to interview an adult at risk.[31]

[10.20] The power of access will permit a suitably experienced, trained and qualified social worker to enter the home or other relevant premises of an adult at risk and in need of protection to interview the adult in private and ascertain if the adult is making decisions freely.[32]

[10.21] The draft Bill will contain the following provisions, restrictions and requirements in relation to the power of entry (for the purposes of gaining access to an at-risk adult) and associated additional powers:

(a) Magistrate approval will be required for use of the power of entry and additional powers on every occasion.

(b) There must be a reasonable attempt to seek the consent of the adult at risk when applying to a magistrate to use the additional powers.

(c) The power of entry and additional powers should be used by a suitably experienced, trained and qualified social worker only (consideration will be given to creating a new group of social workers for the purpose of using Adult Protection Bill/Act powers).

(d) A statutory requirement to take all reasonable steps to support the adult at risk to understand what the power is and why it is being used.

(e) Anyone who is using the power of entry or additional powers will be able to request PSNI support (but will not be required to).

(f) There will be legal consequences for obstructing a social worker who is seeking to apply a power of entry or additional

[31] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* at section 6.

[32] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* at section 6.

power that has been approved by a magistrate (consideration will be given to issuing fines).[33]

(d) Canada

(i) British Columbia (Canada)

[10.22] As discussed in Chapter 5, the Adult Guardianship Act 1996 provides for a range of powers to support and assist “adults who are abused or neglected and who are unable to seek support and assistance because of:

(a) physical restraint,

(b) a physical handicap that limits their ability to seek help, or

(c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.[34]

[10.23] Designated agencies are empowered to determine whether an adult needs support and assistance and are given powers to investigate for this purpose. An agency may apply to the court for an order if the person:

(a) believes it is necessary to enter any premises in order to interview an adult, and

(b) is denied entry to the premises by anyone, including the adult.[35]

[10.24] Upon such 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.[36]

[10.25] 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

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[33] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* at section 6.

[34] Section 44 of the Adult Guardianship Act 1996 (British Columbia).

[35] Section 49(1) of the Adult Guardianship Act 1996 (British Columbia).

[36] Section 49(2) of the Adult Guardianship Act 1996 (British Columbia).

warrant authorising someone from the designated agency to enter the premises and interview the adult.[37]

[10.26] 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 an adult is abused or neglected, and is unable to seek support and assistance for any of the reasons listed at paragraph 10.22 above.

(ii) Manitoba (Canada)

[10.27] As discussed in Chapter 5, the Adults Living with an Intellectual Disability Act provides for a range of investigative powers. An adult living with an intellectual disability is defined under the Act as "an adult living with an intellectual disability who needs assistance to meet their basic needs with regard to personal care or management of their property".[38]

[10.28] Section 22(2) empowers the executive director to enter any place at any reasonable time in order to communicated with and visit the adult, in the context of conducting an investigation under the Act. Section 23(1) allows a justice to grant an order authorising entry to any place for the purposes of an investigation where the justice is satisfied that:

> (a) there are reasonable grounds to believe that an adult living with an intellectual disability is or is likely to be abused or neglected; and
>
> (b) the executive director has been unable to gain access to that adult living with an intellectual disability.

(iii) New Brunswick (Canada)

[10.29] As discussed in Chapter 5, the Family Services Act 1980 provides for powers of investigation to determine whether a person is a neglected adult,[39] or an abused adult.[40] Where a family member or other person who cares for an adult interferes with or obstructs the carrying out of an investigation, the court, on application of

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[37] Section 49(3) of the Adult Guardianship Act 1996 (British Columbia).

[38] Section 1(1) of the Adults Living with Intellectual Disability Act (Manitoba).

[39] A neglected adult is defined as an adult who is a disabled person, elderly person, or person prescribed by regulation who is "incapable of caring properly for himself by reason of physical or mental infirmity and is not receiving proper care and attention" or who "refuses, delays or is unable to make provision for his proper care or attention. See section 34(1) of the Family Services Act 1980 (New Brunswick).

[40] An abused adult is defined as an adult who is a disabled person, elderly person, or person prescribed by regulation and is a victim or is in danger of being a victim of physical or sexual abuse, mental cruelty or any combination of these categories. See section 34(2) of the Family Services Act 1980 (New Brunswick).

the Minister, can issue a warrant authorising an investigation, which also authorises the Minister or a designated person to enter (by force if required) any building or place to carry out an investigation.[41] The court can make such an order after it makes enquiries and is satisfied that it is "reasonable and proper that the investigation be made".[42]

(iv) Nova Scotia (Canada)

[10.30] In Nova Scotia, the relevant Government Minister may apply to a court for 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:

(a) an adult who is being assessed refuses to consent to the assessment; or

(b) 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.[43]

[10.31] The court may grant the order after making enquiries 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 where:

(a) the Minister has given at least four days' notice of the hearing to the adult or the person having care or control of the adult; or

(b) 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.[44]

[10.32] Where the person executing an order authorising entry is not a peace officer, the Adult Protection Act 1986 provides that a peace officer shall assist with the execution of an order when requested to do so by a person acting for the Minister or pursuant to an order of the court.[45]

(v) Newfoundland and Labrador (Canada)

[10.33] As discussed in Chapter 5, the Adult Protection Act 2021 provides for various powers of investigation in the context of "adults in need of protective intervention". Section 17 of the Act provides for a warrant authorising entry onto lands or premises where the judge is satisfied that:

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[41] Section 35(3) of the Family Services Act 1980 (New Brunswick).

[42] Section 35(3) of the Family Services Act 1980 (New Brunswick).

[43] Section 8(2) of the Adult Protection Act 1986 (Nova Scotia).

[44] Section 8(2) of the Adult Protection Act 1986 (Nova Scotia).

[45] Section 15 of the Adult Protection Act 1986 (Nova Scotia).

(a) there are reasonable grounds to believe that the adult who is the subject of the investigation is or may be an adult in need of protective intervention;

(b) there are reasonable grounds to believe that entry onto the lands or premises is necessary to assess the adult who is the subject of the investigation or access, copy or remove documents necessary for the investigation; and

(c) either

(i) the director or investigator has been denied entry onto the lands or premises or has been obstructed in exercising a power under section 16 with respect to the lands or premises, or

(ii) there are reasonable grounds to believe the director or investigator will be denied entry onto the lands or premises or obstructed in exercising a power with respect to the lands or premises.[46]

(e) Australia

(i) South Australia (Australia)

[10.34] Authorised officers[47] conducting an investigation under the Ageing and Adult Safeguarding Act 1995 have a power of entry to any premises, place or vehicle.[48] The powers apply in the course of an investigation relating to a vulnerable adult who is, or is suspected of being, at risk of serious abuse.[49]

[10.35] Force may be used by an authorised officer to enter any premises, place, vehicle or vessel, or to break into or open any part of, or anything in or on, any premises, place, vehicle or vessel but only:

(a) on the authority of a warrant issued by a magistrate; or

(b) if—

(i) entry to the premises, place, vehicle or vessel has been refused or cannot be gained; and

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[46] Section 17(1) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[47] Defined under section 18 of the Ageing and Adult Safeguarding Act 1995 (South Australia) as the Director of the Office for Ageing Well or a member of the Adult Safeguarding Unit who is authorised by the Director in writing.

[48] Section 19 of the Ageing and Adult Safeguarding Act 1995 (South Australia), as inserted on 1 October 2019 by section 6 of the Office for the Ageing (Adult Safeguarding) Amendment Act 2018.

[49] Section 19(1) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

(ii) the authorised officer believes on reasonable grounds that the delay that would ensue as a result of applying for a warrant would significantly increase the risk of harm, or further harm, being caused to a vulnerable adult; and

(iii) the Director of the Office of Ageing Well has approved the use of force to enter the premises, place, vehicle or vessel.[50]

[10.36] A warrant for entry must not be issued by a magistrate unless the magistrate is satisfied on information given on oath, personally or by affidavit, that there are reasonable grounds for the issue of a warrant.[51]

(ii) New South Wales (Australia)

[10.37] As discussed in Chapter 5, the Ageing and Disability Commission was established in New South Wales in 2019, with responsibility for investigating suspected abuse, neglect and exploitation of adults with disability and older adults.

[10.38] Under the Ageing and Disability Commissioner Act 2019, the Ageing and Disability Commissioner may apply for a search warrant if they have "reasonable grounds for believing that there is on any premises an adult with disability, or older adult who is subject to, or at risk of, serious abuse, neglect or exploitation".[52] The warrant permits the Commissioner or a member of their staff to enter the premises and take a number of actions, including examining and inspecting documents, taking photographs, audio or recordings, copying or taking notes from documents, and take possession of and remove documents.[53]

[10.39] Section 17(3) provides that:

> If the person executing a warrant under this section is accompanied by a relevant health practitioner, the relevant health practitioner may inspect the premises and observe and speak with any adult with disability or older adult apparently residing at the premises and may, with the consent of the adult concerned (in circumstances where the adult has been provided with the appropriate support for the purposes of making such a decision), examine the adult.

[10.40] The Ageing and Disability Commissioner Act 2019 also provides for Official Community Visitors who have a range of powers, including to "at any reasonable

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50 Section 19(2) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

51 Section 19(3) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

52 Section 17(1) of the Ageing and Disability Commissioner Act 2019 (NSW).

53 Section 17(2) of the Ageing and Disability Commissioner Act 2019 (NSW).

time, enter and inspect premises at which a visitable service is provided, [and to] confer alone with any person who is resident or employed at the premises”.[54] A ”visitable service” is defined as:

(a) an accommodation service where an adult with disability or older adult using the service is in the full-time care of the service provider, or

(b) an assisted boarding house, or

(c) any other service prescribed by the regulations as a visitable service.[55]

4. The need for powers of entry to and inspection of relevant premises in Ireland

[10.41] The vast majority of consultees were in favour of the introduction of powers of entry to and inspection of certain premises to allow authorities to respond to concerns of actual or suspected abuse or neglect of at-risk adults in Ireland. Such authorities would be the HSE’s SPTs, or the staff of a new independent Adult Safeguarding Body if the social work-led adult safeguarding services currently provided by the HSE’s SPTs were to move to such a new body.[56] In the context of powers of entry and inspection, HIQA stated in its response to the Issues Paper that there should be an immediate extension of the powers of the HSE’s SPTs to ensure that they can cooperate to the fullest degree possible with the relevant entities and settings.[57]

[10.42] Similarly, social workers who engaged with the Commission welcomed the introduction of the proposed powers as a useful tool to assist with safeguarding work, whilst acknowledging that such powers would only be used as a last resort, where all other, less intrusive means have failed.

[10.43] Social work practitioners who participated in an Irish research study conducted in 2019 pointed to the issues posed by social workers not having a legal right of entry to private nursing homes to respond to adult safeguarding concerns.[58]

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[54] Section 22(1)(a)-(b) of the Ageing and Disability Commissioner Act 2019 (NSW).

[55] Section 20 of the Ageing and Disability Commissioner Act 2019 (NSW).

[56] This matter is discussed in detail in Chapter 6.

[57] HIQA, *Law Reform Commission Issues Paper ‘A Regulatory Framework for Adult Safeguarding’ - Response by the Health Information and Quality Authority (HIQA)* (May 2020) at page 35, available at: < https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf>

[58] Donnelly and O’Brien, “Adult Safeguarding Legislation—The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in

Similar findings have been made in an unpublished independent report of a review into a critical incident involving a resident of an Irish nursing home, which has been reported in the media.[59] The report contains a chapter on gaps in safeguarding for residents of private nursing homes which refers to the HSE's SPTs having no jurisdiction over private nursing homes and HIQA having no remit in relation to individual cases of alleged abuse or neglect.[60] The Irish Association of Social Workers and Safeguarding Ireland have both highlighted the need for powers of entry to premises to allow for appropriate responses to allegations of abuse or neglect of at-risk adults who are or were on the premises.[61] In a 2022 Position Paper, the Irish Association of Social Workers noted the challenges faced by social workers when attempting to access at-risk adults in the care of service providers, such as in private nursing homes and residential services.[62]

[10.44] Where they have been granted access to residential centres for older people or residential centres for adults with disabilities, the involvement of the HSE's SPTs has led to positive outcomes. For example, HIQA inspection reports have identified evidence of a local HSE SPT working closely with a service in relation to

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the Absence of Adult Safeguarding Legislation", British Journal of Social Work (2022) 52, 3677–3696, at 3687.

[59] The unpublished report was commissioned by the HSE and conducted by independent patient-safety consultant Cornelia Stuart: Holland, "'No justice, no closure': Widow speaks out on treatment of husband who died of sepsis after head wound not properly addressed" *The Irish Times* (5 June 2023) available at: <https://www.irishtimes.com/health/2023/06/05/widow-of-man-who-died-weeks-after-being-admitted-to-hospital-from-nursing-home-says-hse-report-delivers-no-justice-no-accountability-and-no-closure/> accessed on 8 April 2024.

[60] Holland, "'No justice, no closure': Widow speaks out on treatment of husband who died of sepsis after head wound not properly addressed" *The Irish Times* (5 June 2023) available at: <https://www.irishtimes.com/health/2023/06/05/widow-of-man-who-died-weeks-after-being-admitted-to-hospital-from-nursing-home-says-hse-report-delivers-no-justice-no-accountability-and-no-closure/> accessed on 8 April 2024. Once the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 is commenced, HIQA's Chief Inspector will obtain powers to review a "specified incident". This is discussed further in Chapter 17.

[61] Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022) at page 12; Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case of a Comprehensive Approach to Safeguarding Vulnerable Adults* (Safeguarding Ireland 2022) at pages 47, 70, 96 and 106.

[62] Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022) at page 12. The IASW notes that social workers have occasionally "received letters from nursing homes advising that they will be prosecuted if they attempt to enter the premises".

safeguarding plans.[63] There is also evidence of positive involvement of the HSE's SP Ts in assisting residents directly.[64]

[10.45] In developing the recommendations set out in this Chapter, the Commission carefully considered the views of consultees and stakeholders, the findings of research studies and reports of independent reviews, and evidence of the positive involvement of the HSE's SPTs where they have had access to residential centres and to residents in receipt of services. The Commission also considered the need to vindicate the rights of at-risk adults who are resident in relevant premises – these rights are discussed in section 5 below. Finally, the Commission noted that numerous other jurisdictions provide for powers of entry to premises for adult safeguarding purposes. The Commission believes that the evidence strongly supports the argument that powers of entry to, and inspection of, relevant premises should be provided for in adult safeguarding legislation in Ireland, to allow for responses to allegations of abuse or neglect of at-risk adults, and an assessment of the health, safety or welfare of at-risk adults in such premises. The Commission believes that these powers, in addition to the powers discussed in Chapter 5 and the powers of entry that flow from the new criminal offences proposed in Chapter 19, would address current and significant gaps in the Irish adult safeguarding framework.

[10.46] Notably, in the final stages of drafting this Report, the Department of Health launched its public consultation on Policy Proposals on Adult Safeguarding in the Health and Social Care Sector (the "Policy Proposals").[65] The Policy Proposals include the suggestion that specified bodies and/or authorised officers with safeguarding functions would have powers to:

(a) enter health and social care service premises (including privately provided and voluntary services) for safeguarding purposes, including for the purpose of assessing alleged abuse;
(b) speak in private to a service user who may be at risk of abuse or may have experienced abuse;

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[63] HIQA, *Report of an inspection of a Designated Centre for Disabilities (Adults) – Issued by the Chief Inspector* (21 November 2022) at page 10 available at: <https://www.hiqa.ie/ga/system/files?file=inspectionreports/5635-belltree-21-november-2022.pdf> accessed on 14 April 2024.

[64] National Advocacy Service and Patient Advocacy Service, *NAS & Patient Advocacy Service Annual Report 2021* (2021) at page 33.

[65] Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

(c) access relevant records and/or personal property of a health and social care service user for appropriate safeguarding assessment purposes.[66]

[10.47] These powers would be "subject to appropriate safeguards (which may include obtaining court orders or warrants and/or accompaniment by Gardaí)".[67] Although no further detail as to the parameters of the proposed powers are included in the Policy Proposals, and the development of such proposals is ongoing, the Commission welcomes this point of apparent alignment with its own recommendations contained in this Report.

(a) Interaction of the proposed powers with existing regulatory powers

[10.48] The proposed powers of entry and inspection are intended to facilitate an assessment of the health, safety or welfare of an at-risk adult (or at-risk adults) in a relevant premises. Unlike the powers of HIQA and the MHC discussed above, the powers proposed in this Chapter are not regulatory in nature. Rather, the powers are aimed at assessing individual at-risk adults who are resident in relevant premises. The associated powers proposed in this Chapter – including to inspect the relevant premises and documentation held therein, and to interview staff members – are in furtherance of that purpose of assessing the health, safety or welfare of an at-risk adult. In this way, the proposed powers are appropriately viewed as safeguarding powers, rather than regulatory powers. It might be the case that through exercising the proposed powers, the Safeguarding Body identifies a risk or failing in a relevant premises, particularly one on a broader or systemic level, and refers it, as appropriate, to the relevant regulator of that relevant premises. However, ensuring compliance with standards and regulatory regimes on a service-wide or premises-wide basis is not the purpose of the powers proposed in this Chapter.[68]

[10.49] Equally, the Commission acknowledges the desirability of promoting the provision of high-quality services, compliance with standards and the establishment of comprehensive regulatory inspection regimes. It is preferable that premises, services and settings are improved overall, and that standards are

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[66] Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 26 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

[67] Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 26 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

[68] Whilst the powers proposed in this Chapter have a clearly distinct purpose to that of existing regulatory powers, the Commission found the latter – and in particular, the provisions of the Health Act 2007 – to be useful precedents when developing the parameters of the powers proposed in this Chapter.

appropriately met for the benefit of all residents and individuals receiving services. Robust regulatory powers go a significant way towards achieving this. However, from considering the material outlined above, the Commission recognises that service-level regulatory powers are insufficient to ensure entirely effective and comprehensive adult safeguarding in relevant premises. This is evidenced, for example, by the fact that serious adult safeguarding incidents have arisen in nursing homes which are regulated by HIQA. As noted above, HIQA's remit is limited to service-level regulation. HIQA has stated that it contacts the local HSE SPT in response to concerns about individuals,[69] but the powers of the HSE's SPTs are limited and, in particular, have no statutory basis. The Commission is thus of the view that powers of entry and inspection are needed for the most serious adult safeguarding cases in which the situation appears to go beyond minor non-compliance with standards, and in situations where concerns arise about particular individuals. The Commission finds this to be necessary in light of the matters discussed above, and in particular the views of consultees regarding the need for the HSE's SPTs to be given legal powers of entry. The Commission also believes such powers to be necessary to vindicate the constitutional and ECHR rights of at-risk adults.

5. Rights of at-risk adults and third parties in relevant premises

(a) The constitutional rights of at-risk adults and third parties

[10.50] In this section, the Commission examines whether a power of entry to, and inspection of, relevant premises is needed in order to meaningfully protect and vindicate the constitutional rights of at-risk adults. In particular, the proposed power is intended to vindicate an at-risk adult's constitutional rights to life, liberty, bodily integrity, autonomy, dignity and protection of the person.[70] For example, where an at-risk adult in a relevant premises is experiencing abuse or neglect, their rights to bodily integrity, autonomy and dignity are clearly interfered with. Powers of entry and inspection would enable authorities to ascertain whether abuse or neglect is taking place and would facilitate authorities in taking meaningful steps to support, and prevent harm to, an at-risk adult.

[10.51] In the Commission's view, powers of entry and inspection are necessary tools to identify and prevent abuse of at-risk adults, as they provide a basis for intervention in situations where no other legal means of intervention is provided

[69] Holland, "'No justice, no closure': Widow speaks out on treatment of husband who died of sepsis after head wound not properly addressed" (Irish Times, 5 June 2023) available at: <https://www.irishtimes.com/health/2023/06/05/widow-of-man-who-died-weeks-after-being-admitted-to-hospital-from-nursing-home-says-hse-report-delivers-no-justice-no-accountability-and-no-closure/> accessed on 8 April 2024.

[70] These rights are discussed in more detail in Chapter 4.

for. They also act as a foundational first step in accessing any other supports and interventions that may be required by at-risk adults. The Commission is thus of the view that powers of entry to, and inspection of, relevant premises are needed in Ireland to protect and vindicate the constitutional rights of at-risk adults.

[10.52] However, the proposed powers also have the potential to interfere with an at-risk adult's or a third party's constitutional rights. In particular, the powers may interfere with their rights to liberty, privacy, autonomy and the inviolability of their dwelling. For example, where the authorities access a relevant premises for the purposes of assessing the situation and potentially taking further steps, the constitutional right to privacy of individuals who are resident therein is clearly interfered with. However, as set out in Chapter 4, constitutional rights are not absolute and may be permissibly interfered with in certain circumstances. The legitimacy of such interference is analysed using a proportionality framework.[71] Any proposed powers of entry and inspection must be scrutinised to ensure that they are necessary, proportionate and restricts constitutional rights to the minimum degree possible.

[10.53] The objective of the powers is to allow relevant authorities to assess the health, safety or welfare of an at-risk adult in a relevant premises, and whether or not they are suffering abuse or neglect, and to decide on the appropriate steps to take (if any). The Commission is of the view that this objective is of sufficient importance to warrant overriding constitutionally protected rights, and that the objective relates to concerns that are pressing and substantial in a free and democratic society. In deciding whether to introduce powers of entry and inspection as the means to achieve this objective, the Commission has kept in mind that the means must:

> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible; and
>
> (c) be such that their effects on rights are proportional to the objective.[72]

[10.54] The Commission has also kept this framework in mind when developing the parameters of the power of entry to, and inspection of, relevant premises. For example, the Commission has carefully considered whether the rooms of at-risk adults in relevant premises should be viewed as dwellings for the purposes of any

71 See Chapter 4.

72 See the discussion of this framework, as set out in *Heaney v Ireland* [1994] 3 IR 593 (Costello J) at page 607 in Chapter 4.

proposed adult safeguarding legislation.[73] The Commission has come to view that they should not be so viewed. However, even if the view is taken that such rooms do attract the protection of Article 40.5 of the Constitution, the Commission is of the view that the rights to inviolability of the dwelling and privacy can be legitimately interfered with to allow for a power of entry without warrant in order to vindicate the rights of residents who are believed to be at risk of harm. The Commission thus recommends that in most cases, the proposed power of entry to, and inspection of, relevant premises may be exercised without a warrant where an authorised officer of the Safeguarding Body has a reasonable belief that there is a risk to the health, safety or welfare of an at-risk adult on a relevant premises that is caused by abuse, neglect or ill-treatment.[74]

[10.55] The Commission also proposes that adult safeguarding legislation should provide for a warrant, issued by a judge of the District Court, where the authorised officer or any persons permitted to accompany them is prevented, or has a reasonable belief that there is a likelihood that they will be prevented, from entering a relevant premises. Providing for a warrant which would authorise the use of reasonable force to access a relevant premises avoids the proposed powers being frustrated by obstruction, whilst ensuring that the powers do not disproportionately interfere with constitutional rights.

[10.56] Finally, the Commission considered the rights implications of a power allowing authorised officers and health and social care professionals to interview and conduct a medical examination of an at-risk adult in private in a relevant premises. The Commission is of the view that such a power is necessary to assess the health, safety or welfare of an at-risk adult, with a view to vindicating their constitutional rights. However, as is discussed at section 6(d) below, in light of the significant rights implications arising, the Commission is of the view that such powers cannot be exercised where the at-risk adult objects to their use, and the at-risk adult must be informed of their ability to so object, before the powers are exercised.

(b) The ECHR rights of at-risk adults and third parties

[10.57] The proposed power of entry to, and inspection of, relevant premises also engages a number of rights protected by the European Convention on Human Rights ("ECHR"). For example, introducing the proposed powers of entry and inspection may allow the State to fulfil its positive obligation under Article 2 of the ECHR to take "appropriate steps to safeguard the lives of those within their

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[73] See below at section 6(b)(i).

[74] This is in contrast with the approach taken to accessing private dwellings, discussed in Chapter 11, where the default position is that a warrant issued by the District Court is required.

jurisdiction".[75] Similarly, it may allow the State to vindicate the rights of individuals to be free from ill-treatment under Article 3 of the ECHR, and the rights of individuals to private and family life under Article 8.

[10.58] On the other hand, the proposed power may interfere with rights protected under the ECHR, such as the rights to private and family life under Article 8. In developing the proposed power, the Commission has had regard to the qualified nature of these rights, and the ways in which they may be permissibly interfered with. Such interferences must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society in pursuit of that aim. Article 8(2) of the ECHR expressly states that the protection of health and the rights and freedoms of others are such legitimate aims. The European Court of Human Rights has provided guidance on what will suffice as "necessary in a democratic society", and the Commission has carefully considered this guidance in developing the proposed power.

6. A proposed power of entry to, and inspection of, relevant premises

[10.59] Having considered the gaps in the existing powers of entry, the experiences of comparative jurisdictions, and the need to vindicate the constitutional and ECHR rights of at-risk adults, the Commission is of the view that a power of entry to, and inspection of, relevant premises should be introduced in Ireland.

[10.60] Although there are some limited powers of entry for certain bodies, as discussed in section 2 above, there is no statutory basis for HIQA, the HSE's SPTs, or another appropriate body to enter relevant premises in response to safeguarding concerns, or for the purposes of assessing the health, safety or welfare of an at-risk adult or at-risk adults. This shortcoming has been repeatedly highlighted by consultees and commentators.[76]

[10.61] The Commission thus recommends that adult safeguarding legislation should provide for authorised officers of the Safeguarding Body to be conferred with a power of entry to, and inspection of, relevant premises for the purposes of assessing the health, safety or welfare of an at-risk adult or at-risk adults. This would take the form of a provision in adult safeguarding legislation allowing for an authorised officer of the Safeguarding Body to exercise powers of entry and inspection. The purpose of this intervention is to safeguard at-risk adults and vindicate their rights. This is distinct from (and in addition to), for example, existing powers of entry to conduct searches in the context of criminal

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75 *LCB v UK* (1998) 27 EHRR 212 at para 36.

76 Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (2022) at page 47.

investigations, and existing regulatory powers, as discussed above at section 4(a) above.

[10.62] In Chapter 11, the Commission discusses a power of access to at-risk adults in places including private dwellings, and in Chapter 12, the Commission discusses a power to remove at-risk adults from places where they currently are. The powers proposed in Chapter 12 would allow for an at-risk adult to be removed from a relevant premises and transferred to a designated health or social care facility or other suitable place specified by the court, if the thresholds set out are met. The Commission's scheme of adult safeguarding interventions as proposed in Chapters 10, 11, 12 and 13 of this Report is tiered, with the threshold to exercise each power reflective of the nature and degree of risk posed. Each of the interventions are legal powers that are intended to be used as a last resort, where other less intrusive means – such as social work-led interaction with at-risk adults or requests to attend particular premises – have failed.

[10.63] For example, upon exercising the powers proposed in this Chapter, an authorised officer of the Safeguarding Body might identify an adult safeguarding risk, or find credible evidence of harm or abuse of an at-risk adult. In such a case, it is preferable that the source of the risk, harm or abuse in the relevant premises is mitigated or removed. The Safeguarding Body might make a referral to the relevant regulatory body – for example, HIQA in the context of a designated centre's apparent non-compliance with standards, or a professional body such as CORU in relation to a particular staff member.[77] Similarly, the Safeguarding Body might refer a matter to the Garda Síochána where there is a suspicion of criminality. However, in other cases, these steps might be inappropriate, or the risk to the at-risk adult might be so immediate that urgent action is required. The authorised officer of the Safeguarding Body might then apply to the District Court for a removal and transfer order to remove the at-risk adult from the relevant premises, in accordance with the procedure outlined in Chapter 12.

[77] The regulation of professionals and occupational groups is discussed in Chapter 18.

R. 10.1 **The Commission recommends that** adult safeguarding legislation should provide for authorised officers of the Safeguarding Body to be conferred with a power of entry to, and inspection of, a relevant premises, for the purposes of assessing the health, safety or welfare of an at-risk adult or at-risk adults. This would take the form of a provision in adult safeguarding legislation allowing for an authorised officer of the Safeguarding Body to exercise powers of entry and inspection.

(a) A power of entry to "relevant premises"

[10.64] The Commission believes that the proposed powers of entry and inspection should extend to premises wherein adults, who may be at-risk adults, are likely to be residing, and in receipt of care or services. These premises include, but are not limited to, residential settings where health or social care services are provided to adults who may be at-risk adults. This reflects the fact that the Commission's recommendations are cross-sectoral in nature.[78]

[10.65] The Commission recommends that the following should be included in the definition of "relevant premises":

(a) a designated centre within the meaning of section 2(1) of the Health Act 2007, insofar as it relates to an institution wherein residential services are provided to older people or to adults with disabilities;

(b) a premises in which day services are provided to adults with disabilities;

(c) a premises in which day services are provided to older adults;

(d) any hospital, hospice, health care centre or other centre which receives, treats or otherwise provides physical or mental health services or social care services to adults including approved centres within the meaning of section 2(1) of the Mental Health Act 2001;

(e) a premises in which a service provider provides a health or personal social service or services on behalf of the Health Service Executive or provides a service similar or ancillary to a service that the Health Service Executive may provide and in this regard, a "service provider" means a person who, or organisation that (i) enters into an arrangement under section 38 of the Health Act 2004 to provide a health or personal social service on behalf of the Health Service Executive; or (ii) receives assistance under section 39 of the Health Act 2004 to provide a service similar or ancillary to a service that the Health Service Executive may provide;

[78] See Chapter 1 in relation to the scope of this Report.

(f) a reception or accommodation centre which provides residential accommodation services to adults in the international protection process managed by, or under contract to, the Department of Children, Equality, Disability, Integration and Youth;

(g) a centre which provides residential refuge accommodation services for victims of domestic, sexual or gender-based violence;

(h) a centre which provides residential accommodation services for the purposes of providing substance misuse services; and

(i) a centre which provides residential accommodation services to adults experiencing homelessness.

[10.66] The Commission has identified these premises as being of particular relevance for adult safeguarding purposes.[79] The Commission is of the view that expanding powers of entry to, and inspection of, these relevant premises would significantly improve the position in Ireland. It would provide authorised officers of the Safeguarding Body with the tools they need to assess the health, safety and welfare of at-risk adults in a range of settings where there are currently no such powers.

[10.67] In the future, other premises may be identified as relevant for the purposes of identifying adult safeguarding issues and risks, or some of the above services may be provided in different ways or settings. For this reason, the Commission recommends that the relevant Minister should be empowered by adult safeguarding legislation to prescribe by regulations any other premises as a "relevant premises" for the purposes of the proposed powers.[80]

R. 10.2 **The Commission recommends that** "relevant premises" should be defined in adult safeguarding legislation as:

(a) a designated centre within the meaning of section 2(1) of the Health Act 2007, insofar as it relates to an institution wherein residential services are provided to older people or to adults with disabilities;

(b) a premises in which day services are provided to adults with disabilities;

(c) a premises in which day services are provided to older adults;

[79] Some of these are already subject to regulation, but others are not. In Chapter 7, the Commission recommends that the Government should carefully consider whether relevant services, which are not currently subject to statutory regulatory regimes including statutory inspections, should be brought within such regulatory regimes.

[80] In relation to whowould be the "relevant Minister", see Chapter 20, where the Commission discusses the appropriate allocation of responsibility for adult safeguarding amongst Government departments.

(d) any hospital, hospice, health care centre or other centre which receives, treats or otherwise provides physical or mental health services or social care services to adults including approved centres within the meaning of section 2(1) of the Mental Health Act 2001;

(e) a premises in which a service provider provides a health or personal social service or services on behalf of the Health Service Executive or provides a service similar or ancillary to a service that the Health Service Executive may provide and in this regard, a "service provider" means a person who, or organisation that (i) enters into an arrangement under section 38 of the Health Act 2004 to provide a health or personal social service on behalf of the Health Service Executive; or (ii) receives assistance under section 39 of the Health Act 2004 to provide a service similar or ancillary to a service that the Health Service Executive may provide;

(f) a reception or accommodation centre which provides residential accommodation services to adults in the international protection process managed by, or under contract to, the Department of Children, Equality, Disability, Integration and Youth;

(g) a centre which provides residential refuge accommodation services for victims of domestic, sexual or gender-based violence;

(h) a centre which provides residential accommodation services for the purposes of providing substance misuse services; and

(i) a centre which provides residential accommodation services to adults experiencing homelessness.

R. 10.3 **The Commission recommends that** adult safeguarding legislation should provide the relevant Minister with the power to prescribe by regulations any other premises as a "relevant premises" for the purposes of the proposed powers of entry and inspection.

(b) Requirement for a warrant

[10.68] In developing the parameters of the powers proposed in this Chapter, the Commission considered whether a warrant should be required to exercise the powers. The Commission is of view that, given the nature of relevant premises as providers of services to multiple adults (some of whom may be at-risk adults), a warrant should not be required for an authorised officer of the Safeguarding Body to enter and inspect a relevant premises, so long as the relevant threshold is met. Providing for a warrantless power would allow authorised officers to act swiftly upon receipt of a report or concern, and for them to conduct "unannounced" entries for the purposes of assessing the health, safety or welfare of at-risk adults. It would also alleviate the cost and resource burden associated

with making a court application. Such "unannounced" entry is allowed for under other legislation in Ireland, such as section 73 of the Health Act 2007.

[10.69] However, as is explained below, such a warrantless power should not extend to private dwellings. The Commission is also of the view that it should be possible to obtain a warrant where entry has been prevented or is likely to be prevented. This warrant would allow an authorised officer to be accompanied by a member of the Garda Síochána and for reasonable force to be used, where necessary, to access the relevant premises, ensuring that any obstruction that might arise can be overcome.

(i) Definition of "dwelling"

[10.70] When considering whether warrantless entry should be provided for, a central consideration is the constitutional guarantee of the inviolability of the dwelling.[81] For the purposes of adult safeguarding legislation, the Commission recommends that a "dwelling" should be defined as one or more of the following:

> (a) a building or structure (whether temporary or not) which is constructed or adapted for use as a residence and is being so used,
>
> (b) a vehicle or vessel (whether mobile or not) which is constructed or adapted for use as a residence and is being so used,[82]
>
> (c) a part of a—
>
>> (i) building or structure (whether temporary or not), or
>>
>> (ii) a vehicle or vessel (whether mobile or not), which is constructed or adapted for use as a residence and is being so used,
>>
>> and includes a self-contained part of a relevant premises which is constructed or adapted for use as a residence and is being so used by a service provider, or a member of staff of a service provider, but shall not include the room of a resident in a relevant premises.

[10.71] This is a broad definition, intended to capture the wide range of places in which people might live. However, the Commission believes that a dwelling for the purposes of adult safeguarding legislation should not include the rooms of

[81] See the discussion of this right in more detail in Chapter 4.

[82] In relation to vehicles such as caravans, see the recent case of *Clare County Council v McDonagh* [2022] IESC 2.

residents in relevant premises. The Commission recognises that residents live in relevant premises, and that their rooms in relevant premises are their homes, but the Commission also recognises that such rooms are rarely, if ever, self-contained premises. Many persons who are employed by the management of such premises, for example of residential centres for older people or for people with disabilities, may have access to those rooms. It may be in the interests of residents for authorised officers to have a warrantless power of entry that would allow for timely interventions. The Health Act 2007 takes this approach, considering only parts of designated centres used as private residences by the registered provider of a designated centre or an employee of the registered provider to be dwellings – but excluding the rooms of residents from the definition of dwellings.[83] The Chief Inspector of Social Services and any authorised persons appointed by HIQA have a (warrantless) right of entry to, and inspection of, designated centres, other than any part of a designated centre that is occupied as a dwelling.[84]

[10.72] The Commission is of the view that a similar approach to that used for designated centres under the Health Act 2007 should be taken in relation to the rooms of residents in all relevant premises for the purposes of the powers proposed in this Chapter. Fundamentally, the Commission is of the view that a requirement for a warrant in such as case would be impracticable and disproportionate in light of the purposes of the entry, which is to assess the health, safety or welfare of the at-risk adult (rather than any punitive or disciplinary purpose). In coming to this view, the Commission considered the case of *CA v Minister for Justice*,[85] which involved rooms in an accommodation centre for individuals seeking international protection.[86] Mac Eochaidh J questioned the necessity for unannounced inspections of rooms conducted without the consent of the inhabitants and in circumstances where they might be absent. Although the issue was not argued, Mac Eochaidh J suggested that Article 40.5 of the Constitution "may condemn the room inspections regime".[87] However, this point was not definitively decided, and the Commission remains of the view that the rooms of residents in relevant premises should not be viewed as "dwellings" for

[83] The definition of "dwelling" in section 74 of the Health Act 2007 will be amended by section 71 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023, once section 71 is commenced, to read: "In this section [74 of the Health Act 2007], "dwelling" includes— (a) any part of a designated centre occupied as a private residence by the registered provider of the designated centre or by a member of the staff of the registered provider, and (b) any part of the premises of a person carrying on the business of providing a prescribed private health service occupied as a private residence by that person or by a member of the staff of that person."

[84] Sections 73 and 74 of the Health Act 2007.

[85] [2014] IEHC 532.

[86] Commonly referred to as "direct provision" centres.

[87] [2014] IEHC 532 at para 8.9.

the purposes of the power of entry discussed in this Chapter. In particular, the Commission has considered the protective and supportive purpose of any entry in the adult safeguarding context, and the fact that residents are frequently reliant on the staff, facilities and infrastructure around these rooms rather than occupying rooms as self-contained dwellings. It is also clear that staff, other residents and visitors to the relevant premises may have regular access to the rooms of residents, which could put the occupant at risk of harm. The distinct issue of entry to the standalone, self-contained dwelling of an at-risk adult (whether owned by the at-risk adult or not) is addressed in Chapter 11.

[10.73] A relevant premises may contain or encompass a self-contained dwelling of the service provider or a member of staff. For example, the owner of a premises or provider of services may reside in a dwelling that is separate from the relevant premises, but within the curtilage of it. The Commission is of the view that such a premises should be viewed as a dwelling for the purposes of adult safeguarding legislation. Under the Health Act 2007, any part of a designated centre that is occupied as a private residence by the registered provider or by a member of staff of a registered provider is viewed as a dwelling. The Commission is of the view that the same approach should be taken for the purposes of the proposed power of entry to relevant premises. In light of the constitutional protection afforded to the inviolability of the dwelling, an authorised officer of the Safeguarding Body should be able to enter or inspect such a dwelling other than—

(a) with the consent of the occupier, or

(b) in accordance with a warrant or other legal power of entry.

[10.74] The Commission is of the view that the powers of entry and inspection set out in this Chapter will be sufficient in almost all cases to assess the health, safety or welfare of at-risk adults, and ascertain whether abuse or neglect is occurring in a relevant premises. For example, if files or documentation that would assist in assessing the situation have been brought from the relevant premises to the home of the service provider or staff member, the Safeguarding Body can request such material under the powers proposed in this Chapter.[88] If it appears that the service provider or staff member may have been involved in a sufficiently serious level of misconduct as to raise the possibility of criminality,[89] members of the Garda Síochána will have the usual powers of criminal investigation, including applying for a warrant to search the person's home or other locations. As the proposed powers are intended to facilitate access to at-risk adults, and are not regulatory or criminal in nature, the Commission is of the view it is unnecessary

[88] See section 6(e) below.

[89] For example, the offences under Chapter 19, once implemented.

and inappropriate to provide for a warrant to access such a dwelling in adult safeguarding legislation.

(ii) A warrant for entry in cases of obstruction or prevention

[10.75] As mentioned above, consultees have noted that currently, social workers and the HSE's SPTs may be prevented from accessing particular premises. Similarly, even with a warrantless power of entry provided for in adult safeguarding legislation, authorised officers may experience resistance or obstruction when trying to access relevant premises. In order to ensure the effectiveness of the proposed legislation, the Commission is of the view that a warrant for entry should be available for cases of obstruction, which could be executed in conjunction with a member of the Garda Síochána, using reasonable force where necessary.

[10.76] The Commission thus recommends that adult safeguarding legislation should provide for an authorised officer of the Safeguarding Body to make an application to the District Court for a warrant where the authorised officer (or any persons permitted to accompany them) has been prevented from entering a relevant premises, or has a belief, based on reasonable grounds, that there is a likelihood that they will be prevented from entering the relevant premises.

(iii) Special sitting of the District Court

[10.77] The Commission is of the view that the District Court is the appropriate jurisdiction to hear such applications for a warrant in cases of obstruction or prevention. Some consultees suggested that the Circuit Court would be the appropriate jurisdiction to hear applications for the orders and warrants proposed in this Chapter and in Chapters 11, 12 and 13, as the Circuit Court deals with applications under the Assisted Decision-Making (Capacity) Act 2015, and there may be some overlap between the 2015 Act and proposed adult safeguarding legislation. However, the Commission is of the view that the applications discussed in this Chapter and in Chapters 11, 12 and 13 are distinct, and will not inevitably require expertise in matters regarding capacity on the part of the issuing judge. The District Court is also quicker and less expensive to access than the Circuit Court. The District Court is frequently used for urgent orders, including in the domestic violence context and in relation to care orders, including interim and emergency care orders in respect of children.[90] The possible urgency of the scenarios requiring a warrant to enter a relevant premises supports the view that such orders should be sought in the District Court – if the authorised officer has been, or reasonably believes that there is a likelihood that they will be, prevented from entering the relevant premises, their level of concern

[90] See the Domestic Violence Act 2018 and the Child Care Act 1991, respectively.

will be heightened. The Commission is of the view that this is also preferable to the more costly avenue of the High Court.

[10.78] Given the local and limited nature of the District Court, a warrant for entry to, and inspection of, a relevant premises should be sought in the District Court area for the relevant premises. However, circumstances may arise in which a warrant for entry cannot be obtained quickly, for example because there is difficulty in finding an available District Court judge. Given the possible urgency of situations requiring a warrant, the Commission is of the view that it should be possible to hold a special sitting of the District Court to facilitate a warrant being sought within three days of the intended application, where a sitting is not otherwise available. This is a similar approach to that taken in section 12(4) of the Child Care Act 1991.

R. 10.4 **The Commission recommends that** adult safeguarding legislation should provide for an authorised officer of the Safeguarding Body to exercise a power of entry to and inspection of a relevant premises without warrant, except any part of a relevant premises that is occupied as a dwelling.

R. 10.5 **The Commission recommends that** for the purposes of adult safeguarding legislation, "dwelling" should be defined as one or more of the following:

(a) a building or structure (whether temporary or not) which is constructed or adapted for use as a residence and is being so used,

(b) a vehicle or vessel (whether mobile or not) which is constructed or adapted for use as a residence and is being so used,

(c) a part of a:

(i) building or structure (whether temporary or not): or

(ii) a vehicle or vessel (whether mobile or not), which is constructed or adapted for use as a residence and is being so used,

and includes a self-contained part of a relevant premises which is constructed or adapted for use as a residence and is being so used by a service provider, or a member of staff of a service provider, but shall not include the room of a resident in a relevant premises.

R. 10.6 **The Commission recommends that** the room of a resident in a relevant premises should not be construed as a dwelling for the purposes of adult safeguarding legislation.

R. 10.7 **The Commission recommends that** any self-contained part of a relevant premises which is constructed or adapted for use as a residence and is being so used by a service provider or a member of staff of a service provider shall be construed as a dwelling for the purposes of adult safeguarding legislation.

R. 10.8 **The Commission recommends that**, in light of the constitutional protection afforded to the inviolability of the dwelling, an authorised officer of the Safeguarding Body should not be able to enter or inspect any part of a relevant premises that is occupied as a dwelling other than:

(a) with the consent of the occupier, or

(b) in accordance with a warrant or other legal power of entry.

R. 10.9 **The Commission recommends that** adult safeguarding legislation should provide for an authorised officer of the Safeguarding Body to make an application to the District Court for a warrant where the authorised officer (or any persons permitted to accompany them) has been prevented from entering a relevant premises, or has a belief, based on reasonable grounds, that there is a likelihood that they will be prevented from entering the relevant premises.

R. 10.10 **The Commission recommends that** adult safeguarding legislation should provide that, in the event that the next sitting of the District Court for the District Court area wherein the relevant premises is located is not due to be held within three days of the intended application for a warrant, an application for a warrant may be made at a sitting of the District Court, which has been specially arranged, held within the said three days.

(c) Threshold for exercising a warrantless power of entry, and threshold for applying for and granting a warrant for entry

[10.79] As discussed in section 5, the proposed powers have the potential to interfere with the rights of at-risk adults and others. For this reason, the Commission is of the view that thresholds should be required to exercise the warrantless power, or apply for a warrant. The Commission believes that the same basic threshold should apply to the powers of entry and inspection capable of being exercised without a warrant, and to the application for a warrant in the context of actual or apprehended obstruction. In order to exercise the warrantless power, or apply to the District Court for a warrant for entry, an authorised officer must have a belief, based on reasonable grounds, that:

(a) there is an at-risk adult on the relevant premises;

(b) there is a risk to the health, safety or welfare of the at-risk adult that is caused by abuse, neglect or ill-treatment; and

(c) access to the premises is necessary to assess the health, safety or welfare of the at-risk adult.

[10.80] The requirement for a reasonable belief that the risk is caused by abuse, neglect or ill-treatment is reflective of the fact that there could be many, relatively minor, risks present in relevant premises, such as slip, trip and fall hazards. However, such a risk is appropriately viewed as a health and safety issue rather than an adult safeguarding issue. The powers proposed in this Chapter are solely targeted at risks arising in the adult safeguarding context.

[10.81] In order to exercise the warrantless power or apply for a warrant, it should not be necessary to establish a reasonable belief that an at-risk adult is the victim of a crime. If there are grounds to believe that a crime has been committed, the Garda Síochána have existing powers of entry, which would be augmented if the Commission's recommendations in Chapter 19 regarding new criminal offences are implemented.

[10.82] In the case of an application for a warrant, the Commission recommends that the authorised officer of the Safeguarding Body (or any persons permitted to accompany them) must also:

(d) have been prevented, or

(e) have a reasonable belief that there is a likelihood that they (or any persons permitted to accompany them) will be prevented,

from entering the relevant premises.

[10.83] If an authorised officer has a reasonable belief as to these matters, they will be empowered under adult safeguarding legislation to apply to the District Court for a warrant.[91] In order to grant the warrant for entry to, and inspection of, a relevant premises (except any part of a relevant premises used as a dwelling), a judge of the District Court must be satisfied on the sworn information of an authorised officer that there are reasonable grounds for believing each of the above-mentioned matters. Thus, the Commission recommends that the threshold for granting such a warrant should be that a judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for believing that:

(a) there is an at-risk adult on the relevant premises;

[91] In Chapters 11 and 12, the Commission make recommendations empowering members of the Garda Síochána to apply for some warrants and orders. However, only authorised officers are empowered to apply for warrants to enter and inspect relevant premises.

(b) there is a risk to the health, safety or welfare of the at-risk adult that is caused by abuse, neglect or ill-treatment;

(c) a warrant for access to the relevant premises is necessary to assess the health, safety or welfare of the at-risk adult; and

(d) an authorised officer (or any persons permitted to accompany them) has been prevented, or will be prevented, from entering the relevant premises.

R. 10.11 **The Commission recommends that** the proposed power of entry to, and inspection of, a relevant premises should apply where an authorised officer of the Safeguarding Body has a belief, based on reasonable grounds, that:

(a) there is an at-risk adult on the relevant premises;

(b) there is a risk to the health, safety or welfare of the at-risk adult, that is caused by abuse, neglect or ill-treatment; and

(c) access to the premises is necessary to assess the health, safety or welfare of the at-risk adult.

R. 10.12 **The Commission recommends that** the threshold to apply for a warrant for entry to, and inspection of, a relevant premises, other than any part of a relevant premises used as a dwelling, should be that an authorised officer of the Safeguarding Body has a belief, based on reasonable grounds, that:

(a) there is an at-risk adult on the relevant premises;

(b) there is a risk to the health, safety or welfare of the at-risk adult, that is caused by abuse, neglect or ill-treatment; and

(c) a warrant for access to the relevant premises is necessary to assess the health, safety or welfare of the at-risk adult.

In addition, the authorised officer (or any persons permitted to accompany them) must:

(d) have been prevented; or

(e) have a reasonable belief that there is a likelihood that they (or any persons permitted to accompany them) will be prevented,

from entering the relevant premises.

R. 10.13 **The Commission recommends that** the threshold for granting a warrant for entry to, and inspection of, a relevant premises, other than any part of a relevant premises used as a dwelling, should be that a judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for believing that:

(a) there is an at-risk adult on the relevant premises;

(b) there is a risk to the health, safety or welfare of the at-risk adult, that is caused by abuse, neglect or ill-treatment;

(c) a warrant for access to the relevant premises is necessary to assess the health, safety or welfare of the at-risk adult; and

(d) an authorised officer (or any persons permitted to accompany them) has been prevented, or will be prevented, from entering the relevant premises.

(d) Powers of interview and medical examination

[10.84] The powers proposed in this Chapter are intended for the purposes of assessing the health, safety or welfare of an at-risk adult or at-risk adults. The Commission is of the view that powers of interview and medical examination in private are necessary to facilitate such an assessment. As such, the Commission recommends that adult safeguarding legislation should allow authorised officers, and appropriately qualified health or social care professionals accompanying them, to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a relevant premises.

[10.85] Providing for a power to enforce cooperation by an at-risk adult with an interview and medical assessment would be a significant interference with the rights of an at-risk adult, in particular their constitutional rights to autonomy, dignity and bodily integrity. In the Commission's view, this would be an overly intrusive, paternalistic approach. As such, the Commission recommends that adult safeguarding legislation should require that powers of interview and medical examination cannot be exercised where the at-risk adult objects. The Commission also recommends that the at-risk adult must be informed, in advance, of their right to refuse any interview or medical examination. These are critical safeguards to ensure that the proposed powers do not constitute a disproportionate interference with the constitutional and ECHR rights of at-risk adults.

R. 10.14 **The Commission recommends that** adult safeguarding legislation should allow authorised officers and appropriately qualified health or social care professionals to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a relevant premises.

R. 10.15 **The Commission recommends that** adult safeguarding legislation should require that, in advance of carrying out any interview or medical examination, an authorised officer or health or social care professional must explain to the at-risk adult that they may refuse to answer any question or to be medically examined.

R. 10.16 **The Commission recommends that** adult safeguarding legislation should require that the powers of interview and medical examination cannot be exercised if the at-risk adult objects.

(e) Power of inspection

[10.86] In order to effectively assess the health, safety or welfare of an at-risk adult on a relevant premises, it may be necessary to inspect the relevant premises itself and to inspect documents, records or other items on the premises which may assist an authorised officer in assessing whether there is a risk to an at-risk adult. It may also be necessary to take copies of, or extracts from, documents or records, or to remove documents, records or other items from the relevant premises in order to facilitate an assessment. Further information may be required from staff members on or at the relevant premises in order to explain the content of documents or records. Finally, it may be necessary to interview any persons working on the premises, or anyone in receipt of services on the premises (who may or may not be an at-risk adult) who consents to be interviewed.

[10.87] Powers to carry out similar actions are available in other contexts, such as under the Health Act 2007. Not all of these powers of inspection will be necessary or appropriate in all cases. However, the Commission is of the view that they should be provided for in adult safeguarding legislation, to ensure that at-risk adults can be effectively safeguarded, and that their health, safety and welfare can be assessed. The provision for these powers would significantly enhance the ability of authorised officers to respond effectively to adult safeguarding concerns.

R. 10.17 **The Commission recommends that** an authorised officer, in respect of assessing the health, safety or welfare of an at-risk adult on a relevant premises, should be permitted by legislation to:

(a) inspect, take copies of or extracts from and remove from the relevant premises any documents or records (including personal records) relating to the health, safety or welfare of an at-risk adult,

(b) inspect the operation of any computer and any associated apparatus or material which is or has been in use in connection with the records in question,

(c) inspect any other item and remove it from the premises if an authorised officer considers it necessary or expedient for the purposes of assessing the health, safety or welfare of an at-risk adult,

(d) interview in private any person—

(i) working at the premises concerned, or

(ii) who at any time was or is in receipt of a service at the premises and who consents to be interviewed, and

(e) make any other examination into the state and management of the premises or the standard of any services provided to an at-risk adult, or at-risk adults, on the premises.

R. 10.18 **The Commission recommends that** an authorised officer, in respect of assessing the health, safety or welfare of an at-risk adult on a relevant premises, should be permitted by legislation to require any person who:

(a) is in charge of the premises or of services provided at the premises, or

(b) possesses or is in charge of any records held at the premises or in respect of any services provided at the premises, even if the records are held elsewhere,

to furnish the authorised officer with the information the authorised officer reasonably requires for the purposes of assessing the health, safety or welfare of an at-risk adult, and to make available to the authorised officer any document or record in the power or control of the person described in paragraph (a) or (b) above that, in the opinion of the authorised officer, is relevant to the assessment of the health, safety or welfare of an at-risk adult.

R. 10.19 **The Commission recommends that** an authorised officer, in respect of assessing the health, safety or welfare of an at-risk adult on a relevant premises, should be permitted by legislation to:

(a) require a person who is in charge of the relevant premises or possesses or is in charge of any relevant documents or records to produce a document or record in a form which is legible and can be taken away, and

(b) require a person who is in charge of the relevant premises or possesses or is in charge of any relevant documents or records to provide an explanation of any—

(i) document or record inspected, or

(ii) information provided, or

(iii) other relevant matters.

(f) Who should be empowered to exercise powers of entry and inspection, and execute a warrant

[10.88] The Commission recommends that the power of entry to, and inspection of, a relevant premises should be conferred on an authorised officer of the Safeguarding Body. Authorised officers will have the requisite skills and expertise to assess the health, safety or welfare of an at-risk adult in a relevant premises. They will also be well-placed to use relationship-building and social work skills to ease any distress on the part of those present at the relevant premises, particularly the at-risk adult whose assessment is sought.

[10.89] However, as noted above, it may be the case that the authorised officer experiences obstruction when trying to exercise the power. The Commission thus recommends that the proposed provisions in adult safeguarding legislation should allow for an authorised officer of the Safeguarding Body to be accompanied by a member of the Garda Síochána where the authorised officer is in possession of a warrant issued on the basis of an authorised officer (or any persons permitted to accompany them) having been prevented, or having a belief based on reasonable grounds that there was a likelihood that they would be prevented, from entering the premises. This will allow for the use of reasonable force to access the relevant premises.

[10.90] The Commission also recommends that the proposed provisions should permit an authorised officer to be accompanied by other appropriately qualified health or social care professionals, such as a GP or public health nurse, to ensure that appropriate expertise is available in assessing the health, safety or welfare of an at-risk adult or at-risk adults on the premises. Mindful of the distress and confusion that may be caused by the exercise of a power of entry, it may in some cases be beneficial for an authorised officer to be accompanied by a trusted friend or family member of the at-risk adult. This could assist in de-escalating the situation and reassuring the at-risk adult as to the nature and purpose of the order. The Commission recommends that the proposed provisions should also permit the accompaniment of such individuals.

R. 10.20 **The Commission recommends that** the power of entry to, and inspection of, a relevant premises should be conferred on an authorised officer of the Safeguarding Body.

R. 10.21 **The Commission recommends that** the proposed provisions in adult safeguarding legislation should allow for an authorised officer of the Safeguarding Body to be accompanied by a member of the Garda Síochána where the authorised officer is in possession of a warrant issued on the basis of an authorised officer (or any persons permitted to accompany them) having been prevented, or having a belief based on reasonable grounds that there was a likelihood that they would be prevented, from entering the premises.

R. 10.22 **The Commission recommends that** the proposed provisions in adult safeguarding legislation should permit an authorised officer to be accompanied by appropriately qualified health or social care professionals (such as GPs and public health nurses), or any other persons the authorised officer reasonably considers necessary or appropriate, such as a trusted friend or family member of the at-risk adult.

(g) Provision of a notice in plain English and oral explanation

[10.91] As discussed in section 5, the powers proposed in this Chapter have the potential to interfere with the rights of at-risk adults. In light of this, it is important that at-risk adults are informed about the power that is being used, its purpose and the process involved. The Commission recommends that a notice in plain English must be provided to the at-risk adult whose assessment is intended upon the exercise of a power of entry to a relevant premises (whether using the warrantless power, or upon execution of a warrant). The notice should explain the nature of the power or warrant being exercised and the process involved. It could also inform at-risk adults about independent advocacy services and other available supports. The Commission recommends that the precise content and form of this standard notice should be specified in regulations to the adult safeguarding legislation. This standard format could then be used by authorised officers when they are intervening in particular cases.

[10.92] In addition to the provision of this notice, an authorised officer should also explain the nature and purpose of the powers orally to the at-risk adult whose assessment is intended. Although it would be best practice to provide such explanation, any failure to do so should not, in the Commission's view, invalidate the order or the exercise of any power on foot of order (including the execution of a warrant, where applicable). Whilst it is important that an at-risk adult be assisted in understanding what is happening, giving an appropriately clear oral explanation should not be a statutory precondition to the validity of the order or the exercise of any power on foot of the order.

R. 10.23 **The Commission recommends that** adult safeguarding legislation should require that a notice in plain English be provided to the at-risk adult to whom access is sought, or whose assessment is intended, by the use of the warrant or power, explaining the nature of the warrant or power being exercised and the process involved.

R. 10.24 **The Commission recommends that** adult safeguarding legislation should provide that the relevant Minister may prescribe by regulations a standard notice setting out the form and content of the notice to be provided to the at-risk adult to whom access is sought, or whose assessment is intended, by the use of the warrant or power.

R. 10.25 **The Commission recommends that** when exercising a power of entry to a relevant premises, the authorised officer should, insofar as practicable, explain to the at-risk adult the nature and purpose of the power they are authorised to exercise. However, any failure to give such an explanation should not invalidate the exercise of the power.

(h) Use of reasonable force

[10.93] The Commission believes that it should not be permissible for an authorised officer exercising a warrantless power of entry to use force to enter a premises. However, where a warrant is issued on the basis of an authorised officer (or any persons permitted to accompany them) having been prevented, or having a belief, based on reasonable grounds, that there was a likelihood that they would be prevented, from entering the premises, the issuing of the warrant may be futile without permitting the use of reasonable force. It is standard practice for a warrant allowing entry to a private premises to permit a member of the Garda Síochána to use reasonable force to gain entry to that premises. Use of reasonable force in such an instance could involve the forcing open of a door or the breaking of a lock to gain access to a relevant premises.

[10.94] Therefore, the Commission recommends that the adult safeguarding legislation should allow the District Court to issue a warrant allowing for the use of reasonable force, if necessary, by an authorised officer or member of the Garda Síochána to gain access to a relevant premises.

R. 10.26 **The Commission recommends that** the adult safeguarding legislation should allow for the District Court to issue a warrant allowing for the use of reasonable force, if necessary, by an authorised officer or member of the Garda Síochána to gain access to a relevant premises (except any part of a relevant premises that is occupied as a dwelling).

(i) Duration of a warrant

[10.95] The Commission recommends that a warrant for entry to, and inspection of, a relevant premises (except any part of a relevant premises that is used as a dwelling) should expire 30 daysafter the date of issue of the warrant. The Commission recommends that a warrant should permit an authorised officer of the Safeguarding Body, accompanied by appropriately qualified health or social care professionals, any other persons the authorised officer reasonably considers necessary or appropriate, and by members of the Garda Síochána, as may be necessary, at any time or times, not later than 30 days of the date of issue of the warrant, on production of the warrant if requested, to enter the relevant premises or any part thereof, other than any part of a relevant premises that is used as a dwelling.[92]

[10.96] This approach is indicative of the fact that authorised officers of the Safeguarding Body may need to make repeat visits to the relevant premises within a period of time following the issuing of a warrant, and that the circumstances of the case may mean that it is unnecessary or not possible for the authorised officer (and any person accompanying them) to execute the warrant immediately after its issuance. For example, the authorised officer might take the view that the apparent risk is not so urgent as to require immediate execution, and so they wait a day or two to gather the necessary expertise – for example, ensuring the availability of a health and social care professional and member of the Garda Síochána. Similarly, the warrant may have been sought in the context of an allegation that a specific staff member is causing a risk to an at-risk adult or at-risk adults, but the individual is currently on leave or not working for a few days. The authorised officer should be empowered to use their powers of entry and inspection flexibly, to effectively assess the health, safety or welfare of at-risk adults, and any safeguarding risks arising in relevant premises.

[92] This is a similar approach to that taken in section 75 of the Health Act 2007.

R. 10.27 **The Commission recommends that** a warrant for entry to a relevant premises or any part thereof (other than any part of a relevant premises used as a dwelling) should expire 30 days after the date of issue of the warrant.

R. 10.28 **The Commission recommends that** a warrant should permit an authorised officer of the Safeguarding Body, accompanied by appropriately qualified health or social care professionals, any other persons the authorised officer reasonably considers necessary or appropriate, and by members of the Garda Síochána, as may be necessary, at any time or times, not later than 30 days of the date of issue of the warrant, on production of the warrant if requested, to enter the relevant premises or any part thereof (other than any part of the relevant premises used as a dwelling).

(j) Offences of obstruction of authorised officers of the Safeguarding Body in carrying out functions under adult safeguarding legislation

[10.97] It is conceivable that persons on the relevant premises may attempt to obstruct or refuse to cooperate with an authorised officer of the Safeguarding Body who is attempting to assess the health, safety or welfare of an at-risk adult (or at-risk adults) under the proposed provisions of adult safeguarding legislation. Social work practitioners have pointed to issues that can arise as a consequence of the absence of a legal requirement for private nursing homes and residential facilities to cooperate with the making of safeguarding enquiries.[93] They have emphasised that there is a need for further oversight of nursing homes and that this would reduce the possibilities of institutional abuse and in particular, hidden neglect of nursing home residents.[94]

[10.98] In order to prevent such obstacles to the assessment and safeguarding of at-risk adults, and to allow authorised officers to intervene in a timely manner, the Commission proposes that adult safeguarding legislation should provide for an offence where a staff member, service provider or other person carrying out functions for and within a relevant premises:

(a) refuses to allow an authorised officer of the Safeguarding Body or any person accompanying them to enter a relevant premises (other than any part of a relevant premises used as a dwelling) in accordance with the

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93 Donnelly and O'Brien, "Adult Safeguarding Legislation—The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation", British Journal of Social Work (2022) 52, 3677–3696, at 3687.

94 Donnelly and O'Brien, "Adult Safeguarding Legislation—The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation", British Journal of Social Work (2022) 52, 3677–3696, at 3687.

relevant section of the proposed adult safeguarding legislation or in accordance with a warrant issued by the District Court, or

(b) obstructs or impedes an authorised officer of the Safeguarding Body or any person accompanying them in the exercise of functions under the relevant section of the proposed adult safeguarding legislation or in accordance with a warrant for access to a relevant premises issued by the District Court, or

(c) gives to an authorised officer of the Safeguarding Body or any person accompanying them who is exercising functions under the relevant section of the proposed adult safeguarding legislation or in accordance with a warrant for access to a relevant premises issued by the District Court information that the person giving the information knows, or should reasonably know, to be false or misleading.

[10.99] This offence encompasses physical obstruction, for example blocking access to authorised officers of the Safeguarding Body who are attempting to use a warrant for entry. It also encompasses the provision by a staff member, service provider or other person carrying out functions for and within a relevant premises of information that they know, or should reasonably know, to be false or misleading.[95] This mirrors the position under section 77 of the Health Act 2007. It also reflects the fact that a range of conduct could obstruct or impede the efforts of authorised officers to assess the health, safety or welfare of an at-risk adult in a relevant premises and to decide whether further steps should be taken with regard to the at-risk adult.

[10.100] The Commission recommends that a person guilty of the proposed offence should be liable:(a) on summary conviction, to a fine not exceeding €5,000, or imprisonment for a term not exceeding 12 months, or both, or (b) on conviction on indictment, to a fine not exceeding €70,000, or imprisonment for a term not exceeding 2 years, or both. These proposed penalties are in line with the penalties for refusing access, obstructing or giving false or misleading information to an authorised person under section 77 of the Health Act 2007.[96]

[95] It will be noted that the Commission does not propose an offence for providing false or misleading information in Chapter 11, so there is a difference in approach. The Commission is of the view that there is a distinct rationale for such an offence in the context of relevant premises. Staff of relevant premises have a duty of care to the residents of the premises and should have no concerns about providing accurate information whereas people obstructing access in private dwellings could be concerned family members who think they are doing what is best for the at-risk adult, or want to prevent interference in their family situation.

[96] Section 79(1) of the Health Act 2007 provides that a person is guilty of an offence if a person contravenes section 77 of the Health Act 2007 and section 79(3) sets out the applicable penalties.

[10.101] The Commission is of the view that this offence should only apply to a staff member, service provider or other person carrying out functions for and within a relevant premises. Thus, it would not apply to the friend or family member of an at-risk adult, or other visitor to the relevant premises.

[10.102] For the avoidance of doubt, the Commission is firmly of the view that the proposed offences should not apply to the at-risk adult themselves. Instead, in the event of concern or distress, social work skills should be used to explain the purpose of access and to try to reassure the at-risk adult. This approach is necessary to ensure minimal interference with an at-risk adult's rights.

R. 10.29 **The Commission recommends that** adult safeguarding legislation should provide for an offence where a staff member, service provider or other person carrying out functions for and within a relevant premises:

(a) refuses to allow an authorised officer of the Safeguarding Body or any person accompanying them to enter a relevant premises (other than any part of a relevant premises used as a dwelling) in accordance with the relevant section of the proposed adult safeguarding legislation or in accordance with a warrant for access to a relevant premises issued by a judge of the District Court, or

(b) obstructs or impedes an authorised officer of the Safeguarding Body or any person accompanying them in the exercise of functions under the relevant section of the proposed adult safeguarding legislation or in accordance with a warrant for access to a relevant premises issued by a judge of the District Court; or

(c) gives to an authorised officer of the Safeguarding Body or any person accompanying them who is exercising functions under the relevant section of the proposed adult safeguarding legislation or in accordance with a warrant for access to a relevant premises issued by the District Court information that the person giving the information knows, or should reasonably know, to be false or misleading.

R. 10.30 **The Commission recommends that** a person guilty of the proposed offence should be liable: (a) on summary conviction, to a fine not exceeding €5,000, or imprisonment for a term not exceeding 12 months, or both, or (b) on conviction on indictment, to a fine not exceeding €70,000, or imprisonment for a term not exceeding 2 years, or both.

R. 10.31 **The Commission recommends that** the proposed offences of obstruction should not apply in relation to the at-risk adult whose assessment is intended using the powers of entry and inspection.

(k) Anonymity of at-risk adults

[10.103] The threshold for obtaining a warrant to enter and inspect relevant premises includes a reasonable belief that there is a risk to the health, safety or welfare of an at-risk adult that is caused by abuse, neglect or ill-treatment. Applications for warrants are therefore likely to involve highly sensitive facts and personal details regarding individual at-risk adults. It is important that the at-risk adult's right to privacy, as protected by the Constitution and the ECHR, is carefully observed in the context of such applications. The Commission thus recommends that in relation to any proceedings for a warrant to enter and inspect a relevant premises, it should be an offence for a person to publish, distribute or broadcast any information likely to identify the at-risk adult or at-risk adults concerned, unless the court directs otherwise. Similar provisions are used in existing Irish legislation regarding sensitive applications for orders, such as section 19(9) of the Mental Health Act 2001.

[10.104] It may be that the court considers that it is in the interests of justice that certain information regarding the application or warrant should be published, distributed or broadcast. In such situations, the court should be permitted to specify in a written direction the manner in which such information can be published, distributed or broadcast and impose any conditions it considers necessary. Contravening a direction of this sort or a condition in such a direction should also be an offence.

[10.105] As with the offence of obstruction above, it should not be an offence for an at-risk adult to publish, distribute or broadcast any information identifying themselves, or to contravene a direction or a condition in such a direction of the court in this regard. The Commission has developed a detailed provision in this regard, which is contained in its Adult Safeguarding Bill 2024.

R. 10.32 **The Commission recommends that** in relation to any proceedings for a warrant to enter and inspect a relevant premises, it should be an offence for a person, other than an at-risk adult, to publish, distribute or broadcast any information likely to identify the at-risk adult or at-risk adults concerned, unless the court directs otherwise. (See the relevant section of the Commission's Adult Safeguarding Bill 2024 regarding the anonymity of adults at risk of harm and others.)

(l) Independent advocacy

[10.106] In Chapter 8, the Commission discusses the benefits of independent advocacy in safeguarding at-risk adults and ensuring that their views are heard. In that Chapter, the Commission recommends that adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, so far as is reasonably practicable, access to independent advocacy services for at-risk adults, where it engages with an at-risk adult directly for the purposes of exercising its functions. This would include where the Safeguarding Body or its authorised officers need to intervene to safeguard an at-risk adult by exercising a warrantless power of entry, or applying for a warrant to enter and inspect a relevant premises. This duty applies only where the at-risk adult experiences significant challenges in doing particular things and where there is no suitable person who could effectively support the at-risk adult to enable their involvement, as explained in detail in section 4(b) of Chapter 8.

[10.107] This duty would apply to a number of interventions proposed in this Report, including the power of entry to, and inspection of, a relevant premises, as most interventions would require the Safeguarding Body to engage directly with the at-risk adult. The Commission is of the view that access to independent advocacy services would be a useful additional safeguard in this context. Unlike the authorised officers of the Safeguarding Body or other health or social care workers accompanying them, an independent advocate would not be trying to persuade or counsel the at-risk adult to take a specific course of action. Rather, they would help them to understand what is happening and assist them in communicating their will and preferences.

[10.108] The situations in which relevant premises are accessed without warrant may be so urgent that it is not possible to obtain independent advocacy services ahead of time. However, reasonable efforts should be made to do so, and where such services are available, an at-risk adult must be facilitated in accessing them.

(m) A code of practice for authorised officers and others exercising powers, and a statutory immunity

(i) Statutory code of practice

[10.109] Consultees, including professionals working in the area of adult safeguarding, stressed to the Commission the need for practitioners to be provided with guidance on the use of new adult safeguarding legislation, and meeting statutory thresholds for interventions. Given the complex and intrusive nature of the proposed powers, the Commission is of the view that it would be beneficial for authorised officers (and others who may accompany them) to be provided with a code of practice regarding the usage of the powers. A code of practice would offer practical guidance on the use of the powers, and could set out the internal, operational detail as to how the statutory powers are to be used and put into practice by relevant professionals. Such a code could be drafted by the relevant Minister, in consultation with the Safeguarding Body and others as they sees fit. Statutory codes of practice regarding adult safeguarding legislation are a feature in other jurisdictions, such as Scotland.[97] Such a code would allow authorised officers and others who may accompany them to be thoroughly apprised of their duties and obligations under the legislation, in addition to relevant thresholds and safeguards. Specific training for members of the Garda Síochána may also be necessary, perhaps in the form of joint training programmes with the Safeguarding Body. This would allow members to build the necessary expertise to allow them to assist other practitioners and bodies in effectively safeguarding at-risk adults.[98]

(ii) A statutory immunity for authorised officers and others exercising powers

[10.110] In relation to the interventions proposed in this Chapter and in Chapters 11, 12 and 13, the Commission has considered whether a statutory immunity should be provided for, to clarify that no action would lie against an authorised officer, member of the Garda Síochána or other accompanying individual who exercised powers or functions in accordance with the proposed provisions of adult safeguarding legislation. On balance, the Commission is of the view that such a provision would be unnecessary and inappropriate. Where there are issues in

[97] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022).

[98] The Commission's recommendations regarding cooperation and information sharing are also relevant here, and are intended to support effective inter-agency working. See Chapters 15 and 16.

relation to the exercise of the powers or allegations of non-compliance with statutory requirements, the ordinary common law rules would apply.[99]

7. Conclusions and recommendations

[10.111] In this Chapter, the Commission has explained the rationale for its recommendation to introduce a power of entry to, and inspection of, relevant premises, to be conferred on authorised officers of the Safeguarding Body (who may be accompanied by others, where necessary and appropriate). Such a power would allow authorised officers to respond to allegations of abuse or neglect of at-risk adults in such premises, and to assess the health, safety or welfare of at-risk adults. Whilst a warrant is not required to enter a relevant premises, provision is made for a warrant in cases of actual or apprehended obstruction or prevention of access. The joint execution of such a warrant with a member (or members) of the Garda Síochána, using reasonable force where necessary, will ensure the effectiveness of the proposed powers. The Commission also recommends associated powers of interview, assessment and inspection to assist authorised officers in assessing the health, safety or welfare of at-risk adults.

[10.112] The Commission is of the view that these provisions are necessary to vindicate the constitutional and ECHR rights of at-risk adults, and are framed with appropriate thresholds and safeguards so as to constitute a proportionate interference with the rights of at-risk adults and third parties.

[99] See, for example, actions in negligence against members of the Garda Síochána in relation to the exercise of their public order functions: *Fagan v Garda Commissioner* [2014] IEHC 128.

CHAPTER 11
POWERS OF ACCESS TO AT-RISK ADULTS IN PLACES INCLUDING PRIVATE DWELLINGS

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1. Introduction

[11.1] This Chapter discusses a power of access to at-risk adults in places including private dwellings.[1] The proposed power is intended to facilitate an assessment of the health, safety and welfare of an at-risk adult. As is discussed in detail below, the power would be exercised by the Safeguarding Body, through its "authorised officers", and in some instances by members of the Garda Síochána.[2] An "authorised officer" is a person appointed by the Safeguarding Body for the purposes of exercising statutory functions or powers on the Safeguarding Body's behalf. If the Commission's recommendations in Chapters 5 and 6 were adopted, such authorised officers would be qualified, registered social workers.

[11.2] In Chapter 10, the Commission recommends that powers of entry to and inspection of "relevant premises" should be introduced in Ireland. As explained in Chapter 10, the term "relevant premises" encompasses various residential settings where services are provided to adults, including private facilities such as nursing homes. The power proposed in this Chapter, however, is primarily concerned with access to at-risk adults in private dwellings. This raises particular constitutional considerations, which are considered below. In this Chapter, the Commission refers to "places including private dwellings" because the power is also intended to capture places which are not dwellings, for example certain premises, but which may nevertheless raise difficulties in terms of access. For example, in a particular case, an at-risk adult might be reasonably believed to be in an office, warehouse or similar premises owned or operated by a third party. The power proposed in this Chapter is intended to facilitate access to these types of places, allowing authorised officers (and members of the Garda Síochána, where applicable) to respond flexibly and effectively in such cases.

[11.3] The Commission also recommends powers to interview and medically examine at-risk adults in places including private dwellings, to facilitate the assessment of the at-risk adult's health, safety or welfare (including whether they are suffering

[1] A "dwelling" is defined for the purposes of adult safeguarding legislation as one or more of the following: "(a) a building or structure (whether temporary or not) which is constructed or adapted for use as a residence and is being so used; (b) a vehicle or vessel (whether mobile or not) which is constructed or adapted for use as a residence and is being so used; (c) a part of a— (i) building or structure (whether temporary or not), or (ii) a vehicle or vessel (whether mobile or not), which is constructed or adapted for use as a residence and is being so used, and includes a self-contained part of a relevant premises which is constructed or adapted for use as a residence and is being so used by a service provider, or a member of staff of a service provider, but shall not include the room of a resident in a relevant premises". The dwelling – or private home – of an individual often attracts special legal treatment and protection, including under Article 40.5 of the Constitution. See, for example, *Clare County Council v McDonagh* [2022] IESC 2.

[2] The Safeguarding Body is discussed in Chapters 5 and 6.

abuse or neglect), and a decision as to whether any further actions or supports are needed. Any proposed powers of access and associated powers of interview and medical examination must be centred on vindicating the rights of at-risk adults at risk of harm, as is discussed in section 5 below. In formulating its recommendations in this Chapter, the Commission had regard to the approaches of other jurisdictions to specific safeguarding powers of access, where such orders are an established feature of the adult safeguarding landscape.

[11.4] As with the other adult safeguarding interventions recommended by the Commission in Chapters 10, 12 and 13, the powers proposed in this Chapter are intended to be used only as a last resort, where all other measures to support the at-risk adult (and where necessary, to access them) have failed. The Commission recommends safeguards and thresholds to ensure that this is the case.

(a) Powers of access and proposed criminal offences

[11.5] In Chapter 19, the Commission recommends the introduction of new criminal offences pertaining to a specified category of at-risk adults ("relevant persons").[3] These proposed offences aim to fill the gaps that currently exist in the criminal law. At present, unless members of the Garda Síochána suspect that a deliberate assault or incident of reckless endangerment has been perpetrated, they may not be able to obtain a search warrant to access a dwelling, even where there are reasonable grounds to suspect the occurrence of abuse or neglect. If the offences recommended in Chapter 19 were introduced in Ireland, the position in relation to accessing at-risk adults and responding to concerns of abuse or neglect would be greatly improved, as members of the Garda Síochána would have a lawful basis on which to enter pursuant to a search warrant. However, these powers would facilitate the investigation of the alleged or suspected offence by members of the Garda Síochána. Such powers would not facilitate an assessment of the health, safety or welfare of an at-risk adult by an authorised officer or other health or social care professional.

[11.6] What is considered in this Chapter is a further, additional power, to complement and augment existing powers of access in Irish law. Such a power is considered by the Commission to be necessary, having regard to the submissions made by consultees and the comparative experiences of other jurisdictions. It would operate to allow the relevant authorities to gain access to people who are otherwise invisible to the social care system, in order to vindicate their rights. It would also allow for intervention in circumstances where there are serious safeguarding concerns which do not appear to reach the level of criminality. The proposed power of access will therefore exist alongside new criminal offences to give authorised officers of the Safeguarding Body and members of the Garda

[3] This is a narrower definition than the term "at-risk adult", which is necessary for the purposes of the specificity of the criminal law. This is discussed in more detail in Chapter 19.

Síochána the most effective tools to safeguard at-risk adults. The power will enable them to access at-risk adults to assess their health, safety and welfare. It may also lead to, and facilitate, other actions including interventions under adult safeguarding legislation or the provision of support and assistance to at-risk adults, where necessary and appropriate.

2. Existing powers of access to dwellings under Irish law

[11.7] This section sets out the existing conditions under which access can be gained to a dwelling.[4] For the most part, legislative powers allowing access to dwellings apply to members of the Garda Síochána for the purpose of criminal investigation, with niche powers of access given to members of other agencies that have been tasked with regulatory investigation and enforcement.[5] While there are numerous statutory provisions allowing members of the Garda Síochána and other agents of the State to enter private dwellings to arrest, search and inspect in situations of suspected criminality,[6] there are no provisions under Irish law which allow for a power of access to a private dwelling to assess the health, safety or welfare of an at-risk adult.

[11.8] As noted in the Commission's Issues Paper, it might be possible to use one of the existing legal powers in certain limited cases of suspected abuse or neglect of an at-risk adult where it has not been possible to gain access to the at-risk adult in a private dwelling.[7] However, the existing powers of access do not apply in every instance in which an at-risk adult may be suffering abuse or neglect or where a serious safeguarding risk arises, and significant gaps remain.

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4 The term "power of entry" is often used in the Irish context, particularly in relation to criminal powers, and in other jurisdictions. However in this Chapter, the Commission prefers the term "power of access" because the proposed power is focused on access to the at-risk adult and not mere entrance to a dwelling.

5 Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* vol 1 (LRC 119-2018) at para 2.13. See, for example, 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 which differ as to the places that can be entered and searched, the types of documents or information that can be retrieved, and the persons who can be interviewed.

6 In its report on search warrants, the Commission noted that there are over 300 separate legislative provisions (143 Acts and 159 Statutory Instruments) that, as of 2015, confer powers to issue search warrants. Law Reform Commission, *Search Warrants and Bench Warrants* (LRC 115-2015) at para 2.17.

7 Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at para 6.7.

(a) Access to an at-risk adult in a private dwelling by consent

[11.9] When consent is given by an occupier of a private dwelling, members of the Garda Síochána and relevant authorities can enter a private dwelling without difficulty. Consent for members of the Garda Síochána to enter a private dwelling can be express or implied.[8]

[11.10] Where consent to access an at-risk adult in a private dwelling for the purposes of assessment has been given, there will be no need for a power of access to be invoked. However, an issue arises where consent has been refused, either because of a third party blocking access, where consent to access has been sought but there is no response, or where an at-risk adult is refusing access themselves. This is in keeping with the point outlined above, namely that the proposed interventions under adult safeguarding legislation should be a last resort and only used when necessary.

[11.11] It is envisaged that the proposed power of access will allow for a private interview with an at-risk adult and, if necessary, the performance of a preliminary medical examination, in private, to assess their health, safety or welfare. Separate consent to an interview and a medical examination would be required. Where an at-risk adult objects to an interview or medical examination, such objection cannot be overridden. Powers of interview and medical examination are further discussed in section 6(i) below.

(b) Common law powers of access

[11.12] There are few common law powers of access that may be used in relation to at-risk adults in private dwellings in Ireland. In situations where there is a serious risk to the life of an individual within the dwelling, members of the Garda Síochána are obliged to "safeguard life and limb". In the case of *DPP v Delaney,* this obligation, which devolves on all citizens, was stated by the Supreme Court to be "more important than the inviolability of the dwelling".[9] However, "life and limb" is a high threshold, and would not cover situations where authorised officers have concerns or suspicions of safeguarding issues or neglect, unless such issues or neglect were in fact life-threatening.

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[8] The consent will be for a particular purpose – if that purpose is not intended by the person entering the dwelling, the consent will not be valid. In *DPP v McMahon* [1986] IR 393 the Supreme Court noted that although there is an implied invitation by the owner of a licensed premises to members of the public to enter to buy food and drink, the members of the Garda Síochána did not have that purpose when they entered. This meant that, absent any other statutory authority to enter the premises, the members were trespassers.

[9] [1997] 3 IR 453.

(c) Statutory powers of entry to arrest, search and inspect for the purposes of criminal and regulatory investigation

[11.13] A number of Acts of the Oireachtas allow members of the Garda Síochána to enter and search a private dwelling where there is reasonable suspicion that evidence of criminal activity is to be found therein. Examples include the Misuse of Drugs Act 1977 and the Criminal Justice (Miscellaneous Provisions) Act 1997. The purpose of such powers is to gather evidence. Both pieces of legislation contain provisions outlining the permissible timeframes for access.

[11.14] Under section 6 of the Criminal Law Act 1997, members of the Garda Síochána may enter (if need be, by use of reasonable force) a private dwelling on foot of a warrant to make an arrest, or without a warrant for an arrestable offence, subject to certain conditions. Under the Domestic Violence Act 2018, if protection, safety or barring orders are in place, members of the Garda Síochána are empowered to enter a place for the purpose of an arrest if it is suspected that a respondent breached one or more of those orders.[10] These provisions are of more general application but a consequence of their application may be the protection of at-risk adults.

[11.15] The Commission has previously noted that it is common in regulatory legislation to confer powers upon a regulator or its authorised officers to enter premises on foot of a warrant, to inspect documents, to require persons to provide information, and to interview persons.[11] These are rarely used provisions that are typically included to cover cases that do not normally fall under authorised officers' rights of entry and inspection, such as where the information sought is held in a dwelling rather than a business premises.[12] The Commission discusses powers of entry to and inspection of relevant premises, as distinct from regulatory powers in relation to such premises, in Chapter 10.

(d) Powers of access on child welfare grounds

[11.16] Section 12 of the Child Care Act 1991 provides for a warrantless power of access to a private dwelling or other place, by force if necessary, where a member of the

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[10] See section 35 of the Domestic Violence Act 2018.

[11] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at para 6.2.

[12] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* vol 1 (LRC 119-2018) at para 2.13. See, for example, section 39(5) of the Communications Regulation Act 2002. In its *Report on Search Warrants and Bench Warrants* (LRC 115-2015), the Law Reform Commission identified more than 300 statutory provisions creating similar but not identical procedures for obtaining and executing search warrants and recommended that these provisions should be replaced by a single, generally applicable Search Warrants Act.

Garda Síochána has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of a child, and it would be insufficient for the protection of the child from such immediate and serious risk to await the making of an application for an emergency care order.

[11.17] Section 23T(1) of the Child Care Act 1991, as inserted by section 16 of the Children Act 2001, empowers an authorised officer of the Child and Family Agency to enter, at all reasonable times, any premises (including a private dwelling) wherein a child who is the subject of a private foster care arrangement resides.

[11.18] These provisions empower members of the Garda Síochána, and persons appointed as authorised officers of the Child and Family Agency to exercise certain powers under the Child Care Act 1991, to safeguard the safety and welfare of children in situations where there is concern for their health or welfare. Unlike the criminal investigative powers outlined above, these provisions are civil in nature. It is arguable that without these provisions, the ability of members of the Garda Síochána and authorised officers of the Child and Family Agency to vindicate the rights of children would be seriously impeded.[13] The power in section 12 of the Child Care Act 1991 is frequently invoked.[14] Such powers provide an important practical mechanism of state oversight for children in situations of risk and vulnerability.

[11.19] The lack of similar powers of access to assess the health, safety or welfare of at-risk adults where the evidence available does not meet the criminal threshold is a significant gap in Irish legislation. It is an impediment to the effective responses to safeguarding concerns and, where necessary, to intervention to safeguard at-risk adults.

(e) Civil means of access to adults

[11.20] Outside of the criminal sphere, there are two means of access to adults, including in dwellings, which are of particular relevance in the adult safeguarding context.

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[13] For example, Shannon suggests that "review of the PULSE data has shown the power pursuant to section 12 to be an essential and necessary one within the broader child protection infrastructure of the State.": Shannon, "Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991" (An Garda Síochána 2017) at page 107.

[14] An audit of the use of the power sets out the number of section 12 incidents recorded annually from 2008 to 2015, ranging from 470 incidents in 2008, to 776 in 2012: Shannon, "Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991" (An Garda Síochána 2017) at page 47.

(i) Mental Health Act 2001

[11.21] Section 12(1) of the Mental Health Act 2001 provides for Garda intervention if there are reasonable grounds for believing that a person is suffering from a mental disorder as defined under the Act and that, because of the disorder, there is a serious likelihood of the person causing immediate and serious harm to themselves or another person. There is an ancillary power of access, with potential for the person to be involuntarily detained in an approved centre (generally, a psychiatric unit).[15] While the powers vested in members of the Garda Síochána under section 12 may be used in relation to certain at-risk adults where the statutory threshold is met, as stressed in Chapter 1, not all at-risk adults suffer from a "mental disorder", as defined in section 3(1) of the Mental Health Act 2001. Indeed, consultees (including a public body) expressed concerns to the Commission that the provisions of the Mental Health Act 2001 could be used inappropriately in adult safeguarding cases, in the absence of a broader power of access to at-risk adults in private dwellings. Furthermore, the provisions under the Mental Health Act 2001 do not address the initial difficulty of gaining access in the first place to assess health, safety and welfare, and to determine if any intervention is necessary.

(ii) Inherent jurisdiction of the High Court

[11.22] Article 34.3.1° of the Constitution gives the High Court "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". This is the source of the High Court's "inherent jurisdiction", which has been used to make orders which intervene in the lives of adults in Ireland, in the absence of statutory powers to do so. The use of the inherent jurisdiction and its relevance for adult safeguarding cases is discussed in detail in Chapter 1.

[11.23] While the High Court has used its inherent jurisdiction less frequently in recent years, it is a measure that may still be relied upon in serious cases. For example, a decision of Hyland J to grant orders for removal of an adult about whom social workers had serious safety and welfare concerns is a recent illustration of the invocation of the High Court's inherent jurisdiction in an adult safeguarding case.[16] Children in the home had been taken into care, and in the course of that process a woman had been observed in what appeared to be a state of

[15] Section 13 of the Mental Health Act 2001.

[16] O'Riordan, "'Extremely vulnerable' woman can be taken from family home for assessment, judge says" *The Irish Times* (11 February 2022) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/extremely-vulnerable-woman-can-be-taken-from-family-home-for-assessment-judge-says-1.4799830> accessed on 20 July 2023. Note: there is no written judgment available.

considerable neglect. A social worker attempted to visit the woman but was refused access by a third party. The woman, who was thought to have an intellectual disability, had not been seen in person by her GP in over a decade. The GP had expressed concern about levels of control in the home. Having considered whether other less "draconian" ways of achieving the aims could be used, Hyland J concluded that the orders made entailed the use of the least restrictive means to achieve the aim of safeguarding the woman. The orders permitted members of the Garda Síochána to assist with the removal of the woman from her home; for her to be transferred to hospital (which it was stipulated should take place with minimal force) and for her to be detained in hospital so that medical and psychiatric checks could take place.[17] The Commission understands that when similar orders are made pursuant to the inherent jurisdiction in extreme cases, they will include a power to enter the place where the individual is believed to be.

[11.24] Currently, the only option available to concerned professionals where social work skills are insufficient to protect an adult from harm is to apply for orders under the inherent jurisdiction of the High Court. By comparison, a power of entry for the purposes of gaining access to an at-risk adult in Scottish adult safeguarding legislation[18] allows council officers (generally social workers) to make initial inquiries with the outcomes in many cases involving the provision of supports and safeguards under the safeguarding, mental health or capacity legislation, as appropriate.[19] This allows for a more effective use of other legislative provisions, leading to better protection for at-risk adults who are experiencing abuse or neglect.

[11.25] As matters stand in Ireland, in the absence of a statutory power of access, the potential to seek orders from the High Court is invaluable. However, it is undoubtedly a costly and cumbersome mechanism. The practical and cost barriers to seeking orders under the High Court's inherent jurisdiction confine its utility as a means of protection for at-risk adults. There may also be a lack of

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[17] O'Riordan, "'Extremely vulnerable' woman can be taken from family home for assessment, judge says" *The Irish Times* (11 February 2022) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/extremely-vulnerable-woman-can-be-taken-from-family-home-for-assessment-judge-says-1.4799830> accessed on 20 July 2023. Note: there is no written judgment available.

[18] Section 7 of the Adult Support and Protection (Scotland) Act 2007 (asp 10). This is discussed below at section 3(a).

[19] Scottish Mental Health Law Review, *Consultation* (2022) at page 183 <https://consult.gov.scot/mental-health-law-secretariat/scottish-mental-health-law-review/user_uploads/scottish-mental-health-law-review-consultation-4.pdf> accessed on 20 July 2023.

awareness as to the availability of this safeguarding tool, and a lack of certainty as to the parameters of the inherent power. Providing for a statutory regime of safeguarding interventions would be far preferable to the use of the inherent jurisdiction, for reasons of transparency, clarity, and vindication of rights, amongst others. This view is outlined in detail in Chapter 1.

(f) Concluding analysis of existing means of access and the need for an additional power of access for safeguarding purposes

[11.26] All of the existing means of access are, in the viewof the Commission, insufficent for adult safeguarding purposes. They are designed for different objectives and often have inappropriate thresholds and parameters. They are only applicable in limited circumstances and so are not always capable of effectively preventing harm to at-risk adults, or of allowing professionals to respond to reports or suspicions of abuse or neglect of at-risk adults.

[11.27] Under the current legal framework, without a warrant or a court order, a member of the Garda Síochána can only enter a private dwelling without consent in order to safeguard the "life and limb" of the at-risk adult. There is no provision to enter to assess the health, safety or welfare of an at-risk adult unless criminality is suspected, and a search warrant or arrest power is to be used in its investigation. However, on a practical level, an assessment of potential levels of risk and/or criminality cannot be made unless it is possible to access the at-risk adult in the first instance.

[11.28] Having considered these gaps, the Commission is of the view that a power of access to at-risk adults in places including private dwellings should be introduced in Ireland. Without such a power, relevant authorities may have no alternative method of gaining access to at-risk adults. The purpose of the proposed power is to provide an initial point of contact with an at-risk adult to assess their health, safety or welfare, without the need for evidence of criminality. This would significantly strengthen the safeguarding tools available in Ireland, and allow for a social-work led approach to adult safeguarding.[20]

(i) Interaction with existing legislation

[11.29] It is envisaged that adult safeguarding legislation will dovetail with the Assisted Decision-Making (Capacity) Act 2015, the Mental Health Act 2001 and other

[20] As discussed at section 6(i) below, the Commission also proposes providing authorised officers and health and social care professionals with powers to interview at-risk adults in private and to conduct medical examinations in private, if necessary and with the consent of the at-risk adult. Such powers would facilitate the assessment of the at-risk adult's health, safety and welfare.

existing legislation.[21] There will be situations in which provisions of both capacity and safeguarding legislation or both mental health and safeguarding legislation will apply.[22] A power of access to at-risk adults is the starting point to access the protections afforded by the other pieces of legislation, as a power of access will allow the relevant authorities to conduct an interview with an at-risk adult in private in order to make a preliminary assessment as to whether they are suffering abuse or neglect, and whether other interventions are necessary.

3. Powers of access in other jurisdictions

[11.30] The Commission examined in detail the safeguarding-specific powers of access and interview in other jurisdictions, to gain insights from comparable legislation.

(a) Scotland

[11.31] In Scotland, local councils are tasked with providing social work services for children and at-risk adults in local communities.

[11.32] Under section 7 of the Adult Support and Protection (Scotland) Act 2007, a council officer (generally a social worker) 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". There is no requirement for a warrant.

[11.33] Section 7(2) provides that a right to enter any place under section 7(1) includes a right to enter any adjacent place for the same purpose. A complementary power to interview is provided by section 8, which 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. If a health professional is conducting the visit, or is accompanying the social worker conducting the visit, the health professional can conduct a medical examination, if the adult consents.[23] Visits under these provisions can only take place at reasonable times.[24] Force cannot be

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[21] As is the case in Scotland, where adult safeguarding legislation serves as a gateway for initial inquiries with the ultimate outcome in many cases contingent on the use of mental health and capacity legislation. See: Scottish Mental Health Law Review, *Consultation* (2022) at page 183 <https://consult.gov.scot/mental-health-law-secretariat/scottish-mental-health-law-review/user_uploads/scottish-mental-health-law-review-consultation-4.pdf> accessed on 20 July 2023.

[22] The interaction of adult safeguarding legislation with existing legislation is also discussed in Chapter 1 and 20.

[23] Section 9 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[24] Section 36(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

used to gain access under these light touch provisions, and refusal of access is not an offence.[25]

[11.34] However, where council officials encounter resistance when exercising the power to enter any place under section 7, they have the option to seek a warrant[26] to enter "any specified place" under section 7 (the visit provision) or section 16 (a removal order provision) of the Adult Support and Protection (Scotland) Act 2007. Entry under warrant is done in partnership with a police officer. Reasonable force can be used for entry where necessary, if the police officer considers force to be reasonably required to fulfil the object of the visit.

[11.35] The criteria for granting warrants for entry include that a warrant may be granted only if the sheriff[27] 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.[28]

[11.36] In urgent cases, a warrant for entry in respect of a visit under section 7 may be sought from a justice of the peace, in accordance with section 40 of the 2007 Act.

[11.37] The Adult Support and Protection (Scotland) Act 2007 guidance document sets out the rationale for the power of entry and interview as being to allow early intervention where necessary, with the emphasis on prevention of harm. The document specifies that the power is intended to be used sparingly and, in most situations, other less restrictive measures will be sufficient to protect the person concerned. However, the guidance states that where firmer action is required, the legislation puts in place sufficient powers to ensure that those who need support or protection can have it.[29]

(b) England

[11.38] In England, the Care Act 2014 sets out how adult social care should be provided. While the Care Act 2014 contains safeguarding provisions, including a duty to

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[25] Sections 36(4) and 36(5) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[26] Section 37 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[27] In Scotland a sheriff acts as a judge in criminal and civil cases that can result in sentences up to five years or a fine.

[28] Section 38 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[29] Scottish Government, *The Adult Support and Protection (Scotland) Act 2007: A Short Introduction to Part 1 of the Act* (2008) <https://www.gov.scot/publications/adult-support-protection-scotland-act-2007-short-introduction-part-1-act/pages/1/> accessed on 24 July 2023.

make enquiries, it does not provide for a power of access. In 2012, the Department of Health carried out a consultation on a proposed safeguarding power of access in England. Following the consultation, the Care Bill was not amended to include a power of access 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".[30] However, at the time of writing, the Department of Health and Social Care in England is reconsidering the introduction of powers of access for social workers following a nationally escalated safeguarding adult review.[31] A recent review undertaken by the Home Office and Department of Health and Social Care in England states that the latter body will now review "any new and relevant evidence on powers of entry for social workers since the issue was last considered during the passage of the UK Domestic Abuse Act 2021. This [future review] should include Safeguarding Adult Reviews in England and the use of equivalent powers in Scotland and Wales".[32] This follows a key finding in the joint review that "[f]rontline professionals often lack the necessary tools and resources to allow them to best protect and support people with care and support needs who are, or are at risk of being, abused in their own home by the person providing their care".[33]

[11.39] Introducing such a power would fill the gap that can currently only be filled by making applications under the inherent jurisdiction of the High Court in England and Wales, particularly in respect of a person who has decision-making capacity within the meaning of the Mental Capacity Act 2005 but who:

> "is, or is reasonably believed to be, either:
>
> - under constraint;
> - subject to coercion or undue influence; or

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

[31] At the time of publication, the safeguarding adult review had not been published.

[32] Home Office and Department of Health and Social Care (England), *Safe Care at Home Review* (2023) at page 54. It is stated at page 63 that "[t]he Home Office and DHSC will provide an update on this programme of work in due course". See also Samuel, "Government to review case for powers of entry for social workers in adult safeguarding cases" *Community Care* (8 August 2023) <https://www.communitycare.co.uk/2023/08/08/government-to-review-case-for-powers-of-entry-for-social-workers-in-adult-safeguarding-cases/ > accessed on 9 April 2024.

[33] Home Office and Department of Health and Social Care (England), *Safe Care at Home Review* (2023) at page 52.

- for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent".[34]

(c) Wales

[11.40] The Social Services and Well-being (Wales) Act 2014 provides the legal framework for social care and support in Wales. The Act provides Welsh local authorities with a power of access 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. The order that is sought to permit access is called an "adult protection and support order".

[11.41] An authorised officer (defined as a local authority worker who has undergone specialist training) can apply to a justice of the peace for an adult protection and support order ("APSO") which provides powers of access to any premises where an "adult at risk" is believed to be living (including private dwellings).[35] 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.[36]

[11.42] A police officer may accompany an authorised officer when carrying out the order, and the police officer may use reasonable force, if necessary, to fulfil the purpose of an adult protection and support order.[37]

(d) Northern Ireland

[11.43] Since the publication of the Issues Paper, the Department of Health in Northern Ireland has conducted a consultation on legislative options to inform the development of an Adult Protection Bill for Northern Ireland.

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[34] *Re SA* [2005] EWHC 2942 (Fam) at para 77.

[35] Section 127(1) of the Social Services and Well-being (Wales) Act 2014.

[36] Section 127(2) of the Social Services and Well-being (Wales) Act 2014.

[37] Section 127(7) of the Social Services and Well-being (Wales) Act 2014.

[11.44] The Department of Health in Northern Ireland sought views on whether a legal power for a health and social care professional to enter a premises, accompanied by a member of the Police Service of Northern Ireland ("PSNI"), should be introduced to support a new duty to make enquiries.[38] Such a power would apply in a situation where a health or social care professional "has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection; and that professional is unable to gain entry to the adult's dwelling (or another premises) to speak with the adult in private to ascertain if they are making decisions freely".[39]

[11.45] The Department of Health in Northern Ireland published its Draft Final Policy Proposals for Ministerial Consideration in relation to the Adult Protection Bill in July 2021. The Department of Health stated that "[t]he draft Bill will introduce a new power of [access] to interview an adult at risk".[40]

[11.46] The power of access will permit a "suitably experienced, trained and qualified social worker to enter the home (or other relevant premises) of an adult at risk and in need of protection to interview the adult in private and ascertain if the adult is making decisions freely".[41]

[11.47] The draft Bill will contain the following provisions, restrictions and requirements in relation to the power of entry (for the purposes of gaining access to an at-risk adult) and associated additional powers:

(a) magistrate approval will be required for use of the power of entry and additional powers on every occasion;
(b) there must be a reasonable attempt to seek the consent of the adult at risk when applying to a magistrate to use the additional powers;
(c) the power of entry and additional powers should be used by a suitably experienced, trained and qualified social worker only (consideration will be given to creating a new group of social workers for the purpose of using Adult Protection Bill/Act powers);

[38] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland – Consultation Document* (2020) at para 2.48.

[39] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland – Consultation Document* (2020) at para 2.48.

[40] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at section 6.

[41] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at section 6.

(d) a statutory requirement to take all reasonable steps to support the adult at risk to understand what the power is and why it is being used;
(e) anyone who is using the power of entry or additional powers will be able to request PSNI support (but will not be required to);
(f) an adult at risk will have the right to be supported by a witness rather than be interviewed alone and should be advised of this right;
(g) there will be legal consequences for obstructing a social worker who is seeking to apply a power of entry or additional power that has been approved by a magistrate (consideration will be given to issuing fines).[42]

(e) Canada

(i) British Columbia

[11.48] In British Columbia, the agency that has responsibility for the protection and welfare of at-risk adults living in private dwellings is duty bound to investigate reports of alleged abuse or neglect.[43] A member of the agency may apply to the court for an order of entry if the member:

(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.[44]

[11.49] 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.[45]

[11.50] 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 an employee of the agency to enter the premises and interview the adult.

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[42] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* at section 6.

[43] Section 47(1) of the Adult Guardianship Act 1996 (British Columbia).

[44] Section 49(1) of the Adult Guardianship Act 1996 (British Columbia).

[45] Section 49(2) of the Adult Guardianship Act 1996 (British Columbia).

[11.51] 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 unable to seek support and assistance for any of the following reasons:

(a) a physical restraint;
(b) a physical handicap that limits their ability to seek help; or
(c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.[46]

(ii) Nova Scotia

[11.52] In Nova Scotia, section 8(2) of the Adult Protection Act 1989 provides for an adult protection order for entry. An adult protection order for entry is a court order that allows a peace officer, the Minister of Community Services and/or others specified in the order to enter any building to assess an "adult in need of protection" if the adult has refused to consent to an adult protection assessment or a member of their family or a person who has care or control of the adult has obstructed such assessment.[47] The court may grant the order once it is satisfied that there are "reasonable and probable grounds to believe that the person who is being assessed is an adult in need of protection".[48]

(iii) New Brunswick, Newfoundland and Labrador, and Manitoba

[11.53] Other jurisdictions in Canada have similar provisions allowing for a power of access in adult safeguarding situations, such as New Brunswick,[49] Newfoundland and Labrador,[50] and Manitoba.[51]

(f) Australia

(i) South Australia

[11.54] Authorised officers[52] conducting an investigation under the Ageing and Adult Safeguarding Act 1995 have a power of entry to any premises, place, vehicle or

[46] Sections 44 and 49(4) and of the Adult Guardianship Act 1996 (British Columbia).

[47] Department of Health and Wellness (Nova Scotia), *Adult Protection Policy Manual* at para 5.3 <https://novascotia.ca/dhw/ccs/policies-standards.asp> accessed on 20 July 2023.

[48] Section 8(2) of the Adult Protection Act, RSNS 1989, c 2 (Nova Scotia).

[49] Section 35(3) of the Family Services Act 1980 (New Brunswick).

[50] Section 17(1) of the Adult Protection Act 2014 (Newfoundland and Labrador).

[51] Sections 23(1) and 26(2) of the Adults Living with an Intellectual Disability Act 1993 (Manitoba).

[52] Defined under section 18 of the Ageing and Adult Safeguarding Act 1995 (South Australia) as the Director of the Office for Ageing Well or a member of the Adult Safeguarding Unit who is authorised by the Director in writing.

vessel.[53] The powers apply in the course of an investigation relating to a "vulnerable adult who is, or is suspected of being, at risk of serious abuse".[54]

[11.55] Force may be used by an authorised officer to enter any premises, place, vehicle or vessel, or to break into or open any part of, or anything in or on, any premises, place, vehicle or vessel but only:

> (a) on the authority of a warrant issued by a magistrate; or
> (b) if
>> (i) entry to the premises, place, vehicle or vessel has been refused or cannot be gained; and
>> (ii) the authorised officer believes on reasonable grounds that the delay that would ensue as a result of applying for a warrant would significantly increase the risk of harm, or further harm, being caused to a vulnerable adult; and
>> (iii) the Director [of the Office of Ageing Well] has approved the use of force to enter the premises, place, vehicle or vessel.[55]

A warrant for entry must not be approved by a magistrate unless the magistrate is satisfied on information given on oath, personally or by affidavit, that there are reasonable grounds for the issue of a warrant.[56]

[11.56] The South Australia Law Reform Institute identified in 2022 that the powers under section 19 of the Ageing and Adult Safeguarding Act 1995, as inserted in 2019 by amending legislation,[57] are slightly beyond the "limited coercive information-gathering powers" suggested by the Australian Law Reform Commission ("ALRC") in its relevant 2017 Report,[58] as discussed below. However, the South Australia Law Reform Institute concluded that the high threshold to use the powers

[53] Section 19 of the Ageing and Adult Safeguarding Act 1995 (South Australia), as inserted on 1 October 2019 by section 6 of the Office for the Ageing (Adult Safeguarding) Amendment Act 2018 (South Australia).

[54] Section 19(1) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

[55] Section 19(2) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

[56] Section 19(3) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

[57] As inserted on 1 October 2019 by section 6 of the Office for the Ageing (Adult Safeguarding) Amendment Act 2018 (South Australia).

[58] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA*) (SALRI Report 17 2022) at para 5.1.18. See also, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (ALRC Report No 131 2017).

accords with the ALRC's recommendation 14-6,[59] as authorised officers under the 1995 Act must suspect serious abuse before using these powers.[60]

[11.57] Significantly, it was found by the South Australia Law Reform Institute that, to the date of publication, the Adult Safeguarding Unit had not had occasion to exercise its powers under section 19 of the 1995 Act.[61] The Adult Safeguarding Unit stated that it has not had occasion to use the powers as in cases where a practitioner is experiencing some opposition from a person of concern, the act of advising the person that the powers exist and may be exercised is enough to encourage the person to engage voluntarily with the Unit.[62] The broad theme relayed to the South Australia Law Reform Institute from the wide range of consultees on the Report was that the wide powers in the 1995 Act, "even if not utilised to date, are appropriate and necessary for the [Adult Safeguarding Unit] to properly exercise its vital function of safeguarding the rights of adults who may be vulnerable to abuse, especially in more serious and/or urgent cases".[63]

(ii) New South Wales

[11.58] In its report on *Abuse and Neglect of Vulnerable Adults in NSW – The Need for Action,* the Office of the Ombudsman of New South Wales[64] noted that adult safeguarding officers did not have the power to enter private residences to gain direct access to alleged victims which would be essential in certain matters involving significant risk to alleged victims.[65] It stated that such a power would be

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[59] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (ALRC Report No 131 2017) at page 407.

[60] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA*) (SALRI Report 17 2022) at para 5.1.18.

[61] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at paras 5.1.23 and 5.4.18 – 5.4.21.

[62] South Australia Law Reform Institute*, 'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 5.4.19.

[63] South Australia Law Reform Institute*, 'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 5.4.20.

[64] The role of the Office of the Ombudsman of New South Wales is to investigate complaints, manage compliance with the law and safeguard individuals and communities in their interactions with government and non-governmental agencies that fall within the Ombudsman's jurisdiction.

[65] New South Wales Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW – The Need for Action* (2018) at page 19.

vital to provide a comprehensive adult safeguarding approach.[66] The report discussed an incident in which an 83-year-old woman died from the combined effects of severe malnutrition and infection. In this case, hospital staff believed that the woman had been the victim of neglect. The inquest into this woman's death heard that it is important for a specialised service to have the ability to enter the home of an older person and investigate arrangements for their care as a matter of last resort in cases where less intrusive means of support or management have failed.[67]

[11.59] The Ageing and Disability Commissioner Act 2019 now provides that the Ageing and Disability Commissioner may apply for a search warrant if they have "reasonable grounds for believing that there is on any premises an adult with disability or older adult who is subject to, or at risk of, serious abuse, neglect or exploitation".[68] It allows for a relevant health practitioner to "inspect the premises and observe and speak with any adult with disability or older adult apparently residing at the premises and may, with the consent of the adult concerned (in circumstances where the adult has been provided with the appropriate support for the purposes of making such a decision), examine the adult".[69]

(iii) Victoria

[11.60] The Office of the Public Advocate in Victoria recommended in 2022 that the Victorian Government should make legislative reforms to enable a more comprehensive range of responses to at-risk adults, including granting the Victorian Civil and Administrative Tribunal the power to make a wide range of orders in relation to at-risk adults, as alternatives to guardianship orders, such as entry and assessment orders.[70] Additionally, it recommended the amendment of the Public Advocate's functions in respect of at-risk adults with a "decision-making disability" under the Guardianship and Administration Act 2019 to permit the Public Advocate to apply to the Victorian Civil and Administrative Tribunal or to the Magistrates Court of Victoria for a warrant authorising entry to any premises where the Public Advocate believes that a person with impaired decision-making ability due to a disability is being abused, exploited or

[66] New South Wales Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW – The Need for Action* (2018) at page 19 – 20.

[67] New South Wales Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW – The Need for Action* (2018) at page 23.

[68] Section 17(1) of the Ageing and Disability Commissioner Act 2019 (NSW).

[69] Section 17(3) of the Ageing and Disability Commissioner Act 2019 (NSW).

[70] Victoria Office of the Public Advocate, *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (2022) at page 89.

neglected.[71] In its report, the Office of the Public Advocate referred to the case of a woman who was living in the community in the care of a family member. It noted that in that case, there was sufficient information to enable the police to force entry and the situation was serious enough for the police to remove the woman and transport her to hospital for assessment. However, in less critical situations the police may not have sufficient information to act.[72] The Office added that the police role is limited to offering a referral in cases where there is no clear evidence of criminality.[73]

(iv) Australian Law Reform Commission

[11.61] The Australian Law Reform Commission ("ALRC") considered powers of entry in its 2017 report, *Elder Abuse – A National Legal Response*.[74] Stakeholders had put forward arguments that mirror those set out here, in essence that "[w]here access to the person is blocked (usually by a co-resident relative), the older person is effectively out of reach and their living circumstances (including whether they are suffering abuse and neglect) hidden from view."[75] However, the ALRC ultimately recommended that safeguarding agencies should not be granted a power of entry, on the basis that such powers should be confined to criminal investigation and that the integrity and autonomy of older persons should be respected, including their right to refuse entry. It is worth highlighting that the above recommendations and findings in South Australia, New South Wales and Victoria have been made since the publication of the ALRC's report.

(g) Table of powers of access and assessment

[11.62] Below is a summary of the powers of access to at-risk adults in a private dwelling in other jurisdictions that are available in the adult safeguarding context to assess and interview at-risk adults.

[71] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (2022) at page 90.

[72] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (2022) at page 49 – 50.

[73] Office of the Public Advocate (Victoria), *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (2022) at page 52.

[74] Australian Law Reform Commission, *Report on Elder Abuse – A National Legal Response* (ALRC Report 131 2017).

[75] Australian Law Reform Commission, *Report on Elder Abuse – A National Legal Response* (ALRC Report 131 2017).at para 14.170.

Jurisdiction	Legislation	Exercised by	Warrant required	Interview and assessment
Scotland	Adult Support and Protection (Scotland) Act 2007	Police and council officer (social worker)	Yes, issued by court	Yes
England	None (introduction of legislation is under consideration)	-	-	-
Wales	Social Services and Well-being (Wales) Act 2014	Police and "authorised officer" (social worker)	Yes, issued by court	Yes
Northern Ireland	Proposed under the Adult Protection Bill	Social worker (can request PSNI support)	Yes, issued by court	Yes
Canada (British Columbia)	Adult Guardianship Act 1996	Social worker or health care provider	Yes, issued by court or justice of the peace in immediate circumstances	Yes
Canada (Nova Scotia)	Adult Protection Act 1986	Police officer, social worker, health care professional	Yes, issued by court	Yes
Australia (South Australia)	Ageing and Adult Safeguarding Act 1995	Director of the Office of Ageing Well or member of the Adult Safeguarding Unit	Issued by a magistrate or summary power if entry refused/cannot be gained and reasonable grounds that delay would significantly increase risk of harm, or further harm, being caused to a vulnerable adult, and the Director has approved the use of force.	Yes
Australia (New South Wales)	The Ageing and Disability Commissioner Act 2019	The Ageing and Disability Commissioner	Yes, issued by an authorised officer	Yes

Australia (Victoria)	-	-	-	-

4. Arguments for and against a power of access to at-risk adults in places including private dwellings

[11.63] Introducing a power of access to at-risk adults in places including private dwellings has the potential to both vindicate and interfere with the rights of at-risk adults and third parties. This is a critical consideration in determining whether to introduce such a power, and is discussed in more detail at section 5 below. The broader arguments for and against introducing such a power are discussed in this section.

(a) Arguments in favour of a new power of access to at-risk adults in places including private dwellings

[11.64] Various persuasive arguments in favour of the provision of a new power of access to at-risk adults in private dwellings were discussed in the Issues Paper.[76] These arguments include:

(a) It may be the only means of gaining access to an at-risk adult, for example where a third party is blocking access or where there has been no response to attempts to gain consent to enter the dwelling;
(b) A power of access may prevent abusive situations from escalating and, in the event of criminal offences being disclosed, may prevent the commission of further offences;
(c) The lack of a power of access can prove costly as it can lead to at-risk adults suffering prolonged abuse or neglect; and
(d) The lack of a legal power of access may prevent social workers from taking action where there is suspicion that an at-risk adult is suffering abuse or neglect.

[76] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at paras 6.32 – 6.48.

[11.65] The Adult Safeguarding Bill 2017, a Private Members' Bill, was initiated in the Seanad in March 2017 but lapsed with the dissolution of the 32nd Dáil.[77] While the Bill has since been reinstated to the Seanad Order Paper, the Government has indicated that it intends to await the publication of this Report before developing a separate adult safeguarding Bill to underpin a planned national health sector policy on safeguarding at-risk adults in the context of their interactions with the health sector.[78] The Commission considers that it is worth noting that having researched and consulted extensively in drafting the Adult Safeguarding Bill 2017, the sponsors of the Bill determined that it was appropriate to include powers of entry and inspection in the Bill to apply in a situation where a concerned professional has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection; and the professional is unable to gain access to the adult's dwelling (or another premises) to speak with the adult in private to ascertain if they are making decisions freely.

[11.66] In its Report, *Protecting Our Future*, the Working Group on Elder Abuse recommended that legislation should give a power of entry to the Garda Síochána, where there are reasonable grounds to suspect that "elder abuse" (a term no longer widely used in Ireland or the United Kingdom as it can be construed as ageist)[79] has taken place. The Working Group recommended a power to enter on any premises, if needs be by force, to gain access to the older person in order to interview them. The report was referenced by the Commission in its 2002 *Consultation Paper on Law and the Elderly* wherein the Commission recommended the introduction of a statutory power of entry (for the purposes of gaining access to older people) in certain cases of suspected abuse of older people.[80]

[11.67] The majority of consultees who responded to the Issues Paper, and engaged with the Commission over the course of its work on this Report, agreed that adult safeguarding legislation ought to include a statutory power of access to at-risk

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[77] See the discussion of the 2017 Bill in the background section of this Report.

[78] This separate Bill, the Health (Adult Safeguarding) Bill, was on the Government Legislation Programme for Spring 2024 at the time of publication of this Report. Preparatory research work is underway but the Department of Health has indicated that it does not yet have a definitive schedule for publication of an adult safeguarding Bill. In the final stages of drafting this Report, the Government launched its public consultation on Policy Proposals on Adult Safeguarding in the Health and Social Care Sector: Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024).

[79] McCárthaigh, "Media urged to avoid ageist language in describing older people" *The Irish Times* (23 April 2020) <https://www.irishtimes.com/news/ireland/irish-news/media-urged-to-avoid-ageist-language-in-describing-older-people-1.4235419> accessed on 13 June 2022.

[80] Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC CP 23-2002) at page 71.

adults in private dwellings where there is a reasonable belief on the part of a safeguarding professional, a health care professional or a member of the Garda Síochána that the at-risk adult may be experiencing abuse or neglect and where either a third party is preventing the concerned professional or member from gaining access to the at-risk adult, or where the at-risk adult is blocking access themselves.

[11.68] A number of consultees emphasised that in the vast majority of circumstances, issues can be dealt with or resolved without the need to resort to a statutory power of access. However, it was stated that there are a very limited number of situations where safeguarding staff are actively prevented from entering a dwelling, meaning that a power of access would only be necessary in the most severe cases.[81]

[11.69] The majority of the submissions received from social workers were in agreement that the provision of a new power of access to at-risk adults in private dwellings was necessary, to be used only in rare cases where all other social work skills had been ineffective to gain access to the at-risk adult.[82] Similarly, a number of health and social care workers who engaged with the Commission welcomed the proposed powers, whilst acknowledging that if introduced, the powers will not be used frequently. They noted that in jurisdictions that provide for similar powers of access, the powers are used sparingly but remain very useful to have available as safeguarding tools.

[11.70] Since the publication of the Issues Paper, a study was published which involved interviews with social workers, who highlighted the need for legislation providing a power of entry to access at-risk adults within a dwelling.[83] Participants emphasised that a power of entry is required in some situations where there is an

[81] See, for example, HIQA, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' - Response by the Health Information and Quality Authority (HIQA)* (May 2020) at page 33 – 36, available at: <https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf>; Irish Association of Social Workers, "A Regulatory Framework for Adult Safeguarding" <https://www.iasw.ie/Submissions-and-Representations> accessed on 3 November 2023; See also the Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022).

[82] The Irish Association of Social Workers was of the view that "[a] statutory power of entry could be beneficial in a very small number of cases ... where it is necessary to gain access in order to properly assess whether the person is an adult at risk and to make a decision on what, if any action should be taken." However, it stressed that "[l]egal action should be a last resort." Irish Association of Social Workers, "A Regulatory Framework for Adult Safeguarding" <https://www.iasw.ie/Submissions-and-Representations> accessed on 3 November 2023. See also the Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022) at page 21.

[83] Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52 The British Journal of Social Work 3677 at page 3686.

immediate concern for the safety of an individual.[84] The social workers described situations where a family member had refused access to an at-risk adult and attempts to negotiate access had failed.[85] In those types of situations, many participants in the study believed that social workers should be able to apply to the District Court for an order to gain power to enter and that the law should clarify thresholds in those circumstances.[86]

[11.71] While the provision of a power of access in the adult safeguarding context would be a novel step in Ireland, there is much support for its introduction among almost all actors involved in adult safeguarding. In jurisdictions where a similar power is in force, it appears to be an effective tool in safeguarding at-risk adults as it allows for intervention in cases of suspected abuse or neglect before the situation reaches a criminal threshold.[87]

(b) Arguments against a new power of access to at-risk adults in places including private dwellings

[11.72] Various arguments against the provision of a new power of access were discussed in the Issues Paper.[88] These are briefly summarised below.

[11.73] One argument that has been made against the introduction of a power of access is that there is a need instead for greater focus on community engagement, cooperation and a preventative approach to safeguarding at-risk adults. In opposing an amendment to the Care Bill that would have allowed for a safeguarding power of entry in England, a member of the House of Lords cited a consultation response stating that a power of entry risks being viewed as a quick

[84] Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52 The British Journal of Social Work 3677 at page 3686.

[85] Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52 The British Journal of Social Work 3677 at page 3686.

[86] Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52 The British Journal of Social Work 3677 at page 3686.

[87] See the discussion at section 4(c) below.

[88] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at paras 6.49 – 6.60.

solution, in place of greater focus on community engagement, cooperation and a preventative approach that could be truly empowering to the people involved.[89]

[11.74] A second argument against a power of entry is that the existence of such a power could lead to trust in professionals being compromised. Public and third-sector organisations who made submissions on the potential introduction of a power of entry in England were concerned that such a power would be used as a quick fix that would neither resolve the problem nor improve good professional practice where the intention is to try and build trusting relationships.[90] 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 at-risk adults.[91]

[11.75] Third, some argue that social work skills should be able to overcome access difficulties. 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, but is ultimately achieved through social work skills.[92] However, 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.[93]

[11.76] A related argument concerns the risk that authorities would use the statutory power of access as a default procedure, rather than first trying a consensual approach using less intrusive social work skills. However, as discussed below, the experience of other jurisdictions suggests that this is unlikely, and that statutory powers are only used in the most serious cases.[94]

[11.77] A final argument against the introduction of a safeguarding power of access is that the use of such a power could leave an at-risk adult in greater danger of

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89 House of Lords, *Debate – Care Bill* 14 October 2013 vol 748 col 340; Manthorpe, Martineau, Norrie and Stevens, "Parliamentary Arguments on Powers of Access – The Care Bill Debates" (2016) 16(6) The Journal of Adult Protection 318 at page 322.

90 House of Lords, *Debate – Care Bill* 22 July 2013 vol 747 col 1120.

91 Norrie, Manthorpe, Martineau and Stevens, "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) 18(5) The Journal of Adult Protection 256 at page 262.

92 Manthorpe, Stevens, Martineau and Norrie, "Safeguarding Practice in England where Access to an Adult at Risk is Obstructed by a Third Party: Findings from a Survey" (2017) 19(6) The Journal of Adult Protection 323 at page 329.

93 Manthorpe, Stevens, Martineau and Norrie, "Safeguarding Practice in England where Access to an Adult at Risk is Obstructed by a Third Party: Findings from a Survey" (2017) 19(6) The Journal of Adult Protection 323 at page 329.

94 See the discussion below at section 4(c).

abuse, particularly as a result of retribution from their abuser.[95] Arguments regarding the potential for danger to be increased are linked to the argument that without an accompanying power of removal, a power of access may create an additional risk for at-risk adults.[96]

(c) Discussion

[11.78] Undoubtedly, community engagement, cooperation and a preventative approach are essential to safeguarding at-risk adults, and should be further fostered in Ireland. However, it is evident from research and discussions with consultees working in the area, both in Ireland and in other jurisdictions, that there have been previous cases where every attempt to make contact with an at-risk adult was made, and all failed, resulting in the at-risk adult suffering abuse or neglect unnecessarily.[97]

[11.79] The use of a new power of access is not intended to become a default in safeguarding situations, as the emphasis will always be on less intrusive means of gaining access to at-risk adults, as is reflected in the wording of the proposed legislation. This outcome is evident in jurisdictions such as Scotland, where a power of entry (for the purposes of accessing an at-risk adult) has been in force for over fifteen years and has not replaced the utilisation of social work skills as a method of gaining access to at-risk adults in private dwellings. The use of statutory powers in Scotland has remained a last resort.[98] In South Australia, where a power of entry has been in place since 2019, the power has never been used.[99] The Adult Safeguarding Unit in South Australia has not had occasion to use its statutory investigative powers as in cases where a practitioner is experiencing some opposition from a person of concern, the act of advising the person that the powers exist and may be exercised is enough to encourage the

[95] Williams, "Adult Safeguarding in Wales: One Step in the Right Direction" (2017) 19(4) The Journal of Adult Protection 175 at page 182.

[96] This is discussed in Chapter 12.

[97] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at pages 9 and 10 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023

[98] Preston-Shoot and Cornish, "Paternalism or Proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5 at page 14; Stevens, Martineau, Manthorpe and Norrie, "Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection" (2017) 19(6) The Journal of Adult Protection 312 at page 315.

[99] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at paras 5.1.23 and 5.4.18 – 5.4.21.

person to engage voluntarily with the Unit.[100] In situations where all other social work techniques and attempts to gain access to an at-risk adult have failed and there are concerns for the health, safety or welfare of an at-risk adult, the existence of a power of access would be invaluable in order to protect at-risk adults from harm. The Commission is of the view that the proposed thresholds for applying for and granting a warrant of access, and for exercising a summary power of access, alongside the proposed safeguards (discussed in section 6 below), will prevent these powers being used as a first port of call, unless there is a grave and immediate risk requiring same.[101]

(d) Case studies

[11.80] In support of the Commission's recommendation that a new power of access to at-risk adults in places including private dwellings is necessary, the Commission highlights a number of anonymised case studies drawn from reports published by academics at University College Dublin and the Commissioner for Older People for Northern Ireland[102] in which an at-risk adult suffered neglect or abuse where the existence of a power of access in the adult safeguarding context could have allowed for early intervention and prevented the at-risk adult from experiencing harm and neglect.

(i) Case study 1

[11.81] A report published by academics at University College Dublin in 2019 highlighted a case study of an 83-year-old widowed woman, Lily, who has type 1 diabetes and cognitive impairment, and who was the victim of neglect at the hands of her adult son, Seamus, aged 49.[103]

Seamus moved in with Lily a year previously following the breakdown of his marriage. Seamus had lost his job, was drinking heavily and

[100] South Australia Law Reform Institute, *'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 5.4.19.

[101] See the discussion at section 6 below, and in particular section 6(b).

[102] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at pages 9 and 10 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023; See also Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (2021) at section 8.

[103] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at pages 9 and 10 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023.

became aggressive when drunk, frightening Lily. Seamus took control of Lily's finances.

The Primary Care social worker had arranged for Lily to get a home care package, including a carer to help her with washing, dressing and medications twice a day. Seamus refused to allow carers access to the house and Lily spent most of her time in bed.

Lily missed important medical appointments and Seamus refused to allow the Primary Care social worker or the Public Health nurse to enter the home to check on her on multiple occasions. When Seamus eventually gave consent for Lily's GP to enter the home, Lily had a urinary tract infection, was delirious and required urgent hospital care. In hospital, Lily confided in the doctor that she was afraid of Seamus but could not ask him to leave as he had nowhere else to go.

Seamus then convinced Lily to return home from hospital against medical advice where he again refused to allow the Primary Care social worker, the Public Health nurse or the HSE Safeguarding and Protection Team access to Lily in the home on multiple occasions. There were serious concerns that Seamus was not providing Lily with her medication.

The situation got progressively worse until a member of the Garda Síochána agreed to accompany Lily's GP, the Public Health nurse and the Primary Care social worker to access the home on the grounds of endangerment. Seamus allowed them access to Lily who was found in bed in a diabetic coma and brought to hospital.

Donnelly and O'Brien (UCD, 2019)

[11.82] This case is an example of the rare situations in which all other methods of contacting an at-risk adult have failed and there are health, safety or welfare concerns for the at-risk adult, but safeguarding practitioners have no method of gaining access to the at-risk adult under the current framework.

[11.83] In the report featuring the case study above, the social workers and advocates who participated in the author's research study stated that legislation providing for a power of entry is required in some situations where there is an immediate concern for the safety of an at-risk adult.[104] They described various situations in

[104] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at page 32 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023.

which an at-risk adult would consent to entry but a family member is acting as a gatekeeper, refusing access, and attempts to negotiate with the family member have been protracted and failed.[105] In these situations, the research found that social workers believed they should be able to apply to the District Court for an order to permit entry.[106] The research participants stated that it was important that the law identify the thresholds that would apply to making an application for such an order.[107]

(ii) Case study 2

[11.84] The Commissioner for Older People for Northern Ireland's response[108] to the Northern Ireland Department of Health's consultation document on legislative options to inform the development of an Adult Protection Bill for Northern Ireland[109] contains a number of anonymised case studies, one of which illustrates an instance in which the availability of a power of access could have prevented the continued neglect of an at-risk adult.[110]

> An older woman who had a learning disability was residing in a care home and had married another resident of the home. This caused her family serious concern. The family of her new husband removed her from the care home without her family's knowledge.
>
> After an extensive investigation on the part of her family, she was located and found in a state of neglect to such an extent that the PSNI and local Health Trust became involved. She was found to have capacity at that time and was left in the care of her new husband's relative. Her family were later informed by

[105] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at page 32 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023.

[106] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at page 32 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023.

[107] Donnelly and O'Brien, *Falling Through the Cracks: The Case for Change, Key Developments and Next Steps for Adult Safeguarding in Ireland* (UCD 2019) at page 32 <https://researchrepository.ucd.ie/handle/10197/11242> accessed on 20 July 2023.

[108] Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (2021).

[109] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland – Consultation Document* (2020).

[110] Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (March 2021) at question 8 (Case Study 1).

a neighbour that she had been hospitalised with dehydration and malnourishment.

[11.85] The Commissioner for Older People for Northern Ireland stated that had a power of access been available when the family contacted the local Health Trust initially, a power of access and interview would have allowed practitioners to conduct a private interview to assess whether the older person was making decisions freely.[111] The Commissioner added that the availability of a power of access for private interview would have revealed the level of abuse and neglect at an earlier stage.[112]

5. Rights of at-risk adults and third parties

(a) The constitutional rights of at-risk adults and third parties

[11.86] In this section, the Commission examines whether a power of access is needed in order to meaningfully protect and vindicate the constitutional rights of at-risk adults in Ireland. In particular, the proposed power is intended to vindicate an at-risk adult's constitutional rights to life, liberty, bodily integrity, autonomy, dignity and protection of the person.[113] For example, where a third party is blocking access to an at-risk adult and the at-risk adult is unable to leave the dwelling of their own volition, the adult's right to personal liberty is clearly interfered with. Many other rights are also engaged, particularly if the obstruction is coupled with abuse or neglect of the at-risk adult by the third party. A power of access would empower the at-risk adult to inform authorised officers or members of the Garda Síochána of any abuse or neglect, and would facilitate professionals in taking meaningful steps to support the at-risk adult and prevent harm to them.

[11.87] In the Commission's view, a power of access is a necessary tool to identify and prevent abuse and harm of at-risk adults, as it provides a basis for intervention in situations where no other legal means of intervention is provided for. It is also a foundational first step in accessing any other supports and interventions that may be required by at-risk adults. The Commission is thus of the view that a power of access is needed in order to protect and vindicate the constitutional rights of at-risk adults in Ireland.

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[111] Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (2021) at question 8 (Case Study 1).

[112] Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (2021) at question 8 (Case Study 1).

[113] These rights are discussed in more detail in Chapter 4.

[11.88] However, the proposed power of access also has the potential to interfere with an at-risk adult's or a third party's constitutional rights. In particular, the power may interfere with their rights to liberty, privacy, autonomy and the inviolability of the dwelling. For example, where the authorities access a private home for the purposes of assessing the health, safety and welfare of an at-risk adult, the inviolability of the dwelling is clearly interfered with. The Commission recognises that a power of access to a private home may be viewed by many as a much more significant interference with individual rights than a power of access to a relevant premises, as discussed in Chapter 10. However, as is set out therein and in detail in Chapter 4, constitutional rights are not absolute and may be permissibly interfered with in certain situations. The legitimacy of such interferences is analysed using a proportionality framework.[114] Any proposed power of access must be scrutinised to ensure that it is necessary, proportionate and restricts constitutional rights to the minimum degree possible.

[11.89] The objective of the power of access is to allow relevant authorities to assess the health, safety and welfare of an at-risk adult. In doing so, it will also allow them to assess whether the at-risk adult is suffering abuse or neglect (including self-neglect) and to decide on the appropriate intervention (if any) that should occur. The Commission is of the view that the objective of assessing the health, safety and welfare of an at-risk adult is of sufficient importance to warrant overriding constitutionally protected rights, and that the objective relates to concerns that are pressing and substantial in a free and democratic society. In deciding whether to introduce a power of access as the means to achieve this objective, the Commission has kept in mind that the means must:

> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right as little as possible; and
> (c) be such that their effects on rights are proportional to the objective.[115]

[11.90] The Commission has also kept this framework in mind when developing the parameters of the power of access. For example, the Commission recommends that in most cases, the proposed power may only be exercised on foot of a warrant issued by the District Court, where there are reasonable grounds for believing that there is a risk to the health, safety or welfare of an at-risk adult, and that a warrant for access should be valid only for a short period. This differs from the approach taken in Chapter 10, where the Commission recommends that an authorised officer of the Safeguarding Body should be able to access a relevant premises without a warrant for the purposes of assessing the health,

[114] See Chapter 4.

[115] See the discussion of this framework, as set out in *Heaney v Ireland* [1994] 3 IR 593 (Costello J) at page 607, in Chapter 4.

safety or welfare of an at-risk adult that the authorised officer is of the opinion, based on reasonable grounds, is present therein.

[11.91] In this Chapter, the Commission recommends that a warrant should generally be required to access at-risk adults in places including private dwellings, with a summary power of access available only in limited, urgent situations – as is already the case under the common law. These recommendations are necessary to ensure that the proposed power does not disproportionately interfere with the constitutional rights of at-risk adults and third parties, in particular their rights to liberty, privacy, autonomy and the inviolability of their dwelling.

[11.92] As is discussed in Chapter 4, safeguards may be required when interfering with certain constitutional rights. For example, a warrant obtained from an independent decision-maker is an important safeguard when interfering with the inviolability of the dwelling. Safeguards also help to ensure that an interference is proportionate. The Commission has had regard to these principles in developing the proposed safeguards, which are discussed throughout section 6 below.

[11.93] Finally, the Commission considered the rights implications of a power allowing authorised officers and health and social care professionals to interview and conduct a medical examination of an at-risk adult in a place including a private dwelling. The Commission is of the view that such a power is necessary to assess the health, safety or welfare of an at-risk adult, with a view to vindicating their rights. However, as is discussed at section 6(i), in light of the significant rights implications arising, the Commission is of the view that such powers cannot be exercised where the at-risk adult objects, and the at-risk adult must be informed of their ability to so refuse or object, before the powers are exercised.

(b) The ECHR rights of at-risk adults and third parties

[11.94] The proposed power also engages a number of rights under the European Convention on Human Rights ("ECHR"). For example, introducing the proposed power of access may allow the state to fulfil its positive obligation under Article 2 of the ECHR to take "appropriate steps to safeguard the lives of those within their jurisdiction".[116] Similarly, it may allow the state to vindicate the rights of individuals to be free from ill-treatment under Article 3 of the ECHR, and the rights of individuals to private and family life under Article 8.

[11.95] On the other hand, the proposed power may interfere with rights protected under the ECHR, such as the rights to private and family life and the home under Article 8. In developing the proposed power, the Commission has had regard to the qualified nature of these rights, and the ways in which they may be permissibly interfered with. Such interferences must be prescribed by law, pursue

[116] *LCB v UK* (1998) 27 EHRR 212 at para 36.

a legitimate aim, and be necessary in a democratic society in pursuit of that aim. Article 8(2) of the of the ECHR expressly states that the protection of health and the rights and freedoms of others are such legitimate aims. The European Court of Human Rights has providedguidance on what will suffice as "necessary in a democratic society", and the Commission has carefully considered this in developing the proposed power.

6. A proposed warrant for access to at-risk adults in places including private dwellings, and a summary power of access to at-risk adults in places including private dwellings

[11.96] Having regard to the arguments outlined above at section 4, the need to vindicate the constitutional and ECHR rights of at-risk adults and the experiences of comparative jurisdictions, the Commission is of the view that a power of access to at-risk adults in places including private dwellings should be introduced in Ireland. Specifically, the Commission recommends that adult safeguarding legislation should provide for a warrant for access to at-risk adults in places including private dwellings, for the purposes of assessing the health, safety or welfare of an at-risk adult in situations where there are concerns for them. The Commission also recommends that adult safeguarding legislation should provide for a summary power of access to at-risk adults in places including private dwellings for the same purpose, but for use in urgent situations. This summary power reflects the existing position under the common law, but adds clarity and strengthens the applicable safeguards.

[11.97] The proposed powers of access may be necessary in a range of scenarios, such as where:

(a) there are concerns about abuse or neglect of an at-risk adult and access is being denied by a third party (such as a family member, friend or informal carer);
(b) there are concerns about abuse or neglect of an at-risk adult and access is being denied by the adult themselves, where there are reasons to believe that the at-risk adult is being coerced by a third party into blocking access, or may lack capacity to decide whether to allow the authorities access; or
(c) there are concerns for an at-risk adult but there is no response to numerous efforts to make contact with the at-risk adult.

[11.98] In a recent case in Ireland, an older person, about whom concerns had been raised by neighbours, was found deceased in a house having not been seen for

over one year.[117] The availability of a power of entry would potentially have enabled access for social workers and members of the Garda Síochána in this instance.

[11.99] In relation to the second scenario listed above, relevant authorities may require access to an at-risk adult who is objecting to such access, for various reasons. Consent is not straightforward in the adult safeguarding context. In circumstances of emotional or psychological abuse, coercion, intimidation or duress may be exerted such that an at-risk adult's apparent refusal of consent to access is in fact a result of abusive control. It is notable that in England, where an at-risk adult is being coerced by a third party, an application under the inherent jurisdiction of the High Court can be made on the basis that the coercion the at-risk adult is experiencing prevents them from having full capacity to make a relevant decision, such as refusing entry.[118] The issue of coercion can, and in the view of the Commission should, be addressed by the introduction of a power of access in adult safeguarding legislation, which would apply in cases where there are reasonable grounds for believing that there is a risk to the health, safety or welfare of an at-risk adult. This would include cases of coercion and would allow, where necessary, for an assessment of whether an at-risk adult is acting free of the influence of a third party.

[11.100] Access for the purposes of assessment may also be required in instances where the at-risk adult appears to lack capacity to decide whether to interact with the relevant authorities, but no decision-making supports are in place under the Assisted Decision-Making (Capacity) Act 2015, or where there are reasonable grounds for believing that the at-risk adult is suffering from a mental disorder. The introduction of a power of access would allow authorised officers or members of the Garda Síochána to gain access for the purposes of assessing the at-risk adult, and ascertaining whether they need supports to protect themselves from harm at that particular time – including possible orders or actions under other legislation, as relevant. In this way, the proposed statutory power would dovetail with, and complement, existing legislation such as the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health Act 2001.

[11.101] As noted above, the use of the proposed powers of access should be a last resort, where necessary and appropriate in the circumstances. This will usually arise only where it is not possible for the relevant authorities to access the at-risk adult

[117] McGarry, "Concerns raised a year ago about man found dead at Sallynoggin home local claims" *The Irish Times* (10 February 2022) <https://www.irishtimes.com/news/social-affairs/concerns-raised-a-year-ago-about-man-found-dead-at-sallynoggin-home-local-claims-1.4798855> accessed on 20 July 2023.

[118] *DL v A Local Authority* [2012] EWCA Civ 253; Ruck Keene, "The inherent jurisdiction: where are we now?" (2013) 1 Elder Law Journal 88 at page 88; Pritchard-Jones, "'Palm Tree Justice': The Inherent Jurisdiction in Welfare Cases" (2023) Modern Law Review 1.

outside of the dwelling or other place, such as in a community centre, GP surgery or day service. It may also be the case that serious concerns of abuse or neglect mean that it would be inappropriate to wait to access the at-risk adult outside of the home. In extremely urgent scenarios, the proposed summary power of access could be used.

R. 11.1 **The Commission recommends that** adult safeguarding legislation should make provision for a new power of access to at-risk adults in places including private dwellings, for the purposes of assessing the health, safety or welfare of an at-risk adult.

(a) A proposed warrant for access to at-risk adults in places including private dwellings

[11.102] In its Issues Paper, the Commission discussed the need for powers of entry to gain access to at-risk adults in private dwellings in adult safeguarding cases.119 The majority of consultees agreed that legislation should provide for a power of access to allow for an assessment of the health, safety and welfare of the at-risk adult (including conducting a private interview and medical examination, where necessary and with the at-risk adult's consent). Most of the submissions stated that the exercise of such a power should require an application to court for a warrant in all, or almost all, instances. One consultee was of the opinion that a warrant should always be required while others thought that if there is evidence that someone is being abused, access should be allowed without a warrant.

[11.103] The Commission is of the view that, in light of the constitutional protection afforded to the inviolability of the dwelling, and the relatively unusual nature of the circumstances in which a warrant may be granted (without suspicion of criminality or risk to "life and limb"), the default position should be that the oversight of a court-issued warrant for access should be required. In limited circumstances involving an immediate risk to the "life and limb" of an at-risk adult, the Commission is of the view that the requirement for a warrant may be dispensed with. This is discussed in more detail at section 6(f) below.

[11.104] The requirement to obtain a warrant from an independent decision-maker is an important procedural safeguard in the context of the inviolability of the dwelling, as protected by Article 40.5 of the Constitution.120 Judicial oversight will also

[119] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at para 6.1.

[120] *The People (DPP) v Behan* [2022] IESC 23; *The People (DPP) v Quirke* [2023] IESC 5; *Corcoran v The Commissioner of An Garda Síochána and the Director of Public Prosecutions* [2023] IESC 15. In the older case of *Re Employment Equality Bill 1996* [1997] IESC 6; [1997] 2 IR 321, the Supreme Court was satisifed that provisions conferring powers of entry to premises were

assist in ensuring that the use of a power of access is both necessary and proportionate to achieve the legitimate objective in the circumstances of a particular case. The Commission is of the view that the District Court is the appropriate jurisdiction in which applications for a warrant should be heard.121

R. 11.2 **The Commission recommends that** a power of access should be exercised on foot of a warrant issued by a judge of the District Court. The warrant should permit an authorised officer or a member of the Garda Síochána, or both, accompanied by appropriately qualified health or social care professionals and any other persons the authorised officer or member reasonably considers necessary or appropriate, to enter the place or any part thereof.

(b) Duration of a warrant for access

[11.105] The Commission recommends that a warrant for access should expire three days after the day it is issued. This is indicative of the intention that a warrant for access should be issued only where there is a reasonable belief of a risk to the health, safety or welfare of an at-risk adult, and that the intervention should be strictly temporary in nature. A short period of validity will ensure that the power of access impairs constitutional and ECHR rights as little as possible, and that the power's effect on rights is proportionate to the objective of allowing authorities to assess the health, safety and welfare of an at-risk adult, with a view to ascertaining whether any appropriate supports or interventions are needed.[122]

R. 11.3 **The Commission recommends that** a warrant for access should be valid for three days after the day it is issued.

(c) Who should be empowered to apply for and execute a warrant for access

[11.106] Consultees gave mixed responses to the question of who the power of access should be conferred upon. Some consultees believed the power ought to be conferred on members of the Garda Síochána, others believed it should be conferred on health care professionals or social workers, while others believed it should be conferred on both. Having considered consultees' views and

reasonably necessary to carry out investigations to enforce the Bill's provisions, and as the provisions authorised forcible entry of a dwelling only where a court issued a search warrant on the basis of sworn evidence, they were not contrary to Article 40.5.

[121] See section 6(d) below.

[122] In light of the rights implications, in particular the right to privacy and the inviolability of the dwelling, the validity period for a warrant in this instance is considerably shorter than the validity period for a warrant to enter and inspect a relevant premises, as discussed in Chapter 10.

comparative legislation, the Commission recommends that the application for a warrant should be capable of being made by either an authorised officer of the Safeguarding Body or a member of the Garda Síochána.123 As discussed in section 5, the proposed power has the potential to interfere with the rights of at-risk adults and others. For this reason, the Commission is of the view that a threshold should be required to apply for a warrant. In order to so apply, the authorised officer of the Safeguarding Body or member of the Garda Síochána must have a belief, based on reasonable grounds, that:

(a) an at-risk adult is present in the place;
(b) there is a risk to the health, safety or welfare of the at-risk adult;
(c) a warrant for access is necessary to assess the health, safety or welfare of the at-risk adult; and
(d) access to the at-risk adult cannot be gained by less intrusive means.

[11.107] If a warrant is granted, the question then arises as to who should exercise the power of access on foot of it. In Scotland, both a member of the police force and a council officer (generally a social worker) must be present to exercise a power of entry. The Commission is mindful that the current staffing levels of the HSE's Safeguarding and Protection Teams may be too low to facilitate the implementation of such a requirement in Ireland, particularly where social workers are not on duty at weekends or during the night. In the course of the Commission's consultations on this project, consultees and stakeholders, including social workers and representative bodies, identified the need for higher staffing levels on Safeguarding and Protection Teams and for social workers to be on duty at all times. However, there are multiple resourcing points that would need to be addressed to implement an effective framework for adult safeguarding and the Commission's role is to make recommendations that would promote effective safeguarding and best practice. The Commission believes that the Scottish example is a useful practice that enables the skills of both professions to be combined. Having both a member of the Garda Síochána and a social worker present when executing a warrant for access may also mitigate against the possibility of the power being misused.

[11.108] The presence of a member of the Garda Síochána may prevent potentially volatile situations from escalating and may provide protection for the authorised officer, as well as the at-risk adult, particularly in situations where there is a non-cooperative third party blocking access to the at-risk adult.124 Members of the

[123] As noted above, if the Commission's recommendations in Chapters 5 and 6 were adopted, authorised officers of the Safeguarding Body would be qualified, registered social workers.

[124] This is likely to be a greater risk in places including private dwellings than in relevant premises – as discussed in Chapter 10, the Commission is of the view that authorised officers should be able to access relevant premises without a warrant, with facility to be supported by a member of the Garda Síochána in the event of obstruction.

Garda Síochána have considerable experience in entering dwellings in the exercise of powers of entry for arrest and investigation, as well as in intervening under the Mental Health Act 2001. This expertise would be of benefit to authorised officers seeking to exercise the power. Another reason supporting the presence of a member of the Garda Síochána is that the place being entered may be found to be a crime scene, including the scene of one or more of the offences which the Commission recommends in Chapter 19. If this is the case, the member of the Garda Síochána can invoke powers to designate it as such.[125] There may be evidence that a crime against an at-risk adult has been committed at the place, and the member will be in a position to gather such evidence in accordance with section 7 of the Criminal Justice Act 2006.

[11.109] Accordingly, the Commission recommends that the power to execute a warrant for access should apply to a member of the Garda Síochána or authorised officer of the Safeguarding Body, or both. Ideally, both will be present upon execution of a warrant for access. While it would be best practice for a member the Garda Síochána to be present to execute the warrant, any subsequent interview and medical examination in private may only be carried out by an authorised officer or appropriately qualified health or social care professional.[126]

[11.110] The Commission also recommends that the proposed provisions should permit an authorised officer or member of the Garda Síochána to be accompanied by appropriately qualified health or social care professionals, such as a GP or public health nurse. This will ensure that appropriate expertise is available to assess the health, safety or welfare of an at-risk adult.

[11.111] Mindful of the distress and confusion that may be caused by the exercise of a power of access, it may in some cases be beneficial for an authorised officer or member of the Garda Síochána to be accompanied by a trusted friend or family member of the at-risk adult. This could assist in de-escalating the situation and reassuring the at-risk adult as to the nature and purpose of the order. The Commission recommends that the proposed provisions should also permit the accompaniment of such individuals. This would allow the judge or the applicant member of the Garda Síochána or authorised officer to assess each situation individually and decide whether it is necessary for them to be accompanied by appropriately qualified professionals, or other persons.

[125] Section 5 of the Criminal Justice Act 2006.

[126] See section 6(i) below.

R. 11.4 **The Commission recommends that** an application for a warrant should be capable of being made by either an authorised officer of the Safeguarding Body or a member of the Garda Síochána.

R. 11.5 **The Commission recommends that** in order to apply for a warrant for access, the authorised officer of the Safeguarding Body or member of the Garda Síochána must have a reasonable belief that:

(a) an at-risk adult is present in the place;

(b) there is a risk to the health, safety or welfare of the at-risk adult;

(c) a warrant for access is necessary to assess the health, safety or welfare of the at-risk adult; and

(d) access to the at-risk adult cannot be gained by less intrusive means.

R. 11.6 **The Commission recommends that** the power to execute a warrant for access should apply to a member of the Garda Síochána or authorised officer of the Safeguarding Body, or both.

R. 11.7 **The Commission recommends that** the proposed provisions in adult safeguarding legislation should allow for an authorised officer or member of the Garda Síochána to be accompanied by appropriately qualified health or social care professionals (such as GPs and public health nurses) or any other persons the authorised officer or member of the Garda Síochána reasonably considers necessary or appropriate, such as a trusted friend or family member of the at-risk adult when executing a warrant for access.

(d) Special sitting of the District Court

[11.112] As in Chapter 10, the Commission is of the view that the District Court is the appropriate jurisdiction to hear applications for warrants. Some consultees suggested that the Circuit Court would be the appropriate jurisdiction to hear applications for the interventions discussed in this Chapter and Chapters 10, 12 and 13, as the Circuit Court already deals with applications under the Assisted Decision-Making (Capacity) Act 2015. However, the applications discussed in this Report are distinct, and will not inevitably require expertise in matters regarding capacity. The District Court is also quicker and less expensive to access than the Circuit Court. The District Court is frequently used for urgent orders, including in the domestic violence context and in relation to care orders, including interim and emergency care orders, in respect of children.[127] The possible urgency of the scenarios requiring a warrant supports the view that such orders should be

[127] See the Domestic Violence Act 2018 and Child Care Act 1991, respectively.

sought in the District Court. The Commission is of the view that this is also preferable to the more costly avenue of the High Court.

[11.113] Given the local and limited nature of the District Court, a warrant for access should be sought in the District Court area for the relevant place to which access is sought. However, circumstances may arise in which a warrant for access cannot be obtained quickly, for example because there is difficulty in finding an available District Court judge. The Commission is of the view that a similar model to that set out in section 12(4) of the Child Care Act 1991 should be adopted in the adult safeguarding context. This would allow the applicant to attend a special sitting of the District Court, to ensure that applications are heard sufficiently quickly.

R. 11.8 **The Commission recommends that** adult safeguarding legislation should provide that, in the event that the next sitting of the District Court for the District Court area wherein the place is located is not due to be held within three days of the intended application for a warrant, an application for a warrant may be made at a sitting of the District Court, which has been specially arranged, held within the said three days.

(e) Threshold for granting a warrant for access

[11.114] The Commission recommends that the threshold for granting a warrant for access to an at-risk adult in a place including a private dwelling should be that the court is satisfied by information on oath of an authorised officer or a member of the Garda Síochána that there are reasonable grounds for believing that:

(a) an at-risk adult is present in the place;
(b) there is a risk to the health, safety or welfare of the at-risk adult;
(c) a warrant for access is necessary to assess the health, safety or welfare of the at-risk adult; and
(d) access to the at-risk adult cannot be gained by less intrusive means.

[11.115] It should not be necessary to establish reasonable grounds for believing that an at-risk adult is the victim of a crime, but rather reasonable grounds for believing that there is a risk to the health, safety or welfare of the at-risk adult. Upon accessing the at-risk adult, there may be evidence to suggest that a crime has been committed. However, the power of access is intended to be a power to assess the health, safety or welfare of the at-risk adult.

[11.116] So as not to cause undue interference with the privacy of the individuals concerned and to ensure appropriate regard for the inviolability of the dwelling, the Commission recommends that the relevant authorities should only be issued a warrant for access where it is deemed necessary to protect the health, safety or welfare of an at-risk adult. Setting this threshold will safeguard against any potential abuse of the power and will ensure that the interference with constitutional rights, particularly the inviolability of the dwelling, is proportionate.

[11.117] Several consultees emphasised the importance of ensuring that such a power would be used as a last resort where all other avenues have been explored and where a "reasonable belief" of abuse or neglect has been established. To ensure that this is the case, the Commission recommends that legislation should require that a warrant for access can only be granted where access to the adult cannot be gained by less intrusive means. There ought to be evidence that the member of the Garda Síochána or authorised officer of the Safeguarding Body has sought consent to gain access to the at-risk adult and has been either denied or has not been able to contact anyone in the place to gain consent.128

R. 11.9 **The Commission recommends that** the threshold for the granting of a warrant for access should be that a judge of the District Court is satisfied that there are reasonable grounds for believing that:

(a) an at-risk adult is present in the place;

(b) there is a risk to the health, safety or welfare of the at-risk adult;

(c) a warrant for access is necessary to assess the health, safety or welfare of the at-risk adult; and

(d) access to the at-risk adult cannot be gained by less intrusive means.

(i) Reasonable belief

[11.118] There were mixed responses from consultees to the question of whether evidence of a reasonable belief that an at-risk adult may be at risk of abuse or neglect would constitute a sufficient safeguard to ensure that the power would be used effectively and proportionately, or if any other safeguards would be required.

[11.119] Some consultees proposed that the legislation allowing powers of access for the purposes of accessing an at-risk adult should be such that access is permitted only in very limited circumstances. Some consultees stated that these circumstances should include:

(a) a reasonable belief on the part of a member of the safeguarding social work service of abuse, coercive control, exploitation or neglect;
(b) some objective evidence that supports such a belief;
(c) that any attempt by a safeguarding social worker to enter without such a warrant would defeat the object of the visit, or all other reasonable avenues of entry have been explored and failed; and

[128] This is discussed in more detail throughout this section.

(d) a requirement, generally, that a warrant has been issued by the courts.

[11.120] The Commission is of the view that objective evidence supporting a reasonable belief that a warrant for access is necessary should be required in all cases. Such objective grounds could include:

(a) where an at-risk adult has repeatedly missed GP visits or other medical appointments;
(b) where an at-risk adult has been absent from a day centre that they regularly attend;
(c) where friends, family or neighbours have a reasonable belief of a risk to the health, safety or welfare of an at-risk adult (either as a result of the at-risk adult's own behaviour or a third party's behaviour); and/or
(d) concern that an at-risk adult has not been seen for a prolonged period of time.

[11.121] The Commission thus recommends that when making an application to the District Court for a warrant for access, the applicant should be required to give evidence that there are reasonable grounds for believing each of the matters specified in the threshold.

(ii) Sworn information to make reference to previous attempts to gain access

[11.122] A warrant for access ought to be issued only as a last resort where every other attempt to gain access to the at-risk adult has failed. This is necessary to ensure that the interference with constitutional and ECHR rights is proportionate. In this regard, the Commission recommends that an application for a warrant should be grounded on the sworn evidence of the applicant, stating that reasonable efforts have been made in relation to the following and that such efforts have failed:

(a) to seek consent to enter the place to gain access to the at-risk adult; and
(b) to gain access to the at-risk adult outside of the place.[129]

[11.123] Requiring sworn evidence on these matters will assist the court in considering whether a warrant for access is a proportionate response in the particular case. This will ensure that a warrant for access is only sought and granted where it is necessary and proportionate in the particular circumstances.

[129] "Place" includes a private dwelling but does not include a "relevant premises". "Relevant premises" are discussed and defined in Chapter 10.

R. 11.10 **The Commission recommends that** when making an application to the District Court for a warrant for access, the applicant should be required to give evidence that there are reasonable grounds for believing each of the matters specified in the threshold.

R. 11.11 **The Commission recommends that** an application for a warrant should be grounded on the sworn evidence of the person seeking the warrant, stating that reasonable efforts have been made in relation to the following and that such efforts have failed:

(a) to seek consent to enter the place to gain access to the at-risk adult;

and

(b) to gain access to the at-risk adult outside of the place.

(f) A proposed summary power of access to at-risk adults in places including private dwellings

[11.124] There may be circumstances in which the severity and urgency of the situation requires that access must be gained before an application to the District Court for a warrant could be made. In such circumstances, the urgency of the situation would mean that delaying access to, and assessment of, the at-risk adult pending an application to the court could result in serious harm to, or the death of, the at-risk adult. Having considered consultees' views, comparative legislation, and the need to vindicate the constitutional and ECHR rights of at-risk adults, the Commission is of the view that a summary power of access is necessary in Ireland for such cases.

[11.125] The proposed summary power of access would be similar to the common law power that exists in other circumstances. For example, in DPP v Delaney,130 the duty of members of the Garda Síochána to "safeguard life and limb" was stated by the Supreme Court to be "more important than the inviolability of the dwelling".131 The member of the Garda Síochána was entitled to enter the dwelling in the circumstances of the case, even though they did not have a warrant to do so. Similarly, the Commission is of the view that a summary power of access to at-risk adults in places including private dwellings should be available to members of the Garda Síochána to deal with urgent and immediate situations. As set out below, the threshold of "life and limb" should be retained. Whether a situation meets this standard will need to be assessed by the member, who will be experienced in assessing relative levels of risk. For example, a member might be able to look through a window and see an at-risk adult, or an

[130] *DPP v Delaney* [1997] 3 IR 453. This is discussed above at section 2(b) above.

[131] *DPP v Delaney* [1997] 3 IR 453 (O'Flaherty J) at page 460.

adult who reasonably appears to be an at-risk adult, lying on the floor seemingly unconscious and decide that the threshold is met. Similarly, the member might decide the threshold is met if the at-risk adult called an emergency number and complained about a violent adult son or daughter, but upon arrival to the place there was no answer at the door.

[11.126] Providing for such a power on a clear statutory basis, with an appropriately high threshold, would:

(a) Improve clarity, transparency and legal certainty in relation to the interventions available in the adult safeguarding context;
(b) Ensure that the intervention is provided for by law and is a proportionate interference with individual rights, in particular the constitutional right to inviolability of the dwelling;
(c) Ensure that urgent situations involving at-risk adults can be dealt with appropriately and consistently; and
(d) Allow the proposed adult safeguarding legislation to set out a comprehensive suite of powers available to relevant authorities to safeguard at-risk adults.

[11.127] The Commission thus recommends that adult safeguarding legislation should provide that a member of the Garda Síochána may enter a place including a private dwelling without a warrant, where they have a belief, based on reasonable grounds, that:

(a) an at-risk adult is present in the place;
(b) there is an immediate risk to the life and limb of the at-risk adult; and
(c) the risk is so immediate that the place must be accessed so urgently that there would be insufficient time to apply to a judge of the District Court for a warrant for access.

R. 11.12 **The Commission recommends that** adult safeguarding legislation should provide that a member of the Garda Síochána may enter a place, including a private dwelling, without a warrant where they have a reasonable belief that:

(a) an at-risk adult is present in the place;

(b) there is an immediate risk to the life and limb of the at-risk adult; and

(c) the risk is so immediate that the place must be accessed so urgently that there would be insufficient time to apply to a judge of the District Court for a warrant for access.

This power is referred to in the Commission’s recommendations as a “summary power of access”.

[11.128] The Commission is of the view that, as with the warrant for access, it would be best practice for both a member of the Garda Síochána and an authorised officer of the Safeguarding Body to be present when exercising a summary power of access. However, the same resourcing concerns arise. Also, requiring the attendance of multiple professionals in urgent situations which require a summary power of access would be impractical and could frustrate the purpose of the summary power. For the same reason, the Commission acknowledges that the presence of a trusted friend or family member of the at-risk adult, and of an appropriately qualified person such as a psychiatrist, GP or public health nurse, would be beneficial but is unlikely to be feasible for these urgent cases. Thus, the Commission recommends that adult safeguarding legislation should permit a member of the Garda Síochána to be accompanied by an authorised officer, appropriately qualified health or social care professionals (such as GPs and public health nurses) or any other persons the member reasonably considers necessary or appropriate, such as a trusted friend or family member of the at-risk adult, when exercising a summary power of access. However, the Commission acknowledges that such accompaniment will not be feasible in every case.

[11.129] As it may not be possible for others to accompany the member of the Garda Síochána exercising the proposed summary power, the Commission makes two additional recommendations. First, the Commission recommends that when a summary power of access is exercised, the member of the Garda Síochána must notify the Safeguarding Body in writing and as soon as practicable that the power has been used. This will allow the Safeguarding Body to collect data on the use of the power, and if necessary, to reach out to the at-risk adult directly, as the Safeguarding Body will be most appropriately placed to provide expertise and supports to them.

[11.130] Second, the Commission recommends that where a summary power of access is exercised, the member of the Garda Síochána exercising the power must make an appropriate record of the usage of the power, including the reasons for exercising the power. This record must be uploaded to the PULSE database. These safeguards are necessary to ensure that the power is not abused, and that the interference with rights is proportionate. A summary power of access clearly has significant implications for rights, in particular the at-risk adult's constitutional rights to privacy, dignity and inviolability of the dwelling. It should be exercised only in the most urgent and serious of cases. This is reflected in the threshold, set out above. The Commission's additional recommendations will allow for a means of monitoring the usage of the summary power to ensure that it is not misused, and to allow reviews of instances of its usage.

R. 11.13 **The Commission recommends that** adult safeguarding legislation should permit a member of the Garda Síochána to be accompanied by an authorised officer, appropriately qualified health or social care professionals (such as GPs and public health nurses) or any other persons the member reasonably considers necessary or appropriate, such as a trusted friend or family member of the at-risk adult, when exercising a summary power of access.

R. 11.14 **The Commission recommends that** where a summary power of access is exercised, the member of the Garda Síochána exercising the power must notify the Safeguarding Body in writing as to the use of the power as soon as is practicable.

R. 11.15 **The Commission recommends that** where a summary power of access is exercised, the member of the Garda Síochána exercising the power must make an appropriate record of the usage of the power, including the reasons for exercising the power, and the record must be uploaded to the PULSE database.

(g) Provision of a notice in plain English and oral explanation

[11.131] The Commission is mindful that access to a place such as a private dwelling involves a significant interference with the rights of at-risk adults and third parties, in particular their constitutional rights to privacy and inviolability of the dwelling.132 It is important that at-risk adults in particular are assisted in understanding the legal basis for access and why the access is occurring. Although the warrant for access will be shown to those in the place upon its execution, this is a formal legal document that will not be readily understandable by most people. The Commission thus recommends that adult safeguarding legislation should require that a standard notice in plain English be provided to the at-risk adult whose assessment is intended upon execution of a warrant for access. In addition to explaining the nature of the warrant being exercised, such a document could inform at-risk adults about independent advocacy services and other supports available to them. The Commission is of the view that it would be impractical for this requirement to apply to the summary power of access, so it is limited to the warranted power. The Commission recommends that the precise content and form of this standard notice should be specified in regulations to the adult safeguarding legislation.

[11.132] In addition to the provision of this notice, it would be best practice for an authorised officer or member of the Garda Síochána to explain orally to those present in the place the purpose of their access and the procedure involved. This could be done in cases using the summary power too. This may require appropriate training for members of the Garda Síochána, given that the execution

[132] The rights implications of the proposed power are discussed in more detail in section 5.

of a warrant (or use of the summary power) in these circumstances is very different from the execution of a warrant in the more typical criminal context.133 Although it would be best practice to provide such explanation, any failure to do so should not, in the Commission's view, invalidate the exercise of any power (including the execution of a warrant, where applicable). Whilst it is important that an at-risk adult be assisted in understanding what is happening, giving an appropriately clear oral explanation should not be a statutory precondition for the valid execution of a warrant or exercise of the summary power of access.

R. 11.16 **The Commission recommends that** adult safeguarding legislation should require that a notice in plain English be provided to the at-risk adult whose assessment is intended upon execution of a warrant for access, explaining the nature of the warrant being exercised and the process involved.

R. 11.17 **The Commission recommends that** adult safeguarding legislation should provide that the relevant Minister may prescribe by regulations a standard notice to be provided upon execution of a warrant for access, which explains the nature of the warrant and process involved.

R. 11.18 **The Commission recommends that** when executing a warrant for access or exercising the summary power of access, the authorised officer or member of the Garda Síochána should insofar as practicable explain to the at-risk adult the nature and purpose of the powers they are authorised to exercise. However, any failure to give such an explanation should not invalidate the execution of a warrant or exercise of the summary power.

(h) Use of reasonable force

[11.133] It is standard practice for a warrant allowing entry to a private dwelling to contain provisions that permit a member of the Garda Síochána to use reasonable force to gain entry to that dwelling. Without this provision, the issuing of such a warrant would be futile. Use of reasonable force in this instance could involve the breaking of a window or a lock. The use of reasonable force might be necessary, for example, where all other options to gain access have been exhausted or where the immediacy of the situation necessitates the use of reasonable force.

[11.134] Therefore, the Commission recommends that a warrant for access and a summary power of access provided under adult safeguarding legislation should allow for

[133] The Irish Association of Social Workers has similarly noted the need for specialist expertise when dealing with at-risk adults, and has suggested that "[j]oint training and co-interviewing protocols between Safeguarding and Protection social workers and An Garda Síochána ... should be put in place": Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022) at page 26.

the use of reasonable force, if necessary, by an authorised officer or member of the Garda Síochána to gain access to the place.

R. 11.19 **The Commission recommends that** a warrant for access and a summary power of access provided under adult safeguarding legislation should allow for the use of reasonable force, if necessary, by an authorised officer or member of the Garda Síochána to gain access to the place.

(i) Powers of interview and medical examination

[11.135] As with the power proposed in Chapter 10, this power of access is intended for the purposes of assessing the health, safety or welfare of an at-risk adult. The Commission is of the view that powers of interview and medical examination are necessary to facilitate such an assessment. As such, the Commission recommends that adult safeguarding legislation should allow authorised officers and appropriately qualified health or social care professionals to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a place including a private dwelling.

[11.136] Providing for a power to enforce cooperation by an at-risk adult with an interview and medical assessment would be a significant interference with the rights of an at-risk adult, in particular their constitutional rights to autonomy, dignity and bodily integrity. In the Commission’s view, it would be an overly intrusive, paternalistic approach. As such, the Commission recommends that adult safeguarding legislation should require that such powers cannot be exercised where the at-risk adult objects. The at-risk adult must also be informed in advance of their right to refuse any interview or medical examination. These are critical safeguards to ensure that the proposed powers do not constitute a disproportionate interference with the constitutional and ECHR rights of at-risk adults.

[11.137] As with the power of access itself, these additional powers will not be necessary in all cases. Less intrusive means must always be used first. Equally, access may be gained in a particular case and it may become apparent that the level of risk is in fact much lower than originally thought. In such a case, the proposed powers of interview and medical assessment will not be necessary. However, the Commission is of the view that the powers should be available, on a statutory basis, for cases in which they are required.

R. 11.20 **The Commission recommends that** adult safeguarding legislation should allow authorised officers and appropriately qualified health or social care professionals to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a place including a private dwelling.

R. 11.21 **The Commission recommends that** adult safeguarding legislation should require that, in advance of carrying out any interview or medical examination, an authorised officer or health or social care professional should explain to the at-risk adult that they may refuse to answer any question or to be medically examined.

R. 11.22 **The Commission recommends that** adult safeguarding legislation should require that the powers of interview and medical examination cannot be exercised if the at-risk adult objects.

(j) Offence of obstruction and associated power of arrest

[11.138] Upon executing the warrant for access or exercising the summary power of access, a member of the Garda Síochána may have concerns about any individual(s) present, in particular any individual who may be posing a risk to an at-risk adult. The Commission recommends that the member should be able to request the name and address of such individual, and a record should be kept of these details. This record should be uploaded on the PULSE database.134

[11.139] The proposed power of access is intended to provide a means by which authorities can access an at-risk adult and assess their health, safety and welfare, with a view to determining whether any appropriate supports or interventions are required. Among the situations that the power is intended to address are situations in which a third party is blocking access to the at-risk adult. If that third party could continue to obstruct such access, the power would be futile in many cases. The Commission thus recommends that it should be an offence for a person, other than an at-risk adult, to obstruct or impede a member of the Garda Síochána or an authorised officer when they are executing a warrant for access or exercising the summary power of access. A member of the Garda Síochána should also be able to arrest any individual, other than an at-risk adult, who obstructs or impedes the member when they are executing a warrant for access or exercising the summary power of access.

[11.140] The Commission firmly believes that such an offence and associated power of arrest should not apply in relation to the at-risk adult themselves. Instead, social work skills should be used to explain the purpose of access and to try to reassure the at-risk adult. This approach is necessary to ensure minimal interference with an at-risk adult's rights. Where an at-risk adult continues to resist access in

[134] Given the nature of this power, it is limited to members of the Garda Síochána.

circumstances where there is a reasonable belief of a serious and immediate risk to their health, safety or welfare, the powers of removal and transfer discussed in Chapter 12 may be used.135 As discussed in that Chapter, the use of such powers may be essential to vindicate the rights of the at-risk adult in limited cases. However, the Commission is of the view that in most situations, a power of access allowing for the use of reasonable force to access the place, including a private dwelling, and a power of arrest in relation to third parties who are obstructing access should be sufficient to achieve the objective of assessing the at-risk adult and vindicating their rights.

R. 11.23 **The Commission recommends that** when executing a warrant for access or exercising a summary power of access, a member of the Garda Síochána should be able to require individuals present to provide their name and address, and a record should be kept of these details.

R. 11.24 **The Commission recommends that** it should be an offence for a person, other than an at-risk adult, to obstruct or impede a member of the Garda Síochána or an authorised officer when they are executing a warrant for access or exercising the summary power of access.

R. 11.25 **The Commission recommends that** a member of the Garda Síochána should be able to arrest without warrant any person, other than an at-risk adult, who obstructs or impedes the member when they are executing a warrant for access or exercising the summary power of access.

R. 11.26 **The Commission recommends that** the offence of obstruction and associated power of arrest should not apply in relation to the at-risk adult whose assessment is intended using the power of access.

(k) Anonymity of at-risk adults

[11.141] The threshold for obtaining a warrant for access includes a reasonable belief that there is a risk to the health, safety or welfare of an at-risk adult. Applications for warrants are therefore likely to involve highly sensitive facts and personal details. It is important that the at-risk adult's right to privacy is carefully observed in the context of such applications. The Commission thus recommends, as it does in Chapter 10, that in relation to any proceedings for a warrant for access, it should be an offence for a person to publish, distribute or broadcast any information likely to identify the at-risk adult concerned, unless the court directs otherwise. Similar provisions are contained in existing Irish legislation regarding sensitive applications for orders, such as section 19(9) of the Mental Health Act 2001.

[135] Only if the threshold and requirements as set out in Chapter 12 are fulfilled.

[11.142] It may be that the court considers that it is in the interests of justice that certain information should be published, distributed or broadcast. In such situations, the court should be permitted to specify in a written direction the manner in which such information can be published, distributed or broadcast and impose any conditions it considers necessary. Contravening a direction of this sort, or a condition in such a direction, should also be an offence.

[11.143] As with the offence of obstruction above, it should not be an offence for an at-risk adult to publish, distribute or broadcast any information identifying themselves, or to contravene a direction or a condition in such a direction of the court in this regard.

R. 11.27 **The Commission recommends that** in relation to any proceedings for a warrant for access, it should be an offence for a person, other than an at-risk adult, to publish, distribute or broadcast any information likely to identify the at-risk adult concerned, unless the court directs otherwise. (See the relevant section of the Commission's Adult Safeguarding Bill 2024 regarding the anonymity of adults at risk of harm and others.)

(l) Independent advocacy

[11.144] In Chapter 8, the Commission discusses the benefits of independent advocacy in safeguarding at-risk adults and ensuring that their views are heard. In that Chapter, the Commission recommends that adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, so far as is reasonably practicable, access to independent advocacy services for at-risk adults, where it engages with an at-risk adult directly for the purposes of exercising its functions. This would include where the Safeguarding Body, or its authorised officers, need to intervene to safeguard an at-risk adult by applying for, and executing, a warrant for access. This duty applies only where the at-risk adult experiences significant challenges in doing particular things and where there is no suitable person who could effectively support the at-risk adult to enable their involvement, as explained in detail in section 4(b) of Chapter 8.

[11.145] This duty would apply to a number of interventions, including the power of access to a place including a private dwelling that is proposed in this Chapter, as most interventions would require the Safeguarding Body to engage directly with the at-risk adult. The Commission is of the view that access to independent advocacy services would be a useful additional safeguard in this context. Unlike the authorised officers of the Safeguarding Body or other health or social care workers accompanying them, an independent advocate would not be trying to persuade or counsel the at-risk adult to take a specific course of action; rather they would help them to understand what is happening and assist them in communicating their will and preferences.

[11.146] The situations in which access is sought may be so urgent that it is not possible to obtain independent advocacy services ahead of time. However, reasonable efforts should be made to do so, and where such services are available, an at-risk adult must be facilitated in accessing these services.

(m) A code of practice for authorised officers and others exercising powers, and a statutory immunity

(i) Statutory code of practice

[11.147] Consultees, including professionals working in the area of adult safeguarding, stressed to the Commission the need for practitioners to be provided with guidance on the use of powers under any new adult safeguarding legislation, and meeting statutory thresholds for interventions. Given the complex and intrusive nature of the proposed powers, the Commission is of the view that it would be beneficial for authorised officers (and others who may accompany them) to be provided with a code of practice regarding usage of the powers. This would offer practical guidance on the use of the powers, and could set out the internal, operational detail as to how the statutory powers are to be used and put into practice by relevant professionals. Such a code could be drafted by the relevant Minister, in consultation with the Safeguarding Body and others as it sees fit. Statutory codes of practice regarding adult safeguarding legislation are a feature in other jurisdictions, such as Scotland.[136] Such a code would allow authorised officers and others who may accompany them to be thoroughly apprised of their duties and obligations under the legislation, in addition to relevant thresholds and safeguards. Specific training for members of the Garda Síochána may also be necessary, perhaps in the form of joint training programmes with the Safeguarding Body. This would allow members to build the necessary expertise to allow them to assist other practitioners and bodies in effectively safeguarding at-risk adults.[137]

(ii) A statutory immunity for authorised officers and others exercising powers

[11.148] In relation to the interventions proposed in this Chapter and in Chapters 10, 12 and 13, the Commission considered whether a statutory immunity should be provided for, to clarify that no action would lie against an authorised officer, member of the Garda Síochána or other accompanying individual who exercised powers or functions in accordance with the proposed provisions of adult

[136] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022).

[137] The Commission's recommendations regarding cooperation and information sharing are also relevant here, and are intended to support effective inter-agency working. See Chapters 15 and 16.

safeguarding legislation. On balance, the Commission was of the view that such a provision would be unnecessary and inappropriate. Where there are issues in relation to the exercise of the powers or allegations of non-compliance with statutory requirements, the ordinary common law rules would apply.[138]

7. Conclusions and recommendations

[11.149] Throughout this Chapter, the Commission has explained the rationale for its recommendation that adult safeguarding legislation should make provision for a new power of access to at-risk adults in places including private dwellings, for the purposes of assessing their health, safety and welfare.

[11.150] The proposed warrant for access and summary power of access provide a means to address the gap in existing Irish law that prevents relevant authorities from gaining access to at-risk adults where there are well-founded concerns for their health, safety or welfare. It does so in a way that is, in the view of the Commission, preferable to reliance on the inherent jurisdiction of the High Court and preferable to reliance on existing legislative provisions that were designed for other purposes. The proposed warrant for access and summary power of access would allow for the vindication of an at-risk adult's rights, where they are reasonably believed to be subject to interference or at risk of interference.

[11.151] Building stringent thresholds into the legislation – for example: the need for a warrant in almost all cases and resulting oversight of the District Court; the short duration of the warrant; the requirement of reasonable grounds for a belief of a risk to an at-risk adult's health, safety or welfare; the need for exhaustion of all other avenues of access; and the in-built accountability mechanism of interaction between members of the Garda Síochána and officers of the Safeguarding Body – ensures that the proposed power of access is a proportionate interference with fundamental rights.

[11.152] Similarly, the Commission believes that authorised officers and appropriately qualified health and social care professionals should be empowered to conduct a private interview and medical assessment of the at-risk adult, with their consent, in order to facilitate the assessment of the at-risk adult's health, safety and welfare.

[138] See, for example, actions in negligence against members of the Garda Síochána in relation to the exercise of their public order functions: *Fagan v Garda Commissioner* [2014] IEHC 128.

CHAPTER 12
POWERS OF REMOVAL AND TRANSFER

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1. Introduction

[12.1] In this Chapter, the Commission proposes a removal and transfer order, granted by the District Court, which aims to facilitate an assessment of the health, safety or welfare of an at-risk adult, and of whether any actions are needed to safeguard them, where such assessment cannot be done in the place where the at-risk adult currently is located. This intervention could be used upon gaining access to an at-risk adult or, in limited cases, where access to the at-risk adult has not yet been obtained. It differs from the powers of access recommended in Chapters 10 and 11, where the assessment, interview and medical examination (where applicable) are intended to take place in the relevant premises, private dwelling or other location. Here, the intention is to remove the at-risk adult to another place to facilitate such assessment, as this cannot be done in the place where the at-risk adult currently is located.

[12.2] As with the other interventions proposed in Chapters 10, 11 and 13, this order is intended to be used as a last resort where efforts to obtain the voluntary cooperation of the at-risk adult (and any relevant third parties) have failed. For example, if an at-risk adult consents to attend a health or social care facility or other suitable place and any third parties present facilitate that attendance, the use of the powers discussed in this Chapter will not be necessary.

[12.3] The proposed approach to adult safeguarding interventions is tiered, given that the degree of risk posed will often not be ascertainable prior to gaining access to the at-risk adult. A tiered approach is also necessary because the powers of removal and transfer involve a more significant interference with individual rights than the powers of access proposed in Chapters 10 and 11. For this reason, the Commission is of the view that the threshold for removal and transfer should be higher than the threshold for access: a belief on reasonable grounds that there is a serious and immediate risk to the health, safety or welfare of the at-risk adult should be required (amongst other criteria, discussed below).[1]

[12.4] The relevant authorities should generally have accessed the at-risk adult before applying for a removal and transfer order, and found that they cannot assess:

(a) the at-risk adult's health, safety or welfare, or

(b) whether actions may be required to safeguard the at-risk adult's health, safety or welfare,

in the place where the at-risk adult currently is located.

[1] As is discussed in Chapter 11, for access to an at-risk adult in a place including a private dwelling, a reasonable belief of a risk to the health, safety or welfare of an at-risk adult is required (in addition to other requirements, such as necessity and least intrusive means).

[12.5] If, upon gaining access, a serious and immediate risk meeting the prescribed thresholds is identified, the authorities can then apply to the District Court for a removal and transfer order as proposed in this Chapter, the exercise of which would allow the at-risk adult to be moved to a designated health or social care facility or other suitable place specified by the court to assess the above matters.

[12.6] If access to the at-risk adult has not yet been obtained, the authorities may still apply to the District Court for a removal and transfer order, but a judge of the District Court must (in addition to the general threshold) be satisfied that the granting of a warrant for access would be insufficient in the circumstances. This ensures that the tiered approach is followed, and that the least intrusive order is granted in each particular case.

[12.7] In formulating its recommendations in this Chapter, the Commission has examined the existing mechanisms in Ireland for removing and detaining at-risk adults to analyse and identify any gaps in the law. The Commission has also examined the implications of such powers for constitutional rights and rights under the European Convention on Human Rights ("ECHR"), and the approaches of other jurisdictions to assessment orders and powers of removal, where these are features of the adult safeguarding landscape. This analysis has assisted the Commission in determining the appropriate framing of such orders in Irish law. For example, in light of the significant rights implications that would arise, the Commission does not recommend the introduction of a summary power of removal in Irish law.

(a) Powers of removal and transfer as a gateway to other supports

[12.8] As discussed in Chapter 11, the interventions proposed by the Commission are intended to act as a gateway to the effective use of other legislation, such as the Mental Health Act 2001 and the Assisted Decision-Making (Capacity) Act 2015. Provisions in adult safeguarding legislation allowing for removal and transfer orders would be interoperable with existing mental health and capacity legislation, and anticipated detention legislation.[2] Where there are gaps in the relevant statutory schemes, the use of a removal and transfer order could allow authorities to build an evidential basis to support an application under the inherent jurisdiction of the High Court.[3]

[12.9] Bringing an at-risk adult into contact with health and social care professionals via the exercise of these powers would allow the at-risk adult to receive assessment and appropriate supports. Under the present system, it can be difficult or

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[2] Specifically, the Government's Protection of Liberty Safeguards Bill. See section 5(g)(ii) below.

[3] See Chapter 1. Even if adult safeguarding legislation is introduced, the inherent jurisdiction of the High Court may continue to be used in extreme and unusual situations which the law does not specifically provide for.

impossible to access at-risk adults in the most severe circumstances to ensure that they are receiving the required support they need to protect themselves from harm at particular times. For example, it may not be possible to get an at-risk adult alone in the place where they are currently located, or the location may not be sufficiently safe or sanitary to conduct or attempt to conduct a medical examination. In such cases, powers of removal and transfer would provide authorised officers and members of the Garda Síochána with a very valuable tool to safeguard at-risk adults.

[12.10] In addition to facilitating assessment, the use of a removal and transfer order would result in a brief period of separation between an at-risk adult and any third parties. This may have the additional benefit of mitigating any coercion or undue influence on the part of such third parties, offering the at-risk adult breathing space and an opportunity to confide in appropriately qualified professionals, after being informed of their rights and options.

2. Existing mechanisms for removing and detaining adults under Irish law

(a) Mental Health Act 2001

[12.11] Outside of the criminal and public health[4] contexts, the only mechanism in Irish legislation for the removal of an adult and consequential deprivation of their liberty is provided for by the Mental Health Act 2001.[5] The 2001Act allows for the removal of persons to "approved centres"[6] to facilitate their involuntary admission to such centres, where the person is suffering from a "mental disorder".[7] The 2001 Act provides extensive in-built safeguards to guard against arbitrary detention.

[12.12] Some consultees who responded to the Commission's Issues Paper,[8] including a public body, expressed concern that the existing powers under the Mental Health

[4] See the Health Act 1947.

[5] However, see the recent case of *Health Service Executive v AJ (APUM)* [2024] IEHC 166. Dignam J held at para 19 that section 9 of the Courts (Supplemental Provisions) Act 1961 vests a broad, protective jurisdiction in the High Court which allows for the making of detention orders on a standalone basis, i.e. outside of the wardship process, and is not precluded by the existence of an order under the Mental Health Act 2001. This case is discussed in more detail in Chapter 1.

[6] Section 13 of the Mental Health Act 2001.

[7] Part 2 of the Mental Health Act 2001. See also the definition of "mental health disorder" in section 3(1).

[8] Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019).

Act 2001 may be misused in the absence of provisions for removal in adult safeguarding legislation to facilitate assessments in limited circumstances.

(b) Inherent Jurisdiction of the High Court

[12.13] The inherent jurisdiction of the High Court, discussed in depth in Chapter 1,[9] can be used to make interventions of the type proposed in this Chapter. The High Court has noted that "[i]t has been accepted within the inherent jurisdiction case law that a person who is either a child or a person lacking capacity can be detained in order to protect their right to life and their welfare. The inherent jurisdiction exists in this context to enable the Court to vindicate the rights of vulnerable persons".[10] There is also support for the use of the High Court's inherent jurisdiction in relation to persons who do not lack decision-making capacity in narrow circumstances.

[12.14] However, making applications for an order pursuant to the inherent jurisdiction of the High Court can be costly and complex. The Commission's consultations with stakeholders indicated that there is lack of awareness of the potential to intervene in this way amongst some social care professionals, while others stressed that the current over-reliance on the inherent jurisdiction is inappropriate. The Commission is of the view that providing for a statutory regime of safeguarding interventions would be far preferable to the use of the inherent jurisdiction, for reasons of transparency, clarity and vindication of rights, amongst others.[11] The Commission believes that it would be more cost-effective and less cumbersome to have applications for orders provided for under adult safeguarding legislation to be heard in the District Court. This would also align with other statutory provisions regarding urgent interventions, as is discussed further below at section 5(a)(vi).

3. Assessment orders and powers of removal and transfer in other jurisdictions

[12.15] A number of jurisdictions provide for orders authorising the temporary removal of an at-risk adult from the place where they are currently located, including for the purposes of facilitating an assessment.

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[9] See also Chapter 11.

[10] *Health Service Executive v JB (No 2)* [2016] IEHC 575 at para 111 (O'Hanlon J).

[11] The significant benefits of a statutory scheme, as a preferable alternative to the use of the inherent jurisdiction of the High Court, are discussed in Chapter 1 and below.

(a) Scotland

[12.16] As noted in Chapters 10 and 11, in Scotland, local councils are responsible for providing social work services for children and at-risk adults.

[12.17] Assessment orders are provided for under section 11 of the Adult Support and Protection (Scotland) Act 2007. A council may apply to the sheriff[12] for an "assessment order" which authorises a council officer (generally a social worker) to move a specified person temporarily to allow:

(a) a council officer, or any council nominee, to interview the person in private, and
(b) a health professional nominated by the council to conduct a private medical examination of the person.[13]

[12.18] These powers of assessment are 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 the council needs to do anything in order to protect the person from harm.[14]

[12.19] An assessment order will only be granted if the sheriff is satisfied:

(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.[15]

[12.20] Section 13 of the Adult Support and Protection (Scotland) Act 2007 restricts the exercise of an assessment order. 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,

[12] Similar to a Circuit Court judge.

[13] Section 11(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[14] Section 11(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[15] Section 12 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

during a visit under section 7.[16]

[12.21] Under section 35(1) and (2) of the Act, an "adult at risk" may only be removed for the purposes of performing an assessment if they consent to the granting of the assessment order or consent to the taking of an action for the purposes of carrying out or enforcing an assessment order. However, section 35(3)(a) provides that a refusal to consent may be ignored if the sheriff or person exercising the assessment order reasonably believes (a) that the adult has been unduly pressurised to refuse consent, and (b) that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the assessment order or action is intended to prevent.[17] While an "adult at risk" may be removed for the purposes of performing an assessment, refusal to consent to an interview or a medical examination cannot be ignored.[18] It is noteworthy that the Scottish legislation does not differentiate between adults with or without decision-making capacity in this context.

[12.22] The 2007 Act also provides for removal orders. Under section 14(1) of the 2007 Act, a council may apply to the sheriff for a removal order which authorises:

> (a) 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
>
> (b) the council to take such reasonable steps as it thinks fit for the purpose of protecting the moved person from harm.[19]

[12.23] In "urgent cases", a removal order may be sought from a justice of the peace, in accordance with section 40 of the Act.[20]

[12.24] Section 14(2) of the 2007 Act provides that a removal order expires seven days after the day on which an "adult at risk" has been moved pursuant to the order, or a shorter period if specified in the order. A sheriff may grant a removal order only if satisfied: (a) that the person in respect of whom the order is sought is an

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[16] Section 13 of the Adult Support and Protection (Scotland) Act 2007 (asp 10). These sections are discussed in Chapter 11.

[17] Section 35(4) of the Adult Support and Protection (Scotland) Act 2007 provides that an "adult at risk" may be considered to have been unduly pressurised to refuse to consent to the granting of an order or the taking of an action if it appears— (a) 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 (b) that the "adult at risk" would consent if the adult did not have confidence and trust in that person.

[18] Section 35(6) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[19] Section 14(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[20] Section 40(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) provides that "urgent cases" refers to circumstances where it is no practicable to apply to the sheriff, and an adult at risk is likely to be harmed if there is any delay in granting such an order.

"adult at risk" who is likely to be seriously harmed if not moved to another place, and (b) as to the availability and suitability of the place to which the "adult at risk" is to be moved.[21] Provision is made for variation or recall of a removal order in section 17 of the 2007 Act.

[12.25] The purpose of the removal order is to provide "adults at risk" with the safety they require to make a decision regarding their welfare. An adult may choose to return home to the threatening situation, but this provision is designed to provide them with the time and space away from the threat to decide if that is what they want to do.[22]

[12.26] Section 35 of the 2007 Act applies in the same way to removal orders as to assessment orders. Generally, consent is required, but refusal to consent may be ignored in specified circumstances. While an "adult at risk" may be removed without their consent, an interview or medical assessment cannot be performed without their consent. The local authority may apply for an order without the consent of the adult, but once the order has been executed and the adult is removed, they can immediately return home if they do not wish to remain. There are no compulsory measures to detain someone without their consent. It has been noted that this limits the usefulness of section 35 but reduces the potential for breach of the human rights of the individual whose safety such measures are designed to protect.[23]

[12.27] When first introduced, concern was voiced that the Scottish legislation could have the potential to lead to paternalistic adult support and protection practices.[24] However, research into the outcomes of interventions under the Adult Support and Protection (Scotland) Act 2007 found (albeit on a very small sample of ten case studies) that the 2007 Act has achieved a balance between autonomy

[21] Section 15(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[22] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022) at pages 80 – 81: "A removal order can only be granted in respect of an adult at risk of harm and is primarily for protection purposes and not for a council interview or a medical examination. It permits the person named in the order to be moved from any place to protect them from harm. For example, the place in which the adult at risk actually lives may be a contributory factor in the harm and the move may provide "breathing space" for that specified person." <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2022/07/adult-support-protection-scotland-act-2007-code-practice-3/documents/adult-support-protection-scotland-act-2007-code-practice/adult-support-protection-scotland-act-2007-code-practice/govscot%3Adocument/adult-support-protection-scotland-act-2007-code-practice.pdf>

[23] Stewart, "The Implementation of Adult Support and Protection (Scotland) Act 2007" (2016) University of Glasgow at page 44 <https://theses.gla.ac.uk/7083/1/2016StewartPhd.pdf> accessed on 21 July 2023.

[24] Preston-Shoot and Cornish, "Paternalism or Proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5 at page 7.

and protection.[25] Despite fears that the 2007 Act would be used intrusively and to compel people to do what agencies saw as in their best interests, commentators have pointed to the infrequent use of orders in practice as suggestive of the resolution of many situations by contact, the use of relationship-building and voluntary measures.[26]

(b) England

[12.28] In England there are no general powers of assessment or removal in respect of at-risk adults provided under the Care Act 2014. There are statutory powers of assessment and removal applying to persons who are believed to be suffering from a mental disorder under the Mental Health Act 1983.[27] A person believed to be suffering from a mental disorder may be removed to a place of safety pursuant to a warrant if it appears to a justice of the peace, based on information on oath from an approved mental health professional, that there is reasonable cause to suspect such a person:

(a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control, in any place within the jurisdiction of the justice, or

(b) being unable to care for themself, is living alone in any such place.[28]

[12.29] The justice may issue a warrant authorising a member of the police to enter, if need be by force, any premises specified in the warrant in which that person is believed to be, and, if thought fit, to remove them to a place of safety with a view to the making of an application in respect of them under Part II (Compulsory Admission to Hospital and Guardianship) of the 1983 Act, or of other arrangements for their treatment or care.[29] While this power applies only to persons who are believed to be suffering from a mental disorder, it is noteworthy that the purpose of the power is to safeguard the at-risk adult only in situations of abuse or self-neglect specifically.

[12.30] Under the Mental Capacity Act 2005, the Court of Protection may detain persons over the age of 16 who lack decision-making capacity, where this is in their best interests. "Supervisory bodies" – primarily local authorities – may also authorise

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[25] Preston-Shoot and Cornish, "Paternalism or Proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5 at page 14.

[26] Preston-Shoot and Cornish, "Paternalism or Proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5 at page 14.

[27] Section 135 of the Mental Health Act 1983 (UK).

[28] Section 135(1) of the Mental Health Act 1983 (UK).

[29] Section 135(1) of the Mental Health Act 1983 (UK).

deprivations of liberty for adults aged over 18 in certain settings,[30] in accordance with the Deprivation of Liberty Safeguards ("DOLS") under the 2005 Act.[31] Such authorisation is a complex process, as is outlined in detail in the Law Commission of England and Wales' Report entitled *Mental Capacity and Deprivation of Liberty*.[32] The Court of Protection can hear any challenges to DOLS authorisations.

[12.31] Where a person has decision-making capacity, social workers in England have increasingly relied on the inherent jurisdiction of the High Court in situations where there is evidence that an at-risk adult is experiencing coercion, abuse or undue influence. In such cases, an application is made to the High Court of England and Wales to have the at-risk adult removed from the situation presenting a threat to their health or welfare.[33] As is discussed in Chapters 1 and 11, the use of the inherent jurisdiction in England and Wales to protect adults who are capacitous but otherwise "vulnerable" was confirmed in *Re SA*[34] and *DL v A Local Authority*.[35]

[12.32] This approach is also evident in the case of *Southend-on-Sea Borough Council v Meyers*.[36] This case concerned an at-risk adult, Mr Meyers, who lived with his son, KF. KF exhibited challenging behaviour and had long-term problems with drug and alcohol addiction. The local authority was concerned that KF had been preventing his father from receiving the necessary care he needed for his physical health, which had left him living in a poor environment at home. The court held it would be lawful to temporarily move Mr Meyers to a care home. The Court then decided that Mr Meyers could return home but not to live with his son, KF. This is an example of a situation in which an at-risk adult had decision-making capacity,

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30 Hospitals and care homes only.

31 These are contained in Schedules A1 and 1A to the Mental Capacity Act 2005. Issues with the DOLS are outlined in detail in Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372-2017). The DOLS were intended to be replaced by Liberty Protection Safeguards ("LPS") pursuant to the Mental Capacity (Amendment) Act 2019, but this has now been postponed: Minister of State for Care, "Delay to the implementation of the Liberty Protection Safeguards" (5 April 2023), accessible at: <https://committees.parliament.uk/publications/39330/documents/193093/default/ > last accessed 26 March 2024; Welsh Government, "Written Statement: Update on the implementation of the Liberty Protection Safeguards" (5 April 2023) < https://www.gov.wales/written-statement-update-implementation-liberty-protection-safeguards > accessed on 15 February 2024; "What now for deprivations of liberty?" *Local Government Lawyer* (18 July 2023) <https://www.localgovernmentlawyer.co.uk/adult-social-care/307-adult-care-features/54484-what-now-for-the-deprivation-of-liberty> accessed on 15 February 2024.

32 Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372-2017), Chapter 4.

33 The use of the inherent jurisdiction in England and Wales is discussed in Chapter 1.

34 *Re SA* [2005] EWHC 2942 (Fam) at para 77.

35 *DL v A Local Authority* [2012] EWCA Civ 253.

36 [2019] EWHC 399.

but that capacity was deemed diminished as a result of the coercion he experienced as opposed to a mental impairment.[37]

(c) Wales

[12.33] There is no provision for a general power of removal of an at-risk adult in Welsh legislation. As is discussed in Chapter 11, the Social Services and Well-being (Wales) Act 2014 provides for adult protection and support orders. Such orders do not grant a power of removal but simply allow an authorised officer to gain access to a person suspected of being an "adult at risk" to determine whether they are making decisions freely and whether further action is required. The principle is that the wishes of an "adult at risk" should be capable of being freely expressed and that they should be respected.[38]

[12.34] As is the case in England, under the Mental Health Act 1983 a person may be admitted to a hospital and detained for a period not exceeding 28 days on the grounds that the person is suffering from a mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) and detaining that person is in that person's interests for their own health or safety or with a view to the protection of other persons.[39] An application for admission must be founded on the written recommendations of two medical practitioners.

[12.35] The Mental Capacity Act 2005, including the DOLS, applies in Wales. However, Welsh Ministers have regulation-making powers in respect of matters concerning Wales.[40]

(d) Northern Ireland

[12.36] Under the Adult Protection Bill proposed by the Northern Irish Department of Health, an "assessment order" will permit a suitably experienced, trained and qualified social worker to take an at-risk adult from a premises to a more suitable location to carry out an interview.[41]

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[37] Pritchard-Jones, *The Inherent Jurisdiction of the High Court* (Research in Practice 2020) at page 5 <https://www.researchinpractice.org.uk/media/4683/inherent_jurisdition_pg_web.pdf> accessed on 21 July 2023.

[38] Government of Wales, *Social Services and Well-being (Wales) Act 2014, Working Together to Safeguard People: Volume 4 - Adult Protection and Support Orders* (2016) at page 1.

[39] Section 2(2) of the Mental Health Act 1983 (UK).

[40] Welsh Government, "Written Statement: Update on the implementation of the Liberty Protection Safeguards" (5 April 2023) < https://www.gov.wales/written-statement-update-implementation-liberty-protection-safeguards > accessed on 15 February 2024.

[41] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* (2021) at section 6 <https://www.health-

[12.37] It is also proposed that a "removal order" will permit a suitably experienced, trained, and qualified social worker to remove an at-risk adult from a premises to another location for up to seven days if the adult is likely to be seriously harmed.[42]

[12.38] The same provisions, restrictions and requirements will apply to these powers as to the proposed power of access, discussed in Chapter 11.

(e) Canada

(i) British Columbia (Canada)

[12.39] Under section 56 of the Adult Guardianship Act 1996, a court may, upon an application being made to it, grant an order for the provision of support and assistance to an adult without their consent. The court must be satisfied that the adult:

> (a) is abused or neglected,
>
> (b) is unable to seek support and assistance because of an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect, and
>
> (c) needs and would benefit from the services proposed in the support and assistance plan.[43]

[12.40] Such support and assistance to be provided may include admission to an available care facility, hospital or other facility for a specified period of up to one year, or supervised residence in a care home, the adult's home or some other person's home, for a specified period of up to one year.

[12.41] Provision is also made for emergency assistance. Section 59 of the 1996 Act permits a person from a designated agency to:

> (a) enter, without a court order or a warrant, any premises where the adult may be located and use any reasonable force that may be necessary in the circumstances;

ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 21 July 2023.

[42] Department of Health (Northern Ireland), *Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration* (2021) at section 6 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 21 July 2023.

[43] Section 56 of the Adult Guardianship Act 1996 (BC).

(b) remove the adult from the premises and convey them to a safe place;

(c) provide the adult with emergency health care;

(d) inform the Public Guardian and Trustee that the adult's financial affairs need immediate protection;

(e) take any other emergency measure that is necessary to protect the adult from harm.[44]

[12.42] A person from a designated agency can only take such actions without the adult's agreement, if "the adult is apparently abused or neglected", the adult is apparently incapable of giving or refusing consent, and it is necessary to act without delay, in the opinion of the person from the designated agency, to:

(a) preserve the adult's life,
(b) prevent serious physical or mental harm to the adult, or
(c) protect the adult's property from significant damage or loss.[45]

[12.43] In late 2023, British Columbia's Human Rights Commissioner launched an inquiry into the use of emergency powers to involuntarily detain adults under the Adult Guardianship Act 1996.[46]

(ii) Manitoba (Canada)

[12.44] The Adults Living with an Intellectual Disability Act provides that if, following an investigation under the Act, "the executive director believes that an adult living with an intellectual disability is or is likely to be abused or neglected, the executive director may take such action to protect the adult as the executive director considers appropriate".[47] This includes taking emergency intervention action under section 26.

[12.45] Section 26 of the Act provides that the executive director may "without a court order, take such emergency intervention action as is necessary to protect the adult living with an intellectual disability, including removing the adult to a place of safety". The threshold for taking such action is that the executive director

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[44] Section 59(2) of the Adult Guardianship Act 1996 (BC).

[45] Section 59(1) of the Adult Guardianship Act 1996 (BC).

[46] British Columbia's Office of the Human Rights Commissioner, Commissioner launches inquiry into involuntary detentions under Adult Guardianship Act, orders health agencies to release data (20 November 2023) < https://bchumanrights.ca/news/commissioner-launches-inquiry-into-involuntary-detentions-under-adult-guardianship-act-orders-health-agencies-to-release-data/ > accessed 15 February 2024.

[47] Section 25(1) of the Adults Living with an Intellectual Disability Act (Manitoba).

"believes on reasonable grounds that (a) the adult is or is likely to be abused or neglected; and (b) there is immediate danger of death or serious harm or deterioration to the physical or mental health of the adult".[48] Emergency intervention may continue for up to 120 hours from the time the executive director commences the action.[49]

[12.46] There are duties to inform both the adult and other persons (such as relatives and any substitute decision makers) when such emergency intervention action is taken.

(iii) Nova Scotia (Canada)

[12.47] As discussed in Chapter 11, the Adult Protection Act 1989 provides for an adult protection order for entry for the purposes of carrying out an assessment of the adult. After an assessment takes place, the Minister of Community Services can apply to the court for an order declaring the person to be an adult in need of protection, and where necessary, seek to obtain a protective intervention order. This application can only be made where the Minister is satisfied that there are "reasonable and probable grounds to believe a person is an adult in need of protection".[50]

[12.48] Upon such application, if the court finds "that a person is an adult in need of protection and either:

> (a) is not mentally competent to decide whether or not to accept the assistance of the Minister; or
>
> (b) is refusing the assistance by reason of duress,
>
> the court shall so declare and may, where it appears to the court to be in the best interest of that person,
>
> (c) make an order authorizing the Minister to provide the adult with services, including placement in a facility approved by the Minister, which will enhance the ability of the adult to care and fend adequately for [themself] or which will protect the adult from abuse or neglect".[51]

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48 Section 26(1) of the Adults Living with an Intellectual Disability Act (Manitoba).

49 Section 26(4) of the Adults Living with an Intellectual Disability Act (Manitoba).

50 Section 9 of the Adult Protection Act 1989 (Nova Scotia). An "adult in need of protection" is defined in section 3 of the Act.

51 Section 9(3) of the Adult Protection Act 1989 (Nova Scotia).

[12.49] Such an order expires six months after it is made,[52] and provision is made for such orders to be varied, renewed or terminated.

[12.50] The 1989 Act also separately provides for "removal for protection". Under section 10, the Minister can authorise the immediate removal of a person "to such place as the Minister considers fit and proper for the protection of the person and the preservation of [their] life" where after an assessment, the Minister is satisfied that there are reasonable and probable grounds to believe that:

> (a) the life of the person is in danger;
>
> (b) the person is an adult in need of protection; and
>
> (c) the person is not mentally competent to decide whether or not to accept the assistance of the Minister or is refusing the assistance by reason of duress.[53]

[12.51] Where the Minister authorises an immediate removal, within five days of the removal they must apply for a court order declaring that the person is an adult in need of protection, unless the adult is returned before that date.[54] Upon hearing that application, the court may dismiss the application and direct the return of the person removed, or make an order in accordance with section 9(3) of the 1989 Act, as is discussed above.[55]

[12.52] Guidance on the use of these interventions is given in the Adult Protection Policy Manual, which stresses that "Adult Protection workers must apply to the court under a Section 9 or 10 only as a last resort after all other interventions have been explored and deemed to not be in the client's best interests".[56] Workers are advised to apply for immediate removal under section 10 where they believe "that there are reasonable and probable grounds that the client meets the criteria of an adult in need of protection and a reasonable adult would conclude that [their]life will most likely cease within 48 hours if Adult Protection does not intervene".[57]

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52 Section 9(5) of the Adult Protection Act 1989 (Nova Scotia).

53 Section 10(1) of the Adult Protection Act, RSNS 1989, c 2 (Nova Scotia).

54 Section 10(2) of the Adult Protection Act, RSNS 1989, c 2 (Nova Scotia).

55 Section 10(5) of the Adult Protection Act, RSNS 1989, c 2 (Nova Scotia).

56 Department of Health and Wellness, *Adult Protection Policy Manual* (last reviewed 10 October 2022) at section 6.5.1 < https://novascotia.ca/dhw/ccs/documents/Adult-Protection-Policy-Manual.pdf > accessed 5 December 2023.

57 Department of Health and Wellness, *Adult Protection Policy Manual* (last reviewed 10 October 2022) at section 6.5.1 < https://novascotia.ca/dhw/ccs/documents/Adult-Protection-Policy-Manual.pdf > accessed 5 December 2023.

(iv) New Brunswick (Canada)

[12.53] As discussed in Chapters 5 and 10, the Family Services Act 1980 provides for a range of powers to support and protect neglected adults[58] and abused adults.[59] If, after an investigation under section 35(1), the Minister is satisfied "that a person is a neglected adult or an abused adult and is mentally incompetent, the Minister may:

(a) apply for an order under subsection 39(1), or

(b) if section 37.1 applies, put the person under protective care and proceed under that section."[60]

[12.54] Where a person is placed under protective care, the Minister may, among other things, "remove the person from the location where the person is residing and put the person in such other location as in the Minister's opinion is suitable".[61] Within five days of placing a person under protective care, the Minister must release the person from protective care, or apply to the court for an order under section 39(1) of the 1980 Act.[62]

[12.55] Upon such applications, if the court "is satisfied that the person is a neglected adult or an abused adult and the person is mentally incompetent, the court may, where it appears in the best interests of the person to do so", make a number of orders. This includes "an order directing that the person who is the subject of the application be placed under the supervision of the Minister, subject to such conditions as may be set out in the order, including conditions with respect to the care, control and management of any property of the person".[63] Specific orders may also be made for hospitalisation of the person. Under section 40(1), "[w]here medical evidence at the hearing discloses that a neglected adult or an abused adult requires treatment in a hospital facility the court may include in an order made under subsection 39(1) an order for hospitalization". Under section 40(2), "[a]t any time pending the final determination of an application for an

[58] A "neglected adult" is defined as an adult who is a disabled person or an elderly person, or is within a group prescribed by regulation, and who is "incapable of caring properly for [themselves] by reason of physical or mental infirmity and is not receiving proper care and attention"; or who "refuses, delays or is unable to make provision for [their]proper care or attention". See section 34(1) of the Family Services Act 1980 (New Brunswick).

[59] An abused adult is defined as an adult who is a disabled person, elderly person, or person prescribed by regulation and is a victim or is in danger of being a victim of physical or sexual abuse, mental cruelty or any combination of these categories. See section 34(2) of the Family Services Act 1980 (New Brunswick).

[60] Section 37.1(1) of the Family Services Act 1980 (New Brunswick).

[61] Section 37.1(3) of the Family Services Act 1980 (New Brunswick).

[62] Section 37.1(4) of the Family Services Act 1980 (New Brunswick).

[63] Section 39(1) of the Family Services Act 1980 (New Brunswick).

order under subsection 39(1), the court may order the removal of the person in respect of whom the order is sought to a hospital facility or other place without delay if a medical practitioner certifies that, in [their] opinion, it is necessary to do so in the interests of the person's health".

(v) Newfoundland and Labrador (Canada)

[12.56] The Adult Protection Act 2021 provides for an application to court by a director[64] where a section 14 investigation has commenced and the director reasonably believes that an adult is or may be an adult in need of protective intervention. An "adult in need of protective intervention" is defined in the 2021 Act as an adult who:

(a) lacks capacity with respect to one or more of their health care, physical, emotional, psychological, financial, legal, residential or social needs; and

(b) with respect to the area in which the adult lacks capacity under paragraph (a), is:

(i) incapable of caring for themself, or who refuses, delays or is unable to make provision for adequate care and attention for themself, or
(ii) abused or neglected.[65]

[12.57] Upon such application, the court may make a range of orders, including orders that the adult undergo a medical or capacity assessment, and an order "that the adult be brought to an identified location for the purposes of [such] assessment".[66] The court may also make "an order that the adult reside in a place identified by the director, on the terms and conditions set out in the order".[67]

[12.58] In order to make any such order, the court must be satisfied that there are reasonable grounds to believe that the adult who is the subject of the application is or may be an adult in need of protective intervention and that it is in the best interests of the adult to make the order.[68] Any order expires 30 days after its making, unless terminated before such time, or extended in accordance with

[64] A director is a person appointed by the Provincial Health Authority who has responsibilities under the Act.

[65] Section 5 of the Adult Protection Act 2021 (Newfoundland and Labrador).

[66] Section 20(2)(c) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[67] Section 20(2)(e) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[68] Section 20(2) of the Adult Protection Act 2021 (Newfoundland and Labrador).

section 22(9) for a further period of up to 30 days. Longer term orders can be made under section 25.

[12.59] The 2021 Act also provides for emergency intervention. A director or social worker can apply to the court for a warrant authorising them to enter a premises or vehicle or board a vessel or aircraft, by force if necessary, to remove an adult. The judge may grant the warrant if satisfied that there are reasonable grounds to believe that:

> (a) the adult is or may be an adult in need of protective intervention; and
>
> (b) a less intrusive course of action that would adequately protect the adult is not available.[69]

[12.60] Provision is also made for a summary or warrantless removal. Where a director or social worker has reasonable grounds to believe there would be an immediate risk to the adult's health and safety if no action were taken during the time required to obtain a warrant, the director or social worker may enter a premises or vehicle or board a vessel or aircraft, by force if necessary, to remove the adult without a warrant.[70]

[12.61] Where an adult is removed from the premises where they are living using the warranted or warrantless power, the adult "may be moved to a place determined to be suitable by the director or social worker".[71] Within two days of such removal, a director must apply to the court under section 20 or 21 (as discussed above), and such application must be heard within two days of the making of the application.[72]

(f) Australia

(i) Australia (Federal law)

[12.62] In its 2017 report entitled "Elder Abuse – A National Legal Response", the Australian Law Reform Commission (the "ALRC") did not recommend that adult safeguarding agencies should have the power to remove an at-risk adult from their home without their consent, even if the agency can otherwise act without

[69] Section 26(2) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[70] Section 26(3) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[71] Section 26(8) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[72] Section 26(11) of the Adult Protection Act 2021 (Newfoundland and Labrador).

the person's consent. The rationale for this was that to permit such action may be considered "overly intrusive and paternalistic".[73]

(ii) South Australia (State law)

[12.63] The Ageing and Adult Safeguarding Act 1995 permits a Magistrates Court of South Australia to make orders in respect of "vulnerable adults", including "an order authorising or requiring an examination or assessment of a specified kind of the vulnerable adult" and "such other orders as may be necessary or appropriate to enable the functions conferred on the Adult Safeguarding Unit under [the 1995] Act to be performed in respect of the vulnerable adult".[74] The 1995 Act does not refer explicitly to removal and detention. A vulnerable adult is defined in section 3 as "an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse".

4. Rights of at-risk adults and third parties

[12.64] The prospect of an order that facilitates the removal of a person from a private dwelling or other premises without their consent raises complex ethical questions regarding personal liberty, the limits of paternalism, and the degree to which the state can, and indeed should, act in pursuit of an adult's protection. Any order that permits the deprivation of liberty – even for the briefest period – has potential for misuse, and Ireland has a long and unhappy history of institutionalisation, detention and state interference with families, often justified on "best interests" grounds.[75]

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[73] Australian Law Reform Commission, *Elder Abuse – A National Legal Response Final Report* (ALRC Report 131 – 2017) at page 406.

[74] Section 33(1) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

[75] Some of the institutions involved were run by religious orders, with varying degrees of state involvement. Others were entirely state-run. The range of institutions includes Magdalene Laundries, Mother and Baby Homes, Reformatory and Industrial Schools, and extensive use of psychiatric hospitals. See, for example, Department of Justice, *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries* (2013) <https://www.gov.ie/en/collection/a69a14-report-of-the-inter-departmental-committee-to-establish-the-facts-of/?referrer=http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013 >; Various publications by "Justice for Magdalenes Research" <http://jfmresearch.com/>; Department of Children, Equality, Disability, Integration and Youth, *Final Report of the Commission of Investigation into Mother and Baby Homes* (2021) < https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/>; The Commission to Inquire into Child Abuse, *CICA Report; Volumes I – V* (2009) < https://childabusecommission.ie/?page_id=241 >; Brennan, *Irish Insanity* (Routledge 2015); O'Sullivan and O'Donnell, "Coercive confinement in the Republic of Ireland: The waning of a culture of control" (2007) 9 *Punishment & Society* 27 at page 33: "the proportion of the population in coercive confinement in 1951 was more than 1 per cent. This was eight times

[12.65] Introducing powers of removal and transfer would involve significant rights implications, which are considered in this section. First, this section considers the rights implications of the removal of an at-risk adult from their home or another premises. Second, it considers the rights implications involved in transferring an at-risk adult from that location to a designated health or social care facility or other suitable place. Finally, it considers the rights implications of detaining an at-risk adult upon reaching that place for the purposes of facilitating an assessment of their health, safety or welfare, and whether any actions are needed to safeguard the at-risk adult. It considers whether interferences with the right to liberty can be justified to safeguard an at-risk adult in particular circumstances.

[12.66] At the outset, it should be noted that all three stages involve significant interference with the rights of individuals. This includes interference with the rights of third parties – for example, those who might reside with the at-risk adult, whose rights to privacy and inviolability of the dwelling will be interfered with upon execution of an order. However, the interference with rights will be most significant in relation to the at-risk adult whose removal and transfer is intended. In particular, the exercise of such interventions would interfere significantly with an at-risk adult's constitutional rights to dignity, liberty, bodily integrity and privacy, and their right to personal liberty under Article 5 of the ECHR. Although the interventions may also vindicate these and other rights, the Commission is of the view that these interventions require thorough analysis and justification, given the clear potential for disproportionate interference with constitutional and ECHR rights.

(a) Removal of an at-risk adult from their home or from another location

[12.67] As is discussed below, the proposed power of removal is intended to allow authorities to assess an at-risk adult's health, safety and welfare, and whether any actions are needed to safeguard them, where this cannot be done in the place where the at-risk adult currently is. In particular, the proposed power is intended to vindicate an at-risk adult's constitutional rights to life, liberty, bodily integrity, autonomy, dignity and protection of the person.[76] For example, removing an at-risk adult from a dangerous situation which poses a risk to their health, safety and welfare so that they can be assessed (and potentially access assistance) may vindicate the at-risk adult's rights to dignity and bodily integrity. Moving them to an appropriate, safe and sanitary setting so that a medical examination can take

greater than in 2002". This statistic includes (at page 32) "not only the formal sites of incarceration that are normally associated with the criminal justice system (e.g. prisons, borstals, reformatories), but also psychiatric hospitals, homes for unmarried mothers and various residential institutions for children placed by the courts".

[76] These rights are discussed in more detail in Chapter 4.

place may also vindicate these rights. Allowing the adult a private space to interact with professionals, and potentially confide in them, may vindicate the adult's rights to privacy and autonomy.

[12.68] In the Commission's view, the proposed power of removal is a necessary tool to prevent harm and abuse of at-risk adults, as it provides a way to assess at-risk adults and allow them to confide in appropriately qualified individuals, where a third party is attempting to block such access. If health and social care professionals cannot access the at-risk adult, abuse may continue unchecked. The Commission is thus of the view that a power of removal is needed in order to protect and vindicate the constitutional rights of at-risk adults.

[12.69] However, the proposed power of removal also clearly has the potential to interfere with an at-risk adult's or a third party's constitutional rights. In particular, the power may interfere with their rights to liberty, privacy, autonomy, bodily integrity and dignity. For example, the at-risk adult may be residing with a family member or friend. The privacy rights of the family member or friend would be clearly interfered with when their home is accessed, and the at-risk adult (who may be a close relative or friend of theirs) is removed from their shared home. Even more significantly, where an at-risk adult is removed from their home or another location, no matter how gently, their rights to dignity and bodily integrity (amongst others) are clearly interfered with. The Commission is aware of the significance of such a measure. However, as is discussed in Chapter 4, constitutional rights are not absolute and may be permissibly interfered with in certain circumstances. The legitimacy of such interferences is generally analysed using a proportionality framework.[77] Any proposed power of removal must be closely scrutinised to ensure that it is necessary, proportionate and restricts constitutional rights to the minimum degree possible.

[12.70] The objective of the power of removal is to allow relevant authorities to assess the health, safety or welfare of the at-risk adult, and whether any actions are needed in respect of the at-risk adult, where this cannot be done in the place where the at-risk adult currently is located.[78] The Commission is of the view that this objective is of sufficient importance to warrant overriding constitutionally protected rights, and that the objective relates to concerns that are pressing and substantial in a free and democratic society. In deciding whether to introduce a power of removal as the means to achieve this objective, the Commission has kept in mind that the means must:

[77] See the discussion of this in Chapter 4.

[78] The power may also have the effect of allowing the at-risk adult space and privacy to confide in relevant authorities if they wish, but this is not its core purpose.

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible; and

(c) be such that their effects on rights are proportional to the objective.[79]

[12.71] The Commission has also kept this framework in mind when developing the parameters of the proposed power of removal. For example, the Commission recommends that the proposed power may only be exercised on foot of a court order, and recommends a more stringent threshold than that which applies for a power of access.[80] This is necessary, given the increased level of rights interference that removal involves. These and other safeguards are necessary to ensure that the proposed power does not disproportionately interfere with the constitutional rights of at-risk adults and third parties, in particular their rights to liberty, privacy, autonomy and bodily integrity.

[12.72] The proposed power also engages a number of ECHR rights. For example, introducing the proposed power of removal may allow the State to fulfil its positive obligation under Article 2 of the ECHR to take "appropriate steps to safeguard the lives of those within their jurisdiction".[81] Similarly, it may allow the State to vindicate the rights of individuals to be free from ill-treatment under Article 3 of the ECHR, and the rights of individuals to private and family life under Article 8.

[12.73] On the other hand, the proposed power may interfere with rights protected under the ECHR, such as the rights to private and family life and the home under Article 8. This includes the rights of other family members who may live with the at-risk adult, as mentioned above, but will be most significant for the at-risk adult themself. In developing the proposed power, the Commission has had regard to the qualified nature of these rights, and the ways in which they may be permissibly interfered with in certain circumstances. Such interferences must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society in pursuit of that aim. Article 8(2) of the ECHR expressly states that the protection of health and the rights and freedoms of others are such legitimate aims. The European Court of Human Rights has provided guidance on what will suffice as "necessary in a democratic society", and the Commission has carefully considered such guidance when developing the proposed power.

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[79] See the discussion of this framework, as set out in *Heaney v Ireland* [1994] 3 IR 593 (Costello J) at page 607, in Chapter 4.

[80] See Chapters 10 and 11.

[81] *LCB v UK* (1998) 27 EHRR 212 at para 36.

[12.74] The Commission is of the view that the proposed power is required to protect and vindicate the ECHR rights of at-risk adults, and can be framed in such a way as to minimally impair the ECHR rights of at-risk adults and third parties.

(b) Transfer of an at-risk adult to a designated health or social care facility or other suitable place

[12.75] The Commission is of the view that a power of removal would be ineffective without an associated power to transfer the at-risk adult to a designated health or social care facility or other suitable place, where they can be assessed without interference by third parties and offered a private space to interact with professionals. Such a power would necessarily involve the detention of the at-risk adult for a brief period for the purposes of transfer, as the at-risk adult would not be allowed to leave the vehicle within which they are being transferred.[82] The rights implications of this are addressed in the next paragraph. However, the power of transfer would not encompass the detention of the at-risk adult upon *arrival* at the designated facility or other suitable place. The rights implications of such a detention power are addressed separately, at section 4(c) below. The Commission considered the same rights implications as above and came to the view that a power to transfer the at-risk adult was necessary to protect and vindicate the constitutional and the ECHR rights of at-risk adults.

[12.76] The Commission assessed the potential for interference with rights in the same way as above. In this context, the Commission had particular regard to the at-risk adult's right to liberty, which is protected under Article 40.4.1˚ of the Constitution and under Article 5 of the ECHR. The Commission considers in detail the parameters of this right, and the circumstances in which it may be interfered with, in Chapter 4. This right is clearly engaged where a person is transferred to a designated health or social care facility or other suitable place specified in an order without their consent, whether that occurs in a vehicle or on foot.

[12.77] The Commission is of the view that the very limited period of detention involved with such a power of transfer is necessary to protect and vindicate the constitutional and ECHR rights of at-risk adults. In the Commission's view, the power of transfer can be framed in such a way as to minimally impair the rights of at-risk adults and third parties, in particular the at-risk adult's right to liberty. Clear conditions and safeguards are proposed to ensure that the power is restricted to cases in which it is necessary in the particular circumstances. The power is also extremely time-limited, with any ability to detain an at-risk adult lapsing upon arrival at the designated health or social care facility or other suitable place specified in the order, as is discussed below.

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[82] (or leave the company of associated professionals, if it were possible to transfer them on foot.)

(c) A power of temporary detention for the purposes of assessment

[12.78] In this section, the Commission considers whether provision should be made in adult safeguarding legislation for a power of temporary detention in order to meaningfully protect and vindicate the constitutional and ECHR rights of at-risk adults. As discussed above, deprivation of liberty is possible under the Mental Health Act 2001, but this is limited to certain cases in which an individual is suffering from a "mental disorder".[83] There is currently no statutory scheme regulating the detention of individuals for other reasons, such as for the provision of healthcare outside of the mental health context.

[12.79] At present, an at-risk adult, including an at-risk adult who appears to lack decision-making capacity, could return to an abusive situation and could be prevented by a third party from accessing necessary medical attention or other supports. A power of temporary detention would allow relevant authorities to keep an at-risk adult in a particular place for the purposes of assessing, or attempting to assess, their health, safety or welfare, and determining, or attempting to determine, whether any actions are needed to safeguard the at-risk adult. Such a power thus has the potential to vindicate an at-risk adult's rights, such as their constitutional rights to life, bodily integrity, autonomy and protection of the person.[84]

[12.80] However, a power of temporary detention would also clearly interfere with the constitutional and ECHR rights of an at-risk adult, and potentially those of a third party.[85] In particular, temporarily detaining an at-risk adult would interfere with their rights to liberty, privacy, autonomy and bodily integrity. As with the power of transfer discussed above, the Commission considered the interference of a power of temporary detention with the rights of at-risk adults and third parties. Again, the most significant interference arising is in relation to the at-risk adult's right to liberty, under Article 40.4.1˚ of the Constitution and under Article 5 of the ECHR. Undoubtedly, this right is interfered with when an at-risk adult is detained, even if for a benevolent purpose and even if the at-risk adult is ultimately found to lack capacity to decide where to reside.

[12.81] In *AC v Cork University Hospital*[86] the Supreme Court held that the constitutional guarantee of the right to liberty protected mentally impaired persons to the same extent as all other persons. To hold that persons could not be found to be

[83] "Mental health disorder" is defined in section 3(1) of the Mental Health Act 2001.

[84] These rights are discussed in more detail in Chapter 4.

[85] (For example, the third party's right to private and family life under Article 8 of the ECHR may be interfered with where the at-risk adult, a member of the third party's family, is detained in a designated health or social care facility or other suitable place, and access between the two individuals is prohibited.)

[86] [2019] IESC 73; [2020] 2 IR 38.

detained if they were not capable of making a valid decision to leave for themselves would deny "vulnerable" persons the benefit of the constitutional guarantee that they would not be deprived of their liberty otherwise than in accordance with law. A benevolent or protective motivation or purpose could not be considered to alter the legal fact of detention.

[12.82] The Supreme Court found that the duty of care in the context of discharge from hospital encompassed a requirement to ascertain whether the patient wanted to leave and whether they had given consideration to the consequences of doing so. If hospital authorities believed on reasonable grounds that a third party was pressurising a "vulnerable" patient to leave, it was legitimate to prevent departure for a brief period while the situation was assessed.[87] If a hospital concluded that a patient lacked capacity or had impaired capacity and was potentially more susceptible to dangerous or exploitative conduct, the Supreme Court held that the hospital should have the opportunity to clarify this matter and, if necessary, invoke the assistance of the courts.[88]

[12.83] A "brief period" is all that is permissible where there is no other legal basis for detention. The doctrine of necessity was found by the Supreme Court to be sufficiently broad to permit the temporary, short-term detention of a person who lacked capacity in their own interest in a situation of urgency.[89] The Supreme Court noted that when the risk to a person is from a third party (for example a family member), it is far more desirable that any legal measures are taken against that third party rather than restricting the rights of the person who appears to be at risk.[90]

[12.84] The Commission has considered these principles in developing its recommendations. In Chapter 4, the Commission recommends an obligation on courts, when deciding whether to make any adult safeguarding order,[91] to adopt the least intrusive means possible to meet the objective of safeguarding and protecting the health, safety and welfare of the at-risk adult in the particular circumstances. This Report also provides for a range of measures targeted at persons who may be causing harm to at-risk adults, including no-contact orders which place the onus on the person causing harm to desist.[92]

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87 [2019] IESC 73 at para 346.

88 [2019] IESC 73 at para 347.

89 [2019] IESC 73 at para 349.

90 [2019] IESC 73 at para 381.

91 Whether a warrant for access to a relevant premises, a warrant for access to an at-risk adult in a place including a private dwelling, a removal and transfer order, or any form of no-contact order.

92 See generally Chapter 13.

[12.85] The Commission recognises that the period of transfer to a designated health or social care facility or other suitable place specified in the order would constitute detention of an at-risk adult, albeit for a brief period. The Commission is of the view that this is a proportionate interference with their rights, as outlined above. However, the Commission does not believe that a power to temporarily detain an at-risk adult upon arriving at the facility or other suitable place should be introduced in adult safeguarding legislation. It has reached this view not in light of the rights implications, but rather because it would be preferable for this issue to be dealt with comprehensively under detention legislation. This is discussed in more detail at section 5(g)(ii) below.

[12.86] Finally, as in Chapters 10 and 11, the Commission considered the rights implications of a power allowing authorised officers and appropriately qualified health or social care professionals to interview and conduct a medical examination of an at-risk adult at a designated health or social care facility or other suitable place specified in an order. The Commission is of the view that such a power is necessary to assess the health, safety or welfare of an at-risk adult, with a view to vindicating their rights. However, as is discussed at section 5(b)(vi) below, in light of the significant rights implications arising, the Commission is of the view that such powers cannot be exercised where the at-risk adult objects to their use, and the at-risk adult must be informed of their ability to so refuse or object, before the powers are exercised.

5. A proposed removal and transfer order

[12.87] Having had regard to the need to vindicate the constitutional and ECHR rights of at-risk adults, the views of consultees and the experiences of comparative jurisdictions, the Commission is of the view that a power of removal and transfer should be introduced in Ireland. This power would facilitate the removal and transfer of an at-risk adult to a designated health or social care facility or other suitable place specified in an order, for the purposes of assessing the at-risk adult's health, safety or welfare, and assessing whether any actions are needed in respect of the at-risk adult, where this cannot be done in the place where the at-risk adult currently is located. Such actions might range, for example, from arranging for services such as "meals on wheels" to be provided to the at-risk adult, to preparing an application for an order pursuant to the High Court's inherent jurisdiction, or referring matters to the Garda Síochána, where appropriate. The Commission is of the view that the use of this power would be necessary, for example:

(a) to facilitate an assessment, or an attempt at an assessment, of the at-risk adult's health, safety or welfare, when this cannot meaningfully be done in the place where the at-risk adult currently is located;

(b) to facilitate a private medical examination of the at-risk adult in a safe, appropriate and sanitary location;

(c) to facilitate a private interview with the at-risk adult without the interference of a third party who is allegedly causing concern, where a no-contact order would be ineffective or inappropriate in the circumstances.

[12.88] Given the significance of this power for the rights of at-risk adults, as is discussed above,[93] judicial oversight is a critical safeguard. The need to satisfy a District Court judge to the required threshold will ensure that removal and transfer orders are only sought and granted where they are absolutely necessary in the circumstances, and that they do not disproportionately interfere with the rights of at-risk adults or third parties.

[12.89] Notably, in the final stages of drafting this Report, the Department of Health launched its public consultation on Policy Proposals on Adult Safeguarding in the Health and Social Care Sector (the "Policy Proposals").[94] The Policy Proposals include the suggestion that "[i]n limited circumstances, where necessary to protect an adult at risk from abuse or harm, appropriate authorities would be empowered to intervene by making, or obtaining from a Court, an appropriate order to protect the person, including a removal order authorising, where necessary, the removal of an adult at risk to a place of safety for a specified period, where there is a likelihood of serious abuse or harm if they are not moved".[95] Although no further detail as to the parameters of the proposed powers are included in the Policy Proposals, and the development of such proposals is ongoing, the Commission welcomes this point of apparent alignment with its own recommendations contained in this Report.

(a) A proposed removal and transfer order

(i) The need for an order allowing for removal and transfer

[12.90] When an at-risk adult in a relevant premises, private dwelling or other place is accessed,[96] it may not be possible for them to be assessed, for an authorised officer to interview them in private, or for an accompanying health or social care professional to conduct an appropriate medical examination in private. Family

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93 At section 4.

94 Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

95 Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 27 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

96 For example, using the powers proposed in Chapters 10 and 11, or via consent.

members or other third parties may refuse to allow private interaction with the adult who is potentially at risk of harm. Equally, they may exert influence to pressure the at-risk adult to refuse to cooperate with relevant authorities. In other cases, there may be reasonable grounds to believe that the at-risk adult's refusal is due to a lack of capacity to decide whether to interact with relevant professionals.[97] In such circumstances it is practically impossible for authorised officers of the Safeguarding Body, members of the Garda Síochána or other appropriately qualified health or social care professionals to assess the needs of the at-risk adult, even where it may be apparent that there is a serious and immediate risk to the health, safety or welfare of the at-risk adult.

[12.91] The Commission recognises that in most situations, it is preferable to remove the person allegedly causing concern rather than removing an at-risk adult from what may be their private home. However, the Commission's view is that the severity of the circumstances may in some cases necessitate medical assessment or other attention that cannot be provided in the place, including for reasons of squalor or danger. The immediacy of the circumstances may not allow sufficient time for an application for a no-contact order to be made to exclude the person allegedly causing concern. There may also be issues around removing the third party from the premises if they have a superior legal or beneficial interest in the property to that of the at-risk adult.[98] It is therefore desirable that authorised officers and members of the Garda Síochána should have a means of removing an at-risk adult from the place where they currently are so that their health, safety or welfare can be assessed.

[12.92] As noted above, under the current regime it may be very difficult to assess whether at-risk adults need support to protect themselves from harm at a particular time. Although applications may be made under the inherent jurisdiction of the High Court in extreme cases to remove, transfer and detain certain individuals, if authorities cannot conduct an assessment of the at-risk adult, they may not have an evidentiary basis to support the making of such a far-reaching order. The proposed removal and transfer order would thus fill a gap that remains in the law, even though the inherent jurisdiction exists. There are also a number of advantages to providing in legislation for orders to be made by the District Court, rather than relying on the inherent jurisdiction of the High Court.[99]

[12.93] In a recent High Court decision, Hyland J highlighted the difficulties arising with the use of the inherent jurisdiction to detain individuals in the absence of a legislative framework. Citing caselaw and academic commentary, Hyland J noted

[97] Although it will be presumed in all cases that adults do have capacity on decide on relevant matters – this principle is enshrined in the Assisted Decision-Making (Capacity) Act 2015.

[98] See the discussion of respective interests in property in Chapter 13.

[99] These advantages are discussed in Chapter 1.

the "potential for over subjectivity" with the current regime, and the fact that a legislative framework for detention would be preferable for "transparency, democratic oversight and legal certainty".[100] The Commission is of the view that these arguments apply equally strongly to its proposed safeguarding interventions, including the proposed removal and transfer order. Providing for a clear and express power to make removal and transfer orders in adult safeguarding legislation would have numerous advantages in terms of clarity, predictability, legal certainty and transparency.

[12.94] Statutory intervention would also:

(a) increase knowledge of the potential to intervene in this way, and the requisite thresholds and safeguards, among health and social care professionals;

(b) make using the powers less expensive and less cumbersome by having applications made to the District Court rather than to the High Court;

(c) allow interventions to be made on an urgent basis;

(d) make protective orders of this nature accessible to a greater number of at-risk adults in sufficiently serious cases;[101] and

(e) ensure a consistent approach to adult safeguarding cases.

[12.95] The introduction of removal and transfer orders is supported by a number of consultees who responded to the Commission's Issues Paper and engaged with the Commission throughout this project, and stakeholders in this area, including practitioners working in adult safeguarding, HIQA and the Irish Association of Social Workers.[102] A number of consultees stressed that it would be inappropriate to have powers of access, but no powers of removal to prevent harm to an at-risk adult in severe cases. They noted that upon accessing an at-risk adult, a particularly dire situation could be found, and authorised professionals should have the appropriate tools to respond. In addition to facilitating assessment, removal and transfer orders are a potentially useful tool to ensure that the at-risk

[100] *In The Matter of KK (No 2)* [2023] IEHC 565 (Hyland J) at paras 18 – 21.

[101] As discussed in Chapter 1, the inherent jurisdiction is used sparingly, on a case-by-case basis.

[102] See, for example, HIQA, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' - Response by the Health Information and Quality Authority (HIQA)* (May 2020), at page 37, available at: < https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf>; Irish Association of Social Workers, "A Regulatory Framework for Adult Safeguarding" <https://www.iasw.ie/Submissions-and-Representations> accessed on 3 November 2023; Irish Association of Social Workers, *Position Paper on Adult Safeguarding: Legislation, Policy and Practice* (IASW 2022) at page 21.

adult has the opportunity to interact with, and potentially confide in, appropriately qualified health or social care professionals without interference. On this point, the Commission has noted the argument that without a corresponding power of removal, powers of access may create an additional risk for at-risk adults, leaving them in greater danger of abuse, particularly as a result of retribution from their abuser.

[12.96] Having had regard to these arguments, the need to vindicate the constitutional and ECHR rights of at-risk adults and the experiences of comparative jurisdictions such as Scotland, the Commission is of the view that an order for removal and transfer of an at-risk adult should be introduced in Ireland and provided for in adult safeguarding legislation. Such an order would permit the removal of a person who is reasonably believed to be an at-risk adult to a designated health or social care facility or other suitable place specified in the order to allow professionals to attempt:

(a) an assessment of the health, safety and welfare of the at-risk adult, and

(b) an assessment of whether any actions are needed in respect of the at-risk adult,

where this cannot be done in the place where the at-risk adult is currently located.

[12.97] The Commission recommends that a removal and transfer order should allow a member of the Garda Síochána, accompanied by an authorised officer of the Safeguarding Body where possible, together with appropriately qualified health or social care professionals and other persons as may be necessary, to:

(a) enter the place where the at-risk adult is believed to be, including a relevant premises and a private dwelling;[103]

(b) remove the at-risk adult from the place; and

(c) transfer the at-risk adult from the place to a designated health or social care facility or other suitable place specified in the court's order.

[12.98] This order would not allow for an at-risk adult to be detained upon reaching such place, as is discussed in more detail below at section 5(g)(ii).

[103] In relation to the Commission's definitions of "relevant premises" and "dwelling", see Chapter 10.

R. 12.1 **The Commission recommends that** adult safeguarding legislation should make provision for a removal and transfer order, which would permit the removal of a person who is reasonably believed to be an at-risk adult to a designated health or social care facility or other suitable place specified in the order to allow professionals to attempt:

(a) an assessment of the health, safety and welfare of the at-risk adult, and

(b) an assessment of whether any actions are needed in respect of the at-risk adult,

where this cannot be done in the place where the at-risk adult is currently located.

R. 12.2 **The Commission recommends that** a removal and transfer order should allow a member of the Garda Síochána, accompanied by an authorised officer of the Safeguarding Body where possible, together with appropriately qualified health or social care professionals and other persons as may be necessary, to:

(a) enter the place where the at-risk adult is believed to be, including a relevant premises and a private dwelling;

(b) remove the at-risk adult from the place; and

(c) transfer the at-risk adult to a designated health or social care facility or other suitable place specified in the court's order.

(ii) Application for a removal and transfer order

[12.99] As with interventions proposed in Chapters 10, 11 and 13, the Commission is of the view that there should be a clear threshold that must be met before an authorised officer of the Safeguarding Body or a member of the Garda Síochána can apply to the District Court for a removal and transfer order. This is a preliminary requirement – the threshold for the granting of the order itself, by the District Court, is discussed at section 5(a)(iv). This threshold for making an application is necessary in light of the significant rights implications of the order, as discussed above in section 4, to ensure that these powers are used only when necessary and proportionate in the circumstances. The Commission recommends that in order to apply for a removal and transfer order, the authorised officer of the Safeguarding Body or a member of the Garda Síochána must have a belief, based on reasonable grounds, that:

(a) an at-risk adult is present in a particular place;

(b) there is a serious and immediate risk to the health, safety or welfare of the at-risk adult;

(c) actions may be required to safeguard the health, safety or welfare of the at-risk adult;

(d) removal to a designated facility or other suitable place is necessary to attempt to assess the matters specified in subsections (b) and (c) as such assessment cannot be done in the place where the at-risk adult currently is located; and

(e) the assessment of the matters specified in subsections (b) and (c) cannot be achieved using less intrusive means.

[12.100] This threshold uses the phrase "attempt to assess" because the at-risk adult may choose to leave the place to which they are transferred upon their arrival, and that choice must be respected.[104] If this happens, it may not be possible to carry out an assessment of the matters specified in subsections (b) and (c) above.

[12.101] Given the high threshold required in this context, and the significant interference with rights that the order entails, an authorised officer or member of the Garda Síochána should generally only apply for a removal and transfer order where they have accessed the at-risk adult, and on that basis reasonably believe that a removal and transfer order is necessary. In more urgent situations, it is possible to apply for a removal and transfer order without first gaining access to the at-risk adult, if the District Court is satisfied as to the additional threshold set out below at section 5(a)(iv).

[12.102] The applicant should be required to give evidence that there are reasonable grounds for believing each of the matters specified in the threshold. In addition, given the significant consequences and rights implications of granting such an order, the Commission is of the view that adult safeguarding legislation should require the application for the order to be grounded upon an affidavit or information sworn by an appropriately qualified health or social care professional. A "health or social care professional" would be defined for this purpose as including:

(a) A doctor;

(b) A nurse;

(c) A midwife;

(d) A social worker;

(e) An occupational therapist;

(f) A speech and language therapist;

[104] This is discussed in more detail below.

(g) An emergency medical technician;

(h) A paramedic or advanced paramedic; and

(i) A psychologist.

[12.103] It should be noted that this list does not precisely correspond with the range of health and social care professionals regulated by CORU and other professional regulatory bodies. The Commission recognises that it is currently more likely that a doctor, nurse or social worker will be present at a scene, and it is less likely, for example, that a speech and language therapist would be available on-call to carry out an assessment of the matters specified above. However, awareness of adult safeguarding is growing amongst all professionals, and is increasingly part of the role of many individuals. For this reason, the Commission recommends that the Minister should be empowered to designate further appropriate professionals as health or social care professionals under adult safeguarding legislation in the future.

[12.104] Where an authorised officer of the Safeguarding Body is a health or social care professional, as defined, it should be sufficient for their own evidence to ground the application; no additional professional should be required.

[12.105] Although the Commission provides for the possibility of a member of the Garda Síochána applying for a removal and transfer order, given this requirement for the evidence of a health or social care professional, members will have to work closely with health and social care professionals to bring such an application. It may be possible, for example, for a member to bring an urgent application grounded upon their own evidence and that of a public health nurse. In such cases, the Safeguarding Body may be unaware of the application. The Commission thus recommends that, in addition to their general duty to co-operate with other bodies, every application to court by a member of the Garda Síochána for a removal and transfer order must be notified in writing to the Safeguarding Body as soon as is practicable. This will also facilitate oversight of such powers by the Safeguarding Body, ensuring they are not misused.

R. 12.3 **The Commission recommends that** in order to apply for a removal and transfer order, an authorised officer of the Safeguarding Body or a member of the Garda Síochána must have a belief, based on reasonable grounds, that:

(a) an at-risk adult is present in a particular place;

(b) there is a serious and immediate risk to the health, safety or welfare of the at-risk adult;

(c) actions may be required to safeguard the health, safety or welfare of the at-risk adult;

(d) removal to a designated facility or other suitable place is necessary to attempt to assess the matters specified in subsections (b) and (c) as such assessment cannot be done in the place where the at-risk adult currently is located; and

(e) the assessment of the matters specified in subsections (b) and (c) cannot be achieved using less intrusive means.

R. 12.4 **The Commission recommends that** when making an application to the District Court for a removal and transfer order, the applicant should be required to give evidence that there are reasonable grounds for believing each of the matters specified in the threshold.

R. 12.5 **The Commission recommends that** the application for a removal and transfer order must be grounded upon an affidavit or information sworn by one of the following health or social care professionals:

(a) a doctor;

(b) a nurse;

(c) a midwife;

(d) a social worker;

(e) an occupational therapist;

(f) a speech and language therapist;

(g) an emergency medical technician;

(h) a paramedic or advanced paramedic; or

(i) a psychologist.

Where an authorised officer of the Safeguarding Body is a health or social care professional as defined, it should be sufficient for their own evidence to ground the application.

R. 12.6 **The Commission recommends that** adult safeguarding legislation should provide the relevant Minister with the power to designate other professionals for the purposes of providing evidence to ground an application for a removal and transfer order.

R. 12.7 **The Commission recommends that** every application to court by a member of the Garda Síochána for a removal and transfer order must be notified in writing to the Safeguarding Body as soon as is practicable.

(iii) Obligation to ascertain views

[12.106] The Commission is of the view that before applying for a removal and transfer order, an authorised officer or member of the Garda Síochána should make reasonable efforts to ascertain the views of the at-risk adult in relation to such an order. This obligation is important in light of the at-risk adult's rights, in particular

their constitutional right to autonomy. Many consultees working in the area of adult safeguarding stressed to the Commission the importance of ascertaining, and respecting, the at-risk adult's will and preferences – in addition to empowering individuals to decide matters for themselves. As noted above, in most cases, the authorised officer or member of the Garda Síochána will already have gained access to the at-risk adult, and decided to seek a removal and transfer order on that basis. The views of the at-risk adult will be more apparent in such a case than in cases where access has not yet been obtained.

[12.107] The Commission also recommends that the authorised officer or member of the Garda Síochána must have regard to any views which are expressed by the at-risk adult in determining whether to go ahead with the application for a removal and transfer order. Again, this is necessary to respect the at-risk adult's rights. Upon making any application to the District Court, the applicant should provide evidence to the District Court demonstrating the reasonable efforts made to ascertain the views or wishes of the at-risk adult, and information regarding the use of any methods or supports such as speech and language therapists or independent advocacy services.[105]

[12.108] In complying with this obligation, authorised officers are likely to be particularly well-placed to use social work skills to attempt to ascertain the views of the at-risk adult. In particular, they will have expertise in relationship-building, effective communication, cultural competence and supporting empowerment and person-centredness in their interactions with at-risk adults.[106] Although members of the Garda Síochána will not have the same kind of expertise, the Commission is of the view that members will have similar kinds of skills from their experiences dealing with distressed members of the public, victims of crime, and individuals in sensitive contexts like domestic violence and executing orders under the Mental Health Act 2001.[107] This is an area in which members may benefit from joint training with the Safeguarding Body.[108]

[12.109] The District Court, upon any application, must enquire as to whether reasonable efforts have been made to ascertain the views of the at-risk adult in relation to whom the order is sought, concerning the making of such order. The District Court must also, in determining whether to grant any such order, have regard to

[105] The Commission discusses independent advocacy in detail in Chapter 8.

[106] See Social Workers Registration Board, *Standards of Proficiency for Social Workers* (CORU 2019).

[107] The Commission also notes that section 9(1)(f) of the Policing, Security and Community Safety Act 2024, when commenced, will expand the objectives of the Garda Síochána to include, among others, the objective of "preventing harm to individuals, in particular individuals who are vulnerable or at risk". This change may result in increased training in, and awareness of, dealing with at-risk adults among members of the Garda Síochána.

[108] See below at section 5(f).

any views expressed by the at-risk adult to whom the order is sought, concerning the making of such order.

[12.110] The Commission is of the view that it should be possible for an authorised officer of the Safeguarding Body or a member of the Garda Síochána to seek, and for a judge of the District Court to grant, a removal and transfer order where the at-risk adult expresses no views. The same should apply to situations in which it is not possible to ascertain the at-risk adult's views, as that may not be possible where the at-risk adult is in an abusive or coercive situation.

[12.111] In light of the serious cases which the removal and transfer order is intended to address, the Commission recommends that it should also be possible to seek an order against the wishes of the at-risk adult whose protection is intended by it. As discussed in Chapter 11, consent is not straightforward in the adult safeguarding context. In circumstances of emotional or psychological abuse, coercion, intimidation or duress may be exerted such that an at-risk adult's apparent refusal of consent is in fact a result of abusive control. Similarly, there may be very serious cases in which the presumption of decision-making capacity on the part of the at-risk adult is rebutted, as it appears that the at-risk adult lacks capacity to decide whether to remain where they are currently located, or be moved to an appropriate, safe and sanitary location. The Commission is of the view that in these kinds of cases, a removal and transfer order is a justified and proportionate response, and may be a necessary tool to prevent harm to the at-risk adult and to safeguard their health, safety and welfare.

[12.112] Where it is intended to seek a removal and transfer order against the express wishes of the at-risk adult, the authorised officer or member of the Garda Síochána must reasonably believe that: (a) the apparent objection of the at-risk adult is not voluntary, or (b) the at-risk adult may lack capacity to decide whether to remain in the place where they presently are, or be moved to a designated health or social care facility or other suitable place. The District Court must also be satisfied of this, in addition to the general threshold for granting an order, as set out at section 5(a)(iv) below. This additional threshold is necessary in light of the significant rights implications of granting an order for removal and transfer against the express wishes of the at-risk adult. The Commission recognises that this is a highly coercive measure. The threshold is intended to reflect the rare cases in which it may be necessary and proportionate to intervene in this manner. As with the interventions proposed in Chapters 10, 11 and 13, this power is intended to be used only as a last resort, where all other less intrusive measures to support the at-risk adult and prevent harm to them have failed.

R. 12.8 **The Commission recommends that** adult safeguarding legislation should provide that an authorised officer of the Safeguarding Body or member of the Garda Síochána must:

(a) make reasonable efforts to ascertain the views of the at-risk adult before making an application for a removal and transfer order; and

(b) consider any such views in deciding whether to make an application for a removal and transfer order.

R. 12.9 **The Commission recommends that** the applicant should provide evidence to the District Court to demonstrate the reasonable efforts made to ascertain the views or wishes of the at-risk adult, and information regarding the use of any methods or supports such as speech and language therapists or independent advocacy services.

R. 12.10 **The Commission recommends that** adult safeguarding legislation should provide that, upon any application for a removal and transfer order where access to the at-risk adult has been obtained, the District Court must:

(a) enquire as to whether reasonable efforts have been made to ascertain the views of the at-risk adult in relation to whom the order is sought, concerning the making of such order; and

(b) in determining whether to grant any such order, have regard to any views expressed by the at-risk adult in relation to whom the order is sought, concerning the making of such order.

R. 12.11 **The Commission recommends that** a removal and transfer order may be sought and granted against the views or wishes of an at-risk adult whose protection is intended by the making of the order.

R. 12.12 **The Commission recommends that** if the removal and transfer order is sought in the context of apparent objection on the part of the at-risk adult, an authorised officer of the Safeguarding Body or member of the Garda Síochána must also have a reasonable belief that:

(a) the apparent objection of the at-risk adult is not voluntary; or

(b) the at-risk adult may lack capacity to decide whether to remain in the place where they presently are, or be moved to a designated health or social care facility or other suitable place.

R. 12.13 **The Commission recommends that** if the removal and transfer order is sought in the context of apparent objection on the part of the at-risk adult, in addition to the general threshold for the granting of a transfer and removal order, the judge of the District Court must be satisfied that there are reasonable grounds for believing that the apparent objection of the at-risk adult is not voluntary, or the at-risk adult may lack capacity to decide whether to remain in the place where they presently are, or be moved to a designated health or social care facility or other suitable place for the purposes of an assessment.

(iv) The threshold for granting a removal and transfer order

[12.113] In Chapter 11, the Commission recommends that the threshold for a power of access to at-risk adults in places including private dwellings should involve (among other criteria) a reasonable belief of a risk to the health, safety or welfare of an at-risk adult. That is a relatively low threshold. In light of the significant rights implications involved with a removal and transfer order, the Commission recommends that a more stringent threshold should be required. The higher threshold, as set out in this section, is required to ensure that the interference with rights (particularly the constitutional rights of autonomy, liberty and bodily integrity) is proportionate, and that removal and transfer orders are only granted where they are necessary in the circumstances.

[12.114] Upon an application being made to it, the court will consider whether a removal and transfer order should be granted. The Commission recommends that the threshold for granting a removal and transfer order should be that a judge of the District Court is satisfied that there are reasonable grounds for believing that:

(a) an at-risk adult is present in a particular place;

(b) there is a serious and immediate risk to the health, safety or welfare of the at-risk adult;

(c) actions may be required to safeguard the health, safety or welfare of at-risk adult;

(d) removal to a designated facility or other suitable place is necessary to attempt to assess the matters specified in subsections (b) and (c) as such assessment cannot be done in the place where the at-risk adult is currently located; and

(e) the assessment of the matters specified in subsections (b) and (c) cannot be achieved using less intrusive means.

[12.115] In addition, where a removal and transfer order is sought in circumstances in which the at-risk adult has not yet been accessed, a judge of the District Court must also be satisfied that the granting of a warrant for access would be

insufficient in the circumstances. This ensures that the tiered approach is adhered to, and that orders are only granted where they are necessary and proportionate in the circumstances.

[12.116] In addition, where the applicant intends to transfer the at-risk adult to a suitable place other than a designated health or social care facility, the District Court must be satisfied of an additional threshold. This is discussed below at section 5(a)(v).

R. 12.14 **The Commission recommends that** the threshold for granting a removal and transfer order should be that a judge of the District Court is satisfied that there are reasonable grounds for believing that:

(a) an at-risk adult is present in a particular place;

(b) there is a serious and immediate risk to the health, safety or welfare of the at-risk adult;

(c) actions may be required to safeguard the health, safety or welfare of the at-risk adult;

(d) removal to a designated facility or other suitable place is necessary to attempt to assess the matters specified in subsections (b) and (c) as such assessment cannot be done in the place where the at-risk adult is currently located; and

(e) the assessment of the matters specified in subsections (b) and (c) cannot be achieved using less intrusive means.

R. 12.15 **The Commission recommends that** where an application for a removal and transfer order is made and access to the at-risk adult has not yet been obtained, to grant the order (and in addition to the general threshold for the granting of a removal and transfer order) a judge of the District Court must be satisfied that the granting of a warrant for access would be insufficient in the circumstances.

(v) Designated health or social care facility or other suitable place

[12.117] The Commission recognises that an acute hospital will not always be an appropriate place to take an at-risk adult who does not require healthcare for the purposes of assessing the risk to their health, safety or welfare, and whether any actions are needed to safeguard their health, safety or welfare.[109] However, in the

[109] In the context of detention (although this order does not provide for same), Article 5 of the ECHR requires that there be a relationship between the reason for a particular detention and the place and conditions of that detention. (*Saadi v UK* (2008) 47 EHRR 17 at para 69) For example, the European Court of Human Rights has held that the detention of a

absence of any other appropriate community residential respite or refuge facilities, it may be necessary for an acute hospital to act as such a suitable place. This issue is reflective of the broader point, discussed in Chapter 1, that adult safeguarding legislation is not and will not be a panacea. Many consultees stressed to the Commission that any legislative change will need to be supported by resourcing and capacity-building. This would include, in particular, making available suitable places to which at-risk adults can be safely brought.

[12.118] It may be the case that more appropriate facilities become available in the future. For this reason, the Commission recommends that the legislation should permit the relevant Minister to designate places as health or social care facilities for the purposes of the relevant sections of the proposed adult safeguarding legislation. This will allow for the addition of suitable settings or centres, as they become available in the future.

[12.119] It is possible that, in certain cases, another place such as the dwelling of a trusted friend or family member of the at-risk adult would be a more suitable place to transfer the at-risk adult to. This scenario is provided for in the Scottish legislation regarding assessment orders.[110] The Commission recognises that it might be less distressing for an at-risk adult to be transferred to such a place, rather than being transferred to an acute hospital, for example. As such, the proposed order is framed to allow for removal and transfer to any other suitable place as specified by the court in the order. If an applicant seeks to bring the at-risk adult to a place other than a designated health or social care facility, the Commission recommends that (in addition to the general threshold for the granting of a removal and transfer order) the District Court must be satisfied that such a place is suitable for the purposes of assessing: (a) the health, safety or welfare of the at-risk adult; and (b) whether actions are required to safeguard the health, safety or welfare of the at-risk adult. This will act as an additional safeguard, ensuring that at-risk adults are not transferred to unsuitable places.

person of unsound mind should be in a hospital, clinic or other appropriate setting. (*Enhorn v Sweden* (2005) 41 EHRR 30 at para 42).

[110] Discussed at section 3(a) above.

R. 12.16 **The Commission recommends that** adult safeguarding legislation should permit the relevant Minister to prescribe by regulations designated health or social care facilities to which an at-risk adult may be removed.

R. 12.17 **The Commission recommends that** in order to grant a removal and transfer order authorising removal of an at-risk adult to any place other than a designated health or social care facility, in addition to the general threshold for the granting of a removal and transfer order, a judge of the District Court must be satisfied that such place is suitable for the purposes of assessing:

(a) the health, safety or welfare of the at-risk adult; and

(b) whether actions are required to safeguard the health, safety or welfare of the at-risk adult.

(vi) Special sitting of the District Court

[12.120] As in Chapters 10 and 11, the Commission is of the view that the appropriate jurisdiction to hear such applications is the District Court. Some consultees suggested that the Circuit Court would be the appropriate jurisdiction to hear applications for the interventions discussed in this Chapter and Chapters 10, 11 and 13, as the Circuit Court has expertise in dealing with applications under the Assisted Decision-Making (Capacity) Act 2015. However, the applications discussed in this Report are distinct, and will not inevitably require expertise in matters regarding capacity. The District Court is also quicker and less expensive to access than the Circuit Court. The District Court is frequently used for urgent orders, including in the domestic violence context and in relation to care orders, including interim and emergency care orders, in respect of children.[111] The urgency of the scenarios requiring a removal and transfer order supports the view that such orders should be sought in the District Court. The Commission is of the view that this is also preferable to the more costly avenue of the High Court.

[12.121] Given the local and limited nature of the District Court, a removal and transfer order should be sought in the District Court area for the relevant place (or any of them, where the authorities intend to seek authorisation to remove an at-risk adult from alternative possible locations in which they might be found). However, given the urgency of situations requiring a removal and transfer order, the Commission is of the view that it should be possible to hold a special sitting of the District Court to facilitate an order being sought within three days of the intended application, where one is not otherwise available.

[111] See the Domestic Violence Act 2018 and Child Care Act 1991, respectively.

R. 12.18	**The Commission recommends that** adult safeguarding legislation should provide that, in the event that the next sitting of the District Court for the District Court area wherein the relevant place is located is not due to be held within three days of the intended application for a removal and transfer order, an application for an order may be made at a sitting of the District Court, which has been specially arranged, held within the said three days.

(vii) Validity period of a removal and transfer order

[12.122] Once a removal and transfer order is obtained from the District Court, the Commission recommends that there should be a short validity period. This is indicative of the intention that a removal and transfer ought to be issued only in very urgent cases, and that the intervention should be strictly temporary in nature. A short period of validity will ensure that the interference of the order with the rights of at-risk adults and third parties is proportionate, and that powers are not misused. The Commission recommends that the validity period for a removal and transfer order should be three days.

R. 12.19	**The Commission recommends that** the validity period for a removal and transfer order should be three days.

(b) Execution of a removal and transfer order

(i) Who should be empowered to execute a removal and transfer order?

[12.123] In Chapter 11, the Commission discusses the benefit of both a member of the Garda Síochána and an authorised officer of the Safeguarding Body being present when executing a warrant for access. The same rationale applies to the involvement of members of the Garda Síochána in the execution of a removal and transfer order: Garda presence may prevent potentially volatile situations from escalating. It may also provide protection for authorised officers, health and social care workers or others accompanying them, as well as for the at-risk adult, particularly in situations where there is a potentially hostile third party blocking access to, and removal of, the at-risk adult. Members of the Garda Síochána will also be able to designate a premises as a crime scene,[112] and gather evidence of the commission of crimes,[113] where necessary. For these reasons, the Commission believes that it would be appropriate for a removal and transfer order to be executed by a member of the Garda Síochána.[114]

[112] Section 5 of the Criminal Justice Act 2006.

[113] Section 7 of the Criminal Justice Act 2006.

[114] This also aligns with the approach taken under mental health legislation. See section 5(b)(ii) below.

[12.124] Where possible, the member should be accompanied by an authorised officer of the Safeguarding Body when executing an order. The Commission is mindful that the presence of authorised officer may not always be possible. It may be the case that the reasonable belief of the member of the Garda Síochána that there is a serious and immediate risk to the at-risk adult has been formed based on their own direct observations and/or other information or evidence they have received directly rather than it being based on information provided by an authorised officer. The removal and transfer order might be executed after usual working hours or during the weekend. In such cases, there may not be an authorised officer available to attend the property.

[12.125] The Commission is mindful that the presence of members of the Garda Síochána can cause distress and potentially exacerbate a fraught and stressful situation, and that the presence of an authorised officer and use of social work skills could greatly assist. Each situation will have to be judged on its own unique circumstances, and the procedures adopted for interagency cooperation in the mental health context, including the use of an assisted admissions team,[115] might usefully be replicated in the adult safeguarding context.[116]

[12.126] For the same reasons, the Commission believes that adult safeguarding legislation should allow for a member of the Garda Síochána to be accompanied by any other persons necessary or appropriate when executing the removal and transfer order, including appropriately qualified health or social care professionals and members of an assisted admissions team. The skills and expertise of such persons will assist in achieving the objective of the order, namely facilitating an assessment of the health, safety and welfare of the at-risk adult.

[12.127] In light of the distress and confusion that may arise upon execution of a removal and transfer order, it may in some cases be beneficial for a member of the Garda Síochána to be accompanied by a trusted friend or family member of the at-risk adult. This could assist in de-escalating the situation and reassuring the at-risk adult as to the nature and purpose of the order. The Commission recommends that, as with the interventions proposed in Chapters 10 and 11, this should be permissible under adult safeguarding legislation.

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[115] Assisted admissions teams provide a specialised patient transport service for the transfer to or return of a person from approved medical or social care facilities. There are protocols in place to ensure that the process is conducted in a professional and empathetic manner that protects the dignity and privacy of the person.

[116] See, for example the *Memorandum of Understanding between An Garda Síochána and the HSE on Removal to or Return of a person to an Approved Centre in accordance with Section 13 & Section 27, and the Removal of a person to an Approved Centre in accordance with Section 12, of the Mental Health Act 2001* (2010) <https://www.hse.ie/eng/services/publications/mentalhealth/memo-of-understanding-between-hse-and-garda-.pdf> accessed on 21 July 2023.

R. 12.20 **The Commission recommends that** a removal and transfer order should be executed by a member of the Garda Síochána, who should be accompanied by an authorised officer of the Safeguarding Body, where possible.

R. 12.21 **The Commission recommends that** a member of the Garda Síochána may be accompanied by appropriately qualified health or social care professionals, members of an assisted admissions team, or any other persons that the member reasonably considers necessary or appropriate to execute the removal and transfer order, such as a trusted friend or family member of the at-risk adult.

(ii) Use of reasonable force to gain access to, and to remove and transfer, an at-risk adult

[12.128] As is discussed in Chapters 10 and 11, it is standard practice for warrants to permit the use of reasonable force to gain entry to a specified place. Without this provision, the issuing of warrants would be futile. The powers of access discussed in Chapters 10 and 11 allow for the use of reasonable force, such as the forcing open of a door or the breaking of a lock to gain access to the specified place. Similarly, the Commission recommends that a removal and transfer order should allow for the use of reasonable force, if necessary, to gain access to the place where the at-risk adult is currently located. This might be necessary, for example, where all other options to gain access have been exhausted or the immediacy of the situation necessitates the use of reasonable force. Such a power would be open to a member of the Garda Síochána, and any authorised officer accompanying them.

[12.129] Similarly, to avoid futility, the Commission recommends that a removal and transfer order should allow a member of the Garda Síochána to take all reasonable measures necessary to remove and transfer an at-risk adult. This would include, where necessary, the detention or restraint of the at-risk adult where reasonable efforts to secure the voluntary cooperation of the at-risk adult have failed. Such a power is similar to that provided for under the Mental Health Act 2001 in the context of the removal of persons to approved centres,[117] and in the Commission's view is necessary to ensure that a removal and transfer order is not futile. This power, however, is limited to members of the Garda Síochána, and it should be used as a last resort, as is discussed at section 5(c) below.

[117] See sections 13 and 27 of the Mental Health Act 2001.

R. 12.22 **The Commission recommends that** a removal and transfer order should allow for the use of reasonable force by a member of the Garda Síochána or an authorised officer, if necessary, to gain access to the place where the at-risk adult is currently located.

R. 12.23 **The Commission recommends that** a member of the Garda Síochána should be permitted to take all reasonable measures necessary for the removal and transfer of an at-risk adult including, where necessary, the detention or restraint of the at-risk adult where reasonable efforts to secure the voluntary cooperation of the at-risk adult have failed.

(iii) Provision of a notice in plain English and oral explanation

[12.130] As in Chapters 10 and 11, the Commission is of the view that the significant interference with rights that is involved with a removal and transfer order requires that at-risk adults be informed about the powers that are being used, their purpose and the process involved. The Commission thus recommends that a notice in plain English must be provided to the at-risk adult whose removal and transfer is intended upon execution of a removal and transfer order, explaining the nature of the order being exercised and the process involved. In addition to explaining the nature of the warrant or power being exercised, such a document could inform at-risk adults about independent advocacy services and other available supports. The provision of such a notice is a necessary safeguard given the significant rights implications of the interventions that are proposed in this Chapter, which constitute an even greater interference with individual rights than the powers of access proposed in Chapters 10 and 11. It is vital that individuals, and in particular at-risk adults, are assisted in understanding the legal basis for these interventions, the reason for their use in a particular case, and any supports that may be availed of. The Commission recommends that the precise content and form of this standard notice should be specified in regulations to the adult safeguarding legislation.

[12.131] In addition to the provision of this notice, a member of the Garda Síochána or authorised officer should also explain these matters orally to the at-risk adult whose removal and transfer is intended. They should also specifically explain that that upon arrival at the designated facility or other suitable place, the at-risk adult may choose to leave, and will be facilitated in doing so. Although it would be best practice to provide such explanation, any failure to do so should not, in the Commission's view, invalidate the order or the exercise of any power on foot of the order. Whilst it is important that an at-risk adult be assisted in understanding what is happening, giving an appropriately clear oral explanation should not be a statutory precondition for the valid execution of an order. The Commission is particularly mindful that this requirement will likely require specialist training for members of the Garda Síochána, given that the execution of this kind of order is very different to the use of Garda powers in the criminal context, with which members will be much more familiar.

R. 12.24 **The Commission recommends that** adult safeguarding legislation should require that a notice in plain English be provided to the at-risk adult whose removal and transfer is intended upon execution of a removal and transfer order, explaining the nature of the order being exercised and the process involved.

R. 12.25 **The Commission recommends that** adult safeguarding legislation should provide that the relevant Minister may prescribe by regulations a standard notice to be provided upon execution of a removal and transfer order, which explains the nature of the order and the power being exercised.

R. 12.26 **The Commission recommends that** when executing a removal and transfer order, the authorised officer or member of the Garda Síochána should insofar as practicable explain to the at-risk adult:

(a) the nature and purpose of the order and the powers exercisable under it; and

(b) that upon arrival at the designated health or social care facility or other suitable place, the at-risk adult may choose to leave, and will be facilitated in doing so.

However, any failure to give such an explanation should not invalidate the order or the exercise of any power on foot of the order.

(iv) Objection of the at-risk adult to execution of the order

[12.132] Upon the attempted execution of a removal and transfer order, an at-risk adult may refuse to cooperate with the relevant authorities. The Commission considered whether it should be permissible to override such objection, mindful of the significant rights implications of such a proposal. The Commission concluded that a removal and transfer order would be of little practical utility if it were not possible to remove and transfer the at-risk adult, even where they object to such actions. However, the Commission acknowledges that this constitutes a significant rights interference, and has the potential to undermine the well-established principle, as expressed in section 8(4) of the Assisted Decision-Making (Capacity) Act 2015, that adults shall not be considered as unable to make a decision in respect of a matter merely by reason of making, having made, or being likely to make, an unwise decision.

[12.133] Above, the Commission recommends an obligation on the part of the authorised officer or member of the Garda Síochána to make reasonable efforts to ascertain the views of the at-risk adult in relation to the transfer before applying for a removal and transfer order, and to consider such views in deciding whether to so apply. It recommends a threshold for overriding the objection of the at-risk adult, where that arises. These recommendations reflect the importance of the at-risk adult's right to autonomy, and respecting their wishes and preferences. The Commission is of the view that such an obligation and threshold should not be required at execution stage. At this point, the issue of whether a removal and

transfer order is needed in all the circumstances will have been resolved by a District Court judge. The process of removing the at-risk adult may occur in fraught and heightened situations, wherein it would be challenging to ascertain views and reach a threshold for overriding objection. Thus, the members of the Garda Síochána should be able to execute the removal and transfer order, including by taking the steps referred to in section 5(b)(ii) above, even where the at-risk adult objects to them doing so.

[12.134] However, in line with the Commission's decision regarding detention, discussed below at section 5(g)(ii), the ability to disregard the at-risk adult's apparent objection should lapse upon arrival at the designated health or social care facility or other suitable place.

(v) Matters arising upon arrival at the designated health or social care facility or other suitable place

[12.135] The Commission recommends that if, upon arriving at the designated health or social care facility or other suitable place, the at-risk adult chooses to leave, the Safeguarding Body, members of the Garda Síochána and any other appropriately qualified health or social care professionals, as appropriate, should support them in doing so, and the removal and transfer order should be considered discharged. The Safeguarding Body, members of the Garda Síochána and any other appropriately qualified health or social professionals, as appropriate, should be obliged to return the at-risk adult safely to the place from which they were removed or to a place of the adult's choice, insofar as practicable. The Safeguarding Body should also continue to offer assistance and support to the at-risk adult, including providing information in relation to such other supports as may be available. It is possible that the at-risk adult's views might change, and they may wish to avail of supports in the future. It is important that they be facilitated in doing so, and that they be made aware of their options. This is particularly necessary in light of the severity of the case that will have justified the granting of a removal and transfer order in the first place.

[12.136] It may be that upon arrival at the designated facility or other suitable place, the at-risk adult expresses a desire to leave, but there are clear signs that they lack the capacity to decide to do so, or that they are suffering from a mental disorder as defined under the Mental Health Act 2001. In line with the guiding principles of the Assisted Decision-Making (Capacity) Act 2015, and in light of consultees' views, the Commission is of the view that any capacity concerns should not be grounds for detaining the at-risk adult by refusing them permission to leave the facility or other suitable place.

[12.137] Instead, the Commission recommends that where it appears to the Safeguarding Body, member of the Garda Síochána or other appropriately qualified health or social professional that the at-risk adult may lack capacity to decide whether to remain in the designated health or social care facility or other suitable place, they should endeavour to support the at-risk adult to make the decision, and where

necessary consider supports under the Assisted Decision-Making (Capacity) Act 2015 and notifying, in writing, the Director of the Decision Support Service. In all cases, the Safeguarding Body or other professional should presume that the at-risk adult has capacity to make the decision, and should take steps to support them to make it, before looking to formal supports under the 2015 Act. In the case of a concern regarding a mental disorder, as defined in the Mental Health Act 2001, the Safeguarding Body or other professional with such concern should inform a GP or other appropriate medical professional, or member of the Garda Síochána, for the purposes of a possible application under the Mental Health Act 2001.

[12.138] As discussed above at section 1(a), the proposed adult safeguarding legislation is intended to interact with provisions of relevant related legislation such as the Mental Health Act 2001 and the Assisted Decision-Making (Capacity) Act 2015. It might be that, although the at-risk adult cannot be detained under adult safeguarding legislation, steps can and should be taken under other legislative provisions. If, for example, a capacity assessment was ultimately carried out and the at-risk adult was assessed as lacking capacity to make decisions about their own care, accommodation and contact with others, one could look to the inherent jurisdiction in the short term, the Protection of Liberty Safeguards Bill once enacted,[118] and to invoking supports under the 2015 Act for matters other than detention.[119]

[12.139] If, on the other hand, the at-risk adult does have decision-making capacity, but nonetheless appears to be in a coercive situation, the Safeguarding Body, members of the Garda Síochána and other appropriately qualified health or social professionals would generally be required to respect their wishes, and allow the at-risk adult to return to the place from which they were removed or other place of their choosing. The Safeguarding Body's approach in such a case should be similar to that taken in instances of domestic violence – the Safeguarding Body could regularly check in, offer supports, and encourage the at-risk adult to express their views. As noted above, the at-risk adult's will and preferences might change over time.

[12.140] In the absence of the Protection of Liberty Safeguards Bill or other legislation regulating detention, the inherent jurisdiction of the High Court is currently being

[118] Discussed further below.

[119] In *In the Matter of the Assisted Decision-Making (Capacity) Act 2015, as amended, and In the Matter of Joan Doe* [2023] IECC 10, O'Connor J noted that the 2015 Act "does not confer on the Circuit Court a jurisdiction for making orders in relation to the detention of persons who lack capacity. Presently such an application can be made under the inherent jurisdiction of the High Court. Specifically Article 34.3 vests the High Court with 'full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal'." See detailed discussion on the interaction of the 2015 Act and inherent jurisdiction in Chapter 1.

used for the purposes of detaining individuals, both those who lack decision-making capacity and (in narrow circumstances) capacitous individuals.[120] It would be open to professionals to seek such an order. However, as is discussed below at section 5(g)(ii), the Commission is strongly of the view that this matter should be dealt with pursuant to a clear and comprehensive statutory scheme.

R. 12.27 **The Commission recommends that** if, once a removal and transfer order has been executed, the at-risk adult chooses to leave the designated health or social care facility or other suitable place, the Safeguarding Body, members of the Garda Síochána and appropriately qualified health or social care professionals, as appropriate, should support them in doing so, and the removal and transfer order should be considered discharged.

R. 12.28 **The Commission recommends that** if, once a removal and transfer order has been executed, the at-risk adult chooses to leave the designated health or social care facility or other suitable place, the Safeguarding Body, members of the Garda Síochána and appropriately qualified health or social care professionals, as appropriate, should be obliged to return the at-risk adult to the place from which they were removed or to a place of the at-risk adult's choosing, insofar as practicable. The Safeguarding Body should also continue to offer assistance and support to the at-risk adult, including providing information in relation to such other supports as may be available.

R. 12.29 **The Commission recommends that** if, once a removal and transfer order has been executed, it appears to the Safeguarding Body, members of the Garda Síochána or other professional that the at-risk adult may lack capacity to decide to remain in the designated health or social care facility or other suitable place, they must endeavour to support the at-risk adult to make the decision, and where necessary consider supports under the Assisted Decision-Making (Capacity) Act 2015 and notifying, in writing, the Director of the Decision Support Service. Such a view should not, however, be grounds for refusing the at-risk adult permission to leave the designated health or social care facility or other suitable place.

(vi) Powers of interview and medical examination

[12.141] As in Chapters 10 and 11, the Commission is of the view that powers of interview and medical examination should arise on foot of a removal and transfer order. These powers would facilitate an assessment of the health, safety and welfare of the at-risk adult, and of whether any actions are needed in respect of the at-risk

[120] See also *Health Service Executive v AJ (APUM)* [2024] IEHC 166 and the discussion in Chapter 1 regarding the possibility of detention orders being granted pursuant to the court's jurisdiction under section 9 of the Courts (Supplemental Provisions) Act 1961, outside of the wardship context.

adult. As such, the Commission recommends that a removal and transfer order should allow authorised officers and appropriately qualified health or social care professionals to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a designated health or social care facility or other suitable place specified by the court. Clearly, this will only arise where the at-risk adult does not choose to leave, as set out above.

[12.142] Even if the at-risk adult does not seek to leave the designated health or social care facility or other suitable place, providing for a power to enforce their cooperation with an interview and medical assessment would be a significant interference with their rights. In particular, it would be a significant interference with their constitutional rights to autonomy, dignity and bodily integrity. In the Commission's view, it would be an overly intrusive, paternalistic approach. As such, the Commission recommends that adult safeguarding legislation require that such powers cannot be exercised where the at-risk adult objects. The Commission also recommends that the at-risk adult must be informed in advance of their right to refuse any interview or medical examination. These are critical safeguards to ensure that the proposed powers do not constitute a disproportionate interference with the constitutional and ECHR rights of at-risk adults.

R. 12.30 **The Commission recommends that** a removal and transfer order should allow authorised officers and appropriately qualified health or social care professionals to conduct a private interview with, and a preliminary medical examination of, an at-risk adult in a designated health or social care facility or other suitable place specified by the court.

R. 12.31 **The Commission recommends that** adult safeguarding legislation should require that, in advance of carrying out any interview or medical examination, an authorised officer or health or social care professional should explain to the at-risk adult that they may refuse to answer any question or to be medically examined.

R. 12.32 **The Commission recommends that** adult safeguarding legislation should require that the powers of interview and medical examination cannot be exercised if the at-risk adult objects.

(c) Offence of obstruction and associated power of arrest

[12.143] In Chapter 11, the Commission proposes an offence of obstruction where an individual, other than an at-risk adult, obstructs or impedes a member of the Garda Síochána or an authorised officer when they are exercising a power of access. The Commission also recommends a power of arrest where a person, other than an at-risk adult, obstructs or impedes a member of the Garda Síochána when they are exercising a power of access. Similarly, to address situations where a third party obstructs or impedes the removal and transfer of

an at-risk adult and efforts to secure the voluntary cooperation of the third party have failed, the Commission proposes that an offence of obstruction and an associated power of arrest should be provided.

[12.144] The Commission thus recommends that it should be an offence for a person, other than an at-risk adult, to obstruct or impede a member of the Garda Síochána or an authorised officer when the member or officer is executing a removal and transfer order. A member of the Garda Síochána should also be able to arrest any person, other than an at-risk adult, who obstructs or impedes the member when they are executing a removal and transfer order.

[12.145] In circumstances in which a person does not obstruct the removal of the at-risk adult but follows behind a vehicle transporting the at-risk adult to a designated health or social care facility and attempts to interfere with the care arrangements for the at-risk adult on voluntary admission to the designated health or social care facility, the Commission's view is that the policy of the individual health or social care facility should apply.

R. 12.33 **The Commission recommends that** it should be an offence for a person, other than an at-risk adult, to obstruct or impede a member of the Garda Síochána or an authorised officer when the member or officer is executing a removal and transfer order.

R. 12.34 **The Commission recommends that** a member of the Garda Síochána should be able to arrest without warrant any person, other than an at-risk adult, who obstructs or impedes the member when they are executing a removal and transfer order.

[12.146] As in Chapters 10 and 11, the Commission firmly believes that such an offence and associated power of arrest should not apply in relation to the at-risk adult themself. Where an at-risk adult resists removal and transfer, it is essential that social work skills and appropriate communication are used to explain the purpose of the proposed removal and transfer and to try to reassure the at-risk adult and ease any anxieties or confusion. Careful regard must be had to ensuring the least intrusive interference with the rights of the at-risk adult. However, where an at-risk adult continues to resist removal and transfer in circumstances where there is a serious and immediate risk to their health, safety or welfare, the Commission recommends that a member of the Garda Síochána should be permitted to take all reasonable measures necessary for the removal and transfer of the at-risk adult including, where necessary, the detention or restraint of the at-risk adult. This is discussed above at section 5(b)(ii). While this power of restraint should be used only as a last resort, bearing in mind the implications for the rights of at-risk adults, use of such a power may be essential to vindicate the rights of the at-risk adult where there is a serious and immediate risk to their health, safety or welfare.

R. 12.35 **The Commission recommends that** the offence of obstruction and associated power of arrest should not apply in relation to the at-risk adult whose assessment is intended under the removal and transfer order.

(d) Anonymity of at-risk adults

[12.147] As in Chapters 10 and 11, the Commission is of the view that the at-risk adult's right to privacy should be carefully observed in the context of applications for these orders, as they will involve highly sensitive facts and personal details. The Commission thus recommends that in relation to any proceedings for a removal and transfer order, it should be an offence for a person to publish, distribute or broadcast any information likely to identify the at-risk adult, unless the court directs otherwise. Similar provisions are used in existing Irish legislation regarding sensitive applications for orders, such as section 19(9) of the Mental Health Act 2001.

[12.148] It may be that the court considers that it is in the interests of justice that certain information should be published, distributed or broadcast. In such situations, the court should be permitted to specify in a written direction the manner in which such information can be published, distributed or broadcast and impose any conditions it considers necessary. Contravening a direction of this sort, or a condition in a direction, should also be an offence.

[12.149] As with the offence of obstruction, it should not be an offence for an at-risk adult to publish, distribute or broadcast any information identifying themselves, or to contravene a direction (or a condition in a direction) of the court in this regard.

R. 12.36 **The Commission recommends that** in relation to any proceedings for a removal and transfer order, it should be an offence for a person, other than an at-risk adult, to publish, distribute or broadcast any information likely to identify the at-risk adult, unless the court directs otherwise. (See the relevant section of the Commission's Adult Safeguarding Bill 2024 regarding the anonymity of adults at risk of harm and others.)

(e) Independent advocacy in the context of removal and transfer

[12.150] In Chapter 8, the Commission discusses the benefits of independent advocacy in safeguarding at-risk adults and ensuring that their views are heard. In that Chapter, the Commission recommends that adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, so far as is reasonably practicable, access to independent advocacy services for at-risk adults, where it engages with an at-risk adult directly for the purposes of exercising its functions. This would include where the Safeguarding Body, or its authorised officers, need to intervene to safeguard an at-risk adult by applying for a removal and transfer order. This duty applies only where the at-risk adult experiences significant challenges in doing particular things and where there is no suitable person who

could effectively support the at-risk adult to enable their involvement, as explained in detail in section 4(b) of Chapter 8.

[12.151] This duty would apply to a number of interventions, including the removal and transfer order proposed in this Chapter, as most interventions would require the Safeguarding Body to engage directly with the at-risk adult (for example, in order to ascertain their views before applying for the order). The Commission is of the view that access to independent advocacy services would be a useful additional safeguard in this context. Unlike the authorised officers of the Safeguarding Body, members of the Garda Síochána, or other appropriately qualified health or social care professionals accompanying them, an independent advocate would not be trying to persuade or counsel the at-risk adult to take a specific course of action, rather they would help them to understand what is happening and assist them in communicating their will and preferences.

[12.152] The situations in which removal and transfer orders are executed may be so urgent that it is not possible to obtain independent advocacy services ahead of time. However, reasonable efforts should be made to do so, and where such services are available, an at-risk adult must be facilitated in accessing them. It might be the case that independent advocacy services can be obtained upon reaching the designated health or social care facility or other suitable place. The independent advocate would be well-placed to explain the position to the at-risk adult, and to communicate the at-risk adult's views as to whether they are willing to stay in the facility or other suitable place, or wish to be returned home.

(f) A code of practice for authorised officers and others exercising powers, and a statutory immunity

(i) Statutory code of practice

[12.153] Consultees, including professionals working in the area of adult safeguarding, stressed to the Commission the need for practitioners to be provided with guidance on the use of new adult safeguarding legislation, and meeting statutory thresholds for interventions. Given the complex and intrusive nature of the proposed powers, the Commission is of the view that it would be beneficial for authorised officers (and others who may accompany them) to be provided with a code of practice regarding usage of the powers. This would offer practical guidance on the use of the powers, and could set out the internal, operational detail as to how the statutory powers are to be used and put into practice by relevant professionals. Such a document could be drafted by the relevant Minister, in consultation with the Safeguarding Body and others as it sees fit. Statutory codes of practice regarding adult safeguarding legislation are a

feature in other jurisdictions, such as Scotland.[121] Such a document would allow authorised officers and others who may accompany them to be thoroughly apprised of their duties and obligations under the legislation, in addition to relevant thresholds and safeguards. Specific training for members of the Garda Síochána may also be necessary, perhaps in the form of joint training programmes with the Safeguarding Body. This would allow members to build the necessary expertise to allow them to assist other practitioners and bodies in effectively safeguarding at-risk adults.[122]

(ii) A statutory immunity for authorised officers and others exercising powers

[12.154] In relation to the interventions proposed in this Chapter and in Chapters 10, 11 and 13, the Commission considered whether a statutory immunity should be provided for, to clarify that no action would lie against an authorised officer, member of the Garda Síochána or other accompanying individual who exercised powers or functions in accordance with the proposed provisions of adult safeguarding legislation. On balance, the Commission is of the view that such a provision would be unnecessary and inappropriate. Where there are issues in relation to the exercise of the powers or allegations of non-compliance with statutory requirements, the ordinary common law rules would apply.[123]

(g) Considerations regarding a summary power of removal and transfer, and a power of detention

(i) A summary power of removal and transfer should not be introduced in Ireland

[12.155] The Commission considered the possibility of providing for a summary power of removal and transfer, to be available in particularly urgent cases, where delaying removal of the at-risk adult pending an application to the District Court could result in serious harm to, or the death of, the at-risk adult. The need to remove an at-risk adult in such circumstances might become apparent following:

(a) the exercise of a power of access to an at-risk adult;
(b) the use of a common law power of entry by a member of the Garda Síochána where there is a serious risk to life and limb; or

[121] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022).

[122] The Commission's recommendations regarding cooperation and information sharing are also relevant here, and are intended to support effective inter-agency working. See Chapters 15 and 16.

[123] See, for example, actions in negligence against members of the Garda Síochána in relation to the exercise of their public order functions: *Fagan v Garda Commissioner* [2014] IEHC 128.

(c) the voluntary admission of an authorised officer or other appropriately qualified health or social care professional, and/or a member of the Garda Síochána, to a property.

[12.156] Where there is a serious and immediate risk to the at-risk adult, the existence of a summary power of removal and transfer would allow the at-risk adult to be removed from immediate danger. Some consultees were of the view that such a power would be very useful, to avoid the undesirable scenario whereby an authorised officer or member of the Garda Síochána gains access to an at-risk adult in a particular place and comes across a situation that is urgent and grave, but must then leaves the at-risk adult in the place pending an application to court.

[12.157] However, other consultees expressed general discomfort with powers allowing for removal and any period of detention of at-risk adults, and many stressed the need for court oversight of these interventions.

[12.158] Having considered the views of consultees and stakeholders, the rights of at-risk adults, and comparative legislation, the Commission believes that a summary power of removal and transfer should not be introduced in Ireland. The interventions proposed in this Report are novel, and involve significant rights implications. It would be preferable for such powers to be used in practice before considering additional, more intrusive, interventions. The Commission is also of the view that the scenario of urgent risk is somewhat addressed by allowing for applications for a removal and transfer order, even where access to the at-risk adult has not yet been obtained. This would allow for quicker intervention in cases that appear particularly urgent.

R. 12.37 **The Commission recommends that** adult safeguarding legislation should not make provision for a summary power of removal and transfer.

(ii) A power of detention should not be introduced in Ireland

[12.159] The Commission also considered providing for a power to temporarily detain an at-risk adult upon reaching the designated health or social care facility or other suitable place.[124] There is an argument that, without provision for temporary detention, the effect of a removal and transfer order in preventing harm or

[124] In the Commission's Issues Paper, it noted that deprivation of liberty was being examined by the Department of Health in considerable detail, so the issue would not be included within the scope of this project. However, in light of consultees' views, subsequent developments (in particular, recent judicial decisions and the phasing out of wardship as a basis for detaining individuals following the commencement of most of the provisions of the Assisted Decision-Makin (Capacity) Act 2015 in April 2023), and further comparative research, the Commission considered this issue at length. Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) at para 3.32.

further harm to an at-risk adult is substantially reduced. Without a period of temporary detention, an at-risk adult, including an at-risk adult who appears to be coerced or to be incapacitous, could return to an abusive situation and could be prevented from accessing necessary medical attention or other supports. A power to temporarily detain could thus be a useful tool in creating additional time to assess and minimise the risk posed. It would also offer the at-risk adult additional breathing space, potentially increasing the likelihood that they will confide in relevant authorities and support further actions being taken to support themselves. In very serious cases, the at-risk adult may require a sustained period of medical attention, requiring a number of days or weeks in hospital. A power of temporary detention would facilitate such medical treatment.

[12.160] Providing for statutory powers of temporary detention would also provide greater legal certainty for actions taken to facilitate access to healthcare or other assistance where currently there is no legislative formula. A clear statutory provision, with appropriate thresholds and safeguards, is a preferable approach to reliance on the High Court's inherent jurisdiction or the doctrine of necessity.[125] It would also ensure that the interference with rights (in particular the right to liberty under the Constitution and ECHR) is legitimate, proportionate, and in accordance with law.

[12.161] The Commission considered at length the views of consultees regarding such a power, and noted the concerns of consultees in particular about the interaction of detention powers with the principles expressed in the Assisted Decision-Making (Capacity) Act 2015, and their concern about the proposed power being used to detain at-risk adults for the purposes of assessing capacity. The Commission also considered approaches in other jurisdictions, and ongoing legislative work in Ireland. In particular, the Government is currently working on a Protection of Liberty Safeguards Bill.[126] This is intended to establish a general framework for care arrangements that involve a period of detention, reducing the need to resort to the inherent jurisdiction of the High Court for this purpose.

[12.162] The Commission welcomes this work, which will address an urgent gap in the law and bring much-needed legislative clarity to this area. Any detention power that the Commission would propose in relation to at-risk adults would interact with this wider work, and could result in two models of detention that are not entirely coherent with one another. In the Commission's view, it is preferable that this complex and important issue be dealt with comprehensively under an overarching and comprehensive legislative framework. For this reason, the Commission does not recommend that adult safeguarding legislation should

[125] See further the discussion above and in Chapter 1.

[126] An Expert Advisory Group was established in January 2023, and the Commission understands that the Group has been meeting on a regular basis to inform the development of policy proposals.

provide for a power to temporarily detain at-risk adults. A removal and transfer order should not allow for any period of detention of the at-risk adult, other than occurs during the period of removal and transfer to the designated health or social care facility or other suitable place.

[12.163] The Commission has taken this approach in light of the imminent legislation concerning detention more generally. Such a statutory regime is essential and should be implemented as a matter of urgency. If, for any reason, this work does not continue, legislation will be needed to remedy this gap in the future.

R. 12.38 **The Commission recommends that** a removal and transfer order should not allow for any period of detention of the at-risk adult, other than their removal and transfer to the designated health or social care facility or other suitable place, as specified in the order.

6. Conclusions and recommendations

[12.164] Throughout this Chapter, the Commission has explained the rationale for its recommendation that adult safeguarding legislation should provide for a removal and transfer order. It has also outlined the parameters, safeguards and thresholds associated with such an order. The proposed order would provide adult safeguarding professionals with a necessary tool to support and protect at-risk adults in the most severe and urgent circumstances. The Commission is of the view that such intervention will be necessary in some cases to vindicate the constitutional and ECHR rights of at-risk adults, though it is cognisant of the significant interference with rights that this intervention poses. Like the interventions proposed in Chapters 10 and 11, it is intended as a tool of last resort.

[12.165] Placing this intervention on a statutory footing and including high thresholds and evidentiary requirements, alongside a range of safeguards, will ensure that the interference with the rights of at-risk adults and third parties (although significant) is in accordance with law and is proportionate in the circumstances.

[12.166] Although the Commission does not currently recommend powers to temporarily detain at-risk adults, it welcomes ongoing work on protection of liberty safeguards by Government, to address the current gap in the law.

CHAPTER 13
NO-CONTACT ORDERS

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6. Conclusions and recommendations **381**

1. Introduction

[13.1] This Chapter discusses protective orders such as no-contact orders in the adult safeguarding context. Specifically, the Commission explains its reasons for recommending two key reforms:

(1) the amendment of the Domestic Violence Act 2018, so that domestic abuse perpetrated against at-risk adults is appropriately addressed; and

(2) a new adult safeguarding no-contact order, tailored specifically to the adult safeguarding context and available on an interim and emergency basis in limited cases.

[13.2] The Commission is of the view that it is unhelpful for domestic violence to be obscured or overlooked by being treated as a safeguarding issue when it arises in situations in which the victim happens to be an at-risk adult. What is required is recognition of domestic abuse within the safeguarding context, as well as a means to achieve protection in situations of harm or exploitation that do not fit neatly within existing definitions of domestic abuse, but which nevertheless require a legal response in order to vindicate the rights of an at-risk adult. As with the interventions proposed in Chapters 10, 11 and 12, the expanded range of protective orders would be available as a last resort for appropriate cases, where necessary to safeguard an at-risk adult. Unlike the interventions in those Chapters, however, these orders could be applied for by the at-risk adult they are intended to protect (in addition to authorised officers), allowing them to take steps to protect themself from harm.

[13.3] In formulating its recommendations in this Chapter, the Commission has examined the existing law on protective orders in Ireland and identified gaps in the current regime. Examining comparable statutory orders in Irish law in relation to domestic abuse, harassment and stalking behaviour assisted in determining the parameters of the proposed reforms. The Commission also examined the implications of these orders for constitutional rights and rights under the European Convention on Human Rights ("ECHR"), and the approaches of other jurisdictions to safeguarding no-contact orders, where such orders are an established feature of the adult safeguarding landscape. This analysis has assisted the Commission in determining the appropriate framing of such orders in Irish law.

(a) The autonomy, will and preferences of at-risk adults

[13.4] This Chapter examines the possibility of no-contact orders being made against the wishes of the at-risk adult. This might be necessary, for example, in circumstances in which an at-risk adult appears to lack capacity to decide

whether to have contact with a particular person.[1] It should be noted that, following implementation of the Commission's recommendations in this Report, a particular at-risk adult could be the subject of both the Assisted Decision-Making (Capacity) Act 2015 ("2015 Act") and the proposed adult safeguarding legislation at the same time.[2] In some cases, the adult safeguarding regime will act as a gateway to the interventions provided under the 2015 Act or other health or social care legislation.

[13.5] Under the 2015 Act, decisions regarding a relevant person's "personal welfare" or "property and affairs"[3] can be made by the relevant person with the assistance of a decision-making assistant or co-decision-maker, or by a decision-making representative. However, section 44(1) of the 2015 Act expressly prohibits a decision-making representative from being given the power to prohibit someone from having contact with the person for whom they are a decision-making representatative. At section 4(c)(ii) below, the Commission outlines its view that where an at-risk adult lacks, or is believed to lack, capacity, the Safeguarding Body may apply for an emergency no-contact order on their behalf, where the relevant threshold is satisfied. This threshold, in combination with the requirement for court oversight and other safeguards, will ensure that any interference with the at-risk adult's rights is proportionate.

[13.6] The most contentious issue which arises in this Chapter is whether there are circumstances in which a no-contact order should be capable of being made against the wishes of a capacitous at-risk adult whose protection is sought to be achieved by the making of the order. This question goes to the core of this project, in that it aims to balance autonomy and empowerment with prevention and protection. As in other Chapters, comparative analysis has aided the Commission in concluding that there are limited circumstances in which an at-risk adult's apparent objection should be overridden.[4]

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[1] As noted elsewhere in this Report, the presumption of capacity on the part of all at-risk adults must be respected, in accordance with the guiding principles in section 8 of the Assisted Decision-Making (Capacity) Act 2015.

[2] Although, as noted in Chapter 1, many at-risk adults will not lack capacity to decide on particular matters. Equally, an individual may lack capacity to decide on a particular matter at a point in time, but not satisfy the definition of "at-risk adult".

[3] As defined in section 2 of the Assisted Decision-Making (Capacity) Act 2015).

[4] This issue is addressed in detail below.

2. Existing protective orders under Irish law

(a) Orders under the Domestic Violence Act 2018

(i) Safety, barring and protection orders

[13.7] The concept of a civil restraining order is an established and familiar feature of Irish family law, which provides for safety, barring and protection orders where domestic abuse is alleged or established. Orders available under the Domestic Violence Act 2018 provide for protection in domestic abuse situations in certain limited categories of intimate and familial relationships. Such orders are used to protect a person who alleges that they are experiencing domestic abuse by prohibiting the person to whom the order is directed (the respondent) from using violence against, threatening or putting the applicant in fear. The applicant may be the respondent's spouse, civil partner, former intimate partner or parent.[5] Such orders can also operate to prohibit communication with the applicant, to direct the respondent to leave or to bar them from entering a particular place. A court has wide discretion in determining whether to make such an order, but is required to have regard to matters such as any history of violence, destruction of property, recent separation and the applicant's perception of the risk to their safety or welfare due to the behaviour of the respondent.[6]

[13.8] Although safety, barring and protection orders are civil orders, failure to comply with an order is a criminal offence[7] for which there is a power of arrest without warrant.[8] This arrest power (and the potential for the imposition of bail conditions in the event that a person is charged with contravention of a Domestic Violence Act order) is an important practical protection measure in the domestic abuse context. However, because Domestic Violence Act orders are restricted to specific intimate and familial relationships, they are not always applicable in the adult safeguarding context.

[5] Where the respondent is of full age and is not a dependent person in relation to the parent. In relation to safety and protection orders, the applicant may also be an adult with whom the respondent cohabits on a non-contractual basis or the parent of a child whose other parent is the respondent. In relation to barring orders, former intimate partners may only be made subject to such orders where they were cohabiting with the applicant.

[6] Section 5 of the Domestic Violence Act 2018.

[7] Section 33 of the Domestic Violence Act 2018.

[8] Section 35(1) of the Domestic Violence Act 2018.

(ii) Domestic Violence Act orders can be sought and made without consent

[13.9] Domestic Violence Act orders can be sought and made even if the person whose protection is intended in the making of the order does not consent. Section 11 of the 2018 Act provides that the Child and Family Agency (the "Agency") may make an application on behalf of an "aggrieved person" for a barring order, a safety order or an emergency barring order where the Agency has reasonable cause to believe that the aggrieved person is prevented or deterred from making an application on their own behalf as a result of molestation, violence, threatened violence or fear of the respondent.

[13.10] The genesis of this provision, first introduced in 1996 and replicated in the 2018 Act, was a Law Reform Commission recommendation in its Report on Child Sexual Abuse aimed at protecting children living in abusive situations (that is, a third party welfare consideration).[9] The Commission stated:

> It should be stressed that the health board's power to seek a barring order would derive from its duty to protect children at risk. The exercise of this form of intervention by a public body should be strictly limited to the circumstances in which State intervention in the family is justified under the Constitution.[10]

[13.11] The possibility of domestic violence prosecutions without the cooperation of the victim is also referred to in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, usually referred to as the "Istanbul Convention". This Convention was ratified by Ireland on 8 March 2019 and entered into force in Ireland on 1 July 2019. The Explanatory Report to the Istanbul Convention refers to the potential for extension of restraining orders and protection orders to victims who are unwilling or unable to apply on their own behalf:

> Parties may also consider taking measures to ensure that standing to apply for restraining or protection orders … is not limited to victims. These measures are of particular relevance in relation to legally incapable victims, as well as regarding vulnerable victims

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

10 Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990) at para 3.31.

> who may be unwilling to apply for restraining or protection orders for reasons of fear or emotional turmoil and attachment.[11]

[13.12] Section 11(1)(b)-(d) of the Domestic Violence Act 2018 gives effect to this concept in Irish law, by providing that the Child and Family Agency can apply for an order where it:

> (b) has reasonable cause to believe that the aggrieved person has been subjected to molestation, violence or threatened violence or otherwise put in fear of [their] safety or welfare,
>
> (c) is of the opinion that there are reasonable grounds for believing that, where appropriate in the circumstances, a person would be deterred or prevented as a consequence of molestation, violence or threatened violence by the respondent or fear of the respondent from pursuing an application for a safety order, a barring order or an emergency barring order on [their] own behalf or on behalf of a dependent person, and
>
> (d) considers, having ascertained as far as is reasonably practicable the wishes of the aggrieved person or, where the aggrieved person is a dependent person, of the person to whom paragraph (c) relates in respect of the dependent person, that it is appropriate in all the circumstances to apply for a safety order, a barring order or an emergency barring order in accordance with this Act on behalf of the aggrieved person.[12]

[13.13] When considering any application made by the Child and Family Agency, the District Court or the Circuit Court is required to have regard to any wishes expressed by the aggrieved person, but their consent is not required for the granting of an order.[13] An annotation of the Domestic Violence Act 2018 notes:

> Read literally, s.11(3) [of the Domestic Violence Act 2018] does not expressly require the court to ascertain those wishes, though it

[11] Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011) at para 276.

[12] Similar wording was contained in this section's predecessor, section 6 of the Domestic Violence Act 1996.

[13] Section 11(3) of the Domestic Violence Act 2018.

must be implicit that the court should endeavour to make reasonable efforts to ascertain their wishes, if not already expressed.[14]

[13.14] The language of section 11 does not expressly refer to the possibility of making an order without the consent of the aggrieved person, but the potential is clear.

[13.15] The Commission understands that this provision is used infrequently.[15] The Child Law Project referred in January 2023 to a case in which the provision was used and stated that it was the first time that it had observed the provision being used.[16]

(b) Civil orders under the Non-Fatal Offences against the Person Act 1997

[13.16] A statutory form of injunction, effectively a restraining order, has long been available in respect of the offence of harassment. Prior to changes introduced in 2023, if a defendant was convicted of harassment, the court could (in addition to or as an alternative to any other penalty) prohibit the person from communicating by any means with or about the victim or from approaching the residence or place of employment of the victim. If, on the evidence, the court found the defendant not guilty of harassment, an order could still be made to prevent them from communicating with or approaching the victim if the court was satisfied that it was in the interests of justice to do so. This was described by the Court of Appeal in *DPP v Ramachandran* as "a remarkable feature of the

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[14] Ryan, Domestic Violence Act 2018 (Annotated) (8 May 2018) Irish Current Law Statutes Annotated (available on Westlaw IE)._

[15] An observational study published in 2019 recorded no instances of orders being sought or granted without consent of the aggrieved person: Conneely, O'Shea and Dempsey, "Domestic Violence in the District Court" (2019) 4 Irish Journal of Family Law 79. See also Mason Hayes & Curran, "When Can State Agencies Apply for Domestic Violence Orders?" (13 September 2022) <https://www.mhc.ie/latest/insights/when-can-state-agencies-apply-for-domestic-violence-orders#:~:text=Section%2011%20of%20the%20DVA,the%20victim%20of%20domestic%20abuse> accessed 8 August 2023. The authors note that not all domestic violence situations are captured by the legislation, and that it uses very technical language. However, they suggest that "this relatively recent legislation is a valuable additional measure to assist state agencies in protecting vulnerable children and adults against domestic violence".

[16] Law Society Gazette, "Tusla seeks barring order against violent parent" (17 January 2023) <https://www.lawsociety.ie/gazette/top-stories/2023/january/tusla-seeks-barring-order-against-alleged-violent-parent> accessed 20 March 2023; Child Law Project, "CFA seeks interim barring order to protect children already under care order" *Case Reports 2022*, Volume 2, Case 32 <https://www.childlawproject.ie/publications/cfa-seeks-interim-barring-order-to-protect-children-already-under-care-order/> accessed 8 August 2023.

Act",[17] but the Court had no difficulty in making a ten-year no-contact order, in tandem with orders excluding the respondent from specified locations for the same period, notwithstanding his acquittal. Such restraining orders were described by Baker J in *O'Raithbheartaigh v Judge McNamara* as "a form of preventative justice recognised as an important element in the administration of justice".[18]

[13.17] Section 10 of the Non-Fatal Offences against the Person Act 1997 was substituted by section 23 of the Criminal Justice (Miscellaneous Provisions) Act 2023 on 1 November 2023.[19] Where an individual has been found guilty of harassment under section 10(1) or the new offence of stalking under section 10(2) of the 1997 Act, the court may make an order prohibiting that person from communicating by any means with or about the other person, or approaching the place of residence, education or employment of the other person.[20] As with orders made under the Domestic Violence Act 2018, non-compliance with such an order under section 10 of the 1997 Act is an offence.[21]

[13.18] It no longer appears possible to impose such an order where the individual has *not* been found guilty of either harassment or stalking. However, the 2023 Act provides for a new scheme of civil restraining orders, discussed below.

(c) Civil restraining orders under Part 5 of the Criminal Justice (Miscellaneous Provisions) Act 2023

[13.19] The Criminal Justice (Miscellaneous Provisions) Act 2023, enacted in July 2023, has broadened the availability of civil restraining orders. At the time of writing, the Act has not been fully commenced. The Act substituted section 10 of the Non-Fatal Offences against the Person Act 1997 on 1 November 2023, as is discussed above. At the time of writing, Part 5 of the Act has not yet been commenced. Once the provisions contained in Part 5 of the Act are commenced,

[17] *DPP v Ramachandran* [2000] 2 IR 307.

[18] *O'Raithbheartaigh v Judge of the District Court Patricia McNamara* [2014] IEHC 406; [2014] 1 IR 236 at para 42.

[19] Criminal Justice (Miscellaneous Provisions) Act 2023 (Commencement) (No 2) Order 2023 (SI No 525 of 2023), art 3(c).

[20] Section 10(4) of the Non-Fatal Offences against the Person Act 1997, as amended. As under the previous provision, such an order may be made in addition to or as an alternative to any other penalty. Regarding communication, the court may specify a period for the prohibition. Regarding contact, the court must specify a distance within which the person cannot approach.

[21] Section 10(8) of the Non-Fatal Offences against the Person Act 1997, as amended.

the Act will separately provide for a system of civil restraining orders. Part 5 of the Act provides that such civil restraining orders can be granted in situations aligned with, but not limited to, stalking and harassment. Such restraining orders will be available where there are reasonable grounds for believing that the respondent has engaged in "relevant conduct" towards the applicant or a person connected to the applicant, and where it is considered that the making of the order is, in all of the circumstances, necessary and proportionate to protect the safety and welfare of the applicant.[22] "Relevant conduct" is defined as:

> conduct engaged in, without lawful authority or reasonable excuse, by the respondent towards the applicant or, where relevant, a person connected to the applicant, that would reasonably be considered likely to cause the applicant—
>
> (a) to fear that violence will be used against the applicant or person, or
>
> (b) serious alarm or distress that has a substantial adverse impact on [their] usual day-to-day activities.[23]

[13.20] An order made under section 28 of the 2023 Act will prohibit the respondent from actions in respect of the applicant, or a person connected to the applicant, including: (a) using or threatening to use violence against, molesting or putting in fear the person; (b) following or communicating by any means with or about the person; (c) approaching, within such distance as the court shall specify, the place of residence, education or employment of the person; (d) engaging in such other forms of relevant conduct as the court specifies.[24] Section 28(6) provides that section 28 restraining orders shall have effect for a period of up to five years.

[22] Section 28(3) of the Criminal Justice (Miscellaneous Provisions) Act 2023.

[23] Section 27(2) of the Criminal Justice (Miscellaneous Provisions) Act 2023. A list of behaviours is set out in section 27(3) as exemplifying relevant conduct, without prejudice to the generality of section 27(2), including: following, watching, monitoring, tracking or spying upon a person; pestering a person; impersonating a person; communicating with or about a person; purporting to act or communicate on behalf of a person; disclosing to other persons private information in respect of a person; interfering with the property (including pets) of a person; loitering in the vicinity of a person; causing, without the consent of the person, an electronic communication or information system operated by a person to function in a particular way.

[24] Section 28(4) of the Criminal Justice (Miscellaneous Provisions) Act 2023.

[13.21] In effect, the 2023 Act has put clearer parameters on the previous harassment restraining order, taking into account case law that emerged from its use.[25] It has removed the need for a prosecution to take place before such an order may be sought or granted. This distinguishes it from orders under section 10 of the 1997 Act, which can only be granted following a prosecution and conviction.

[13.22] Civil restraining orders made under the 2023 Act will, of course, be available to at-risk adults, but a gap remains because in order for such orders to be granted, there is a requirement for the respondent to engage in "relevant conduct" towards the applicant or a person connected to the applicant, which would reasonably be considered likely to cause the applicant to fear that violence will be used against the applicant or person, or serious alarm or distress that has a substantial adverse impact on their usual day-to-day activities. As discussed throughout the Report, for example in Chapters 14 and 19, many forms of abuse and exploitation can occur in circumstances where it cannot reasonably be considered likely to cause a person to fear that violence will be used against them, or serious alarm or distress that has a substantial adverse impact on their usual day-to-day activities.

(i) Civil restraining orders can be sought and made without consent

[13.23] A person who is being subjected to the relevant conduct (as defined) can apply for a civil restraining order themselves, but there is also provision for a member of the Garda Síochána to make an application on their behalf.[26] A member may make an application where they believe the incidents justify the making of an application.[27] In making such an application, the member is obliged, so far as is reasonably practicable, to ascertain the views of the applicant,[28] but the applicant's consent is not a pre-requisite for the making of an order.

[25] For example, in *O'Raithbheartaigh v Judge of the District Court Patricia McNamara* [2014] IEHC 406; [2014] 1 IR 236, it was held that notice ought to have been given to the accused of the possibility of an application for a restraining order at a time when the evidence on foot of which the order was made could still be tested. Failure to give the accused notice meant that the requirement of fair and proper procedure was not met.

[26] Sections 28(1)(b) and 31(1) of the Criminal Justice (Miscellaneous Provisions) Act 2023.

[27] Section 31(1) of the Criminal Justice (Miscellaneous Provisions) Act 2023.

[28] Section 31(2) of the Criminal Justice (Miscellaneous Provisions) Act 2023.

3. Approaches to protective orders in other jurisdictions

(a) Jurisdictions that do not specifically provide for adult safeguarding no-contact orders

(i) England and Wales

[13.24] In England and Wales, there is no specific adult safeguarding no-contact order provided for in law. Legislation provides for a domestic violence protection order,[29] but the relevant provisions (sections 24 to 33) of the Crime and Security Act 2010 are due to be repealed upon commencement of provisions for domestic abuse protection orders in Part 3 of the Domestic Abuse Act 2021.[30]

[13.25] When commenced, the relevant sections of Part 3 of the Domestic Abuse Act 2021 will provide for domestic abuse protection orders that will prevent a person ("P") from being abusive to another person with whom P is personally connected. Two people are "personally connected" for the purposes of the 2021 Act if they:

> (a) are, or have been, married;
>
> (b) are, or have been, civil partners of each other;
>
> (c) have agreed to marry one another (whether or not the agreement has been terminated);
>
> (d) have entered into a civil partnership agreement (whether or not the agreement has been terminated);
>
> (e) are, or have been, in an intimate relationship with each other;
>
> (f) each have, or there has been a time when they each have had, a parental relationship in relation to the same child; or
>
> (g) are relatives.[31]

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[29] Sections 27 and 28 of the Crime and Security Act 2010 (UK).

[30] Section 55 of the Domestic Abuse Act 2021 (UK); Home Office (UK), "Guidance: Domestic Abuse Act 2021 commencement schedule" (updated 20 April 2023) <https://www.gov.uk/government/publications/domestic-abuse-act-2021-commencement-schedule/domestic-abuse-act-2021-commencement-schedule> accessed 21 April 2023.

[31] Section 2(1) of the Domestic Abuse Act 2021 (UK).

[13.26] The order is intended to prevent abuse by requiring P to either do, or refrain from doing, anything prescribed in the order.[32] Basing the order on a close personal connection, as opposed to an intimate relationship, is reflective of the fact that:

> Disabled victims may be at increased risk in relation to particular examples of abusive behaviour, either from an intimate partner, family member, or carer (who is "personally connected" to them), or face specific risks relating to their disability and related circumstances including: control of medication; refusal to interpret; denial of access to health services or equipment; actions which makes the person's health condition worse; and otherwise using the person's disability to control them.[33]

[13.27] In relation to who will be empowered to apply for an order under the 2021 Act, and as to whether the consent of the victim will be required for an application for such an order, the relevant provisions (when commenced) will allow an application for an order to be made by —

(a) the person for whose protection the order is sought;

(b) the appropriate chief officer of police;

(c) a person specified in regulations made by the Secretary of State;

(d) any other person with the leave of the court to which the application is to be made.[34]

[13.28] The legislation will also allow a court to make a domestic abuse protection order in family, criminal and civil proceedings in specified circumstances.[35] Before making an order against a person, a court must consider several matters, including any opinion of the person for whose protection the order would be made which relates to the making of the order and of which the court is made aware.[36] However, the relevant provisions of the Act (when commenced) will

[32] Section 27(1) of the Domestic Abuse Act 2021 (UK).

[33] Home Office (UK), "Domestic Abuse Statutory Guidance" (July 2022) at para 162 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089015/Domestic_Abuse_Act_2021_Statutory_Guidance.pdf> accessed on 13 March 2023.

[34] Section 28(2) of the Domestic Abuse Act 2021 (UK).

[35] Section 31 of the Domestic Abuse Act 2021 (UK).

[36] Section 33(1)(b) of the Domestic Abuse Act 2021 (UK).

specifically provide that it is not necessary for the person for whose protection a domestic abuse protection order is made to consent to the making of the order.[37]

(ii) Northern Ireland

[13.29] Since the publication of the Commission's Issues Paper,[38] the Northern Irish Department of Health conducted a consultation on legislative options to inform the development of an Adult Protection Bill in Northern Ireland.[39]

[13.30] The Northern Ireland Department of Health has proposed that the Bill should include a "banning order" to apply specifically in adult safeguarding situations. If enacted, a banning order would ban a person from being in a specified location for up to six months if the adult whose protection is intended by the making of the order is being, or is likely to be, seriously harmed by that person.[40]

[13.31] On the issue of consent, the Department of Health's proposals state that where there is evidence that the adult has not consented but is under duress or subject to coercion, an order can nevertheless be granted, overruling withheld consent.[41]

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37 Section 33(3) of the Domestic Abuse Act 2021 (UK).

38 Law Reform Commission, *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019).

39 Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) <https://www.health-ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 31 July 2023.

40 Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) <https://www.health-ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 31 July 2023.

41 Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021).

(b) Jurisdictions that provide for adult safeguarding no-contact orders

(i) Scotland

[13.32] The Adult Support and Protection (Scotland) Act 2007 provides a suite of specific protections to "adults at risk", including "banning orders".[42] The effect of a banning order is to ban the subject of the order from being in a specified place.[43] 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 subject to be removed from a specified place,

(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.[44]

[13.33] A banning order may be granted only if the sheriff is satisfied that:

(a) an adult at risk is being, or is likely to be, seriously harmed by another person,

(b) 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

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[42] "Adults at risk" are defined in section 3(1) of the 2007 Act as adults 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".

[43] Section 19(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[44] Section 19(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

(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.[45]

[13.34] A banning order can be made against anyone who is likely to cause serious harm to an "adult at risk". No particular familial or other relationship between the subject and the "adult at risk" is required.[46] A banning order may last for up to 6 months.[47] Temporary banning orders are also provided for.[48] A temporary banning order is an interim order issued pending the determination of an application for a banning order. Provision is made for variation or recall of a banning order or temporary banning order.[49]

[13.35] In Scotland, adult support and protection orders of all kinds are usually only sought and granted with the consent of the adult for whom they are made.[50] However, there is express statutory provision for a banning order that can be issued without the consent of the "adult at risk" where it is reasonably believed that the adult is being unduly pressurised into refusing consent, and there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.[51] Where an adult does not have capacity to consent, the requirement to

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[45] Section 20 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[46] Sections 19 and 20 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[47] Section 19(5)(c) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[48] Section 21 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[49] Section 24 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[50] Stevens, Martineau, Manthorpe and Norrie, "Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection" (2017) 19(6) The Journal of Adult Protection 312 at 316; Sections 35(1) and 35(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[51] Section 35(3) of the Adult Support and Protection (Scotland) Act 2007 (asp 10); Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022) at pages 74 – 75.

establish undue pressure does not apply – instead, evidence of lack of capacity will be required.[52]

[13.36] Analysis of the operation of Scottish banning orders made against the wishes of those whose protection they are intended to secure is instructive for our purposes. Scottish debates and academic analysis have considered the overriding of consent in cases involving adults who have capacity but who choose to remain in abusive situations notwithstanding the concerns of professionals. The analysis can be condensed as follows:

(a) It has been argued that the granting of such orders without consent potentially infringes rights to liberty and private life under Articles 5 and 8 of the European Convention on Human Rights;[53]
(b) Concerns have been expressed about how undue pressure might be established;[54]
(c) In the same study, other participants argued that without no-consent provisions the whole regime would be "toothless";[55]
(d) Provisions to override consent may contribute to perceptions of inherent vulnerability and comparisons with children, contributing to a process where the citizenship rights of capacitous adults are "curtailed, compromised or made fragile by their lack of ability in certain areas";[56]
(e) Another evaluative study suggests that the Scottish legislation assumes that, in certain circumstances, protection should outweigh choice. Practitioner participants took the view that long term autonomy is

[52] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022) at page 74. Where an adult cannot consent in Scotland, the Code of Practice states that it is good practice to approach the Office of the Public Guardian to ascertain whether a guardian or attorney may consent on behalf of the adult. This is the equivalent of making enquiries with the Decision Support Service in Ireland as to the existence of assisted decision-making arrangements under the Assisted Decision-Making (Capacity) Act 2015.

[53] Stewart and Atkinson, "Citizenship and adult protection in the UK: an exploration of the conceptual links" (2012) 14(4) The Journal of Adult Protection 163.

[54] Stewart, *Supporting Vulnerable Adults: Citizenship, Capacity, Choice* (2012 Dunedin Academic Press).

[55] *Ibid.*

[56] Stewart and Atkinson, "Citizenship and adult protection in the UK: an exploration of the conceptual links" (2012) 14(4) The Journal of Adult Protection 163 at page 164.

fostered by good protection, with the various protection orders, including banning orders, being used as measures of last resort;[57]

(f) Others have argued that Scottish legislation does not go far enough, with perceptions of insufficient provision to enforce orders.[58]

(ii) British Columbia (Canada)

[13.37] In British Columbia, if, following an investigation by the agency responsible for adult safeguarding, it has been established that an adult requires support or assistance, is suffering abuse, and is unable to stop the abuse[59] owing to an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect,[60] the agency may take a number of steps to protect the adult. One such measure is to apply to the court to grant an interim order.[61] An interim order lasts for a period of 90 days[62] and requires a person:

(i) to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises,

(ii) not to visit, communicate with, harass or interfere with the adult,

(iii) not to have any contact or association with the adult or the adult's financial affairs, or

[57] Preston-Shoot and Cornish, "Paternalism or proportionality? Experiences and Outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5; Cornish and Preston-Shoot, "Governance in adult safeguarding in Scotland since the implementation of the Adult Support and Protection (Scotland) Act 2007" (2013) 15(5) The Journal of Adult Protection 223 at page 233.

[58] Mackay, McLaughlan, Rossi, McNicholl, Notman and Fraser, "Exploring how practitioners support and protect adults at risk of harm in the light of the of the Adult Support and Protection (Scotland) Act 2007" (2011) University of Stirling; Preston-Shoot and Cornish, "Paternalism or proportionality? Experiences and outcomes of the Adult Support and Protection (Scotland) Act 2007" (2014) 16(1) The Journal of Adult Protection 5; Ekosgen, "Qualitative analysis of the provision of adult support for people who have gone through adult protection procedures – Final Report" (2012); Sherwood-Johnson, "Keeping adults safe from mistreatment: an independent advocacy perspective – Final Report" (2015) University of Stirling.

[59] Section 51(3) of the Adult Guardianship Act 1996 (British Columbia).

[60] Section 44(c) of the Adult Guardianship Act 1996 (British Columbia).

[61] Section 51(1)(e) of Adult Guardianship Act 1996 (British Columbia).

[62] Section 51(1)(e) of Adult Guardianship Act 1996 (British Columbia).

(iv) to comply with any other restriction of relations with the adult.

[13.38] The interim order is one of many protective measures that the designated agency may take to ensure the safety of an at-risk adult before an application for the provision of services to the adult can be made.

[13.39] On hearing an application for the provision of services to the adult, the court will consider whether the adult:

(a) is being abused or neglected,
(b) is unable to seek support and assistance because of an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect, and
(c) needs and would benefit from the services proposed in the support and assistance plan.[63]

[13.40] If the court is satisfied of these matters, it can make an order compelling the provision of services to the adult (a support and assistance order) without the adult's consent.[64] The court can also make other orders, including an order against a person the court finds has abused the adult to do or refrain from doing certain things, as with the interim order above but without the short time limit.[65]

[13.41] The court must choose the most effective, but the least restrictive and intrusive, way of providing support and assistance.[66] A person against whom an order is made may apply to the court to change or cancel the order,[67] and in considering such applications the court will apply a best interests test.[68] Orders compelling the provision of support and assistance last for 12 months unless a shorter period is specified by the court.[69]

(iii) Nova Scotia (Canada)

[13.42] Under Nova Scotian law, an application for a "protective intervention order" can be made where the Minister of Community Services has conducted an assessment and is satisfied that there are reasonable and probable grounds to

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[63] Sections 56(1) and (3) of the Adult Guardianship Act 1996 (British Columbia).

[64] Section 56(3)(a) of the Adult Guardianship Act 1996 (British Columbia).

[65] Section 56(3)(c) of the Adult Guardianship Act 1996 (British Columbia).

[66] Section 56(5) of the Adult Guardianship Act 1996 (British Columbia).

[67] Section 58(1) of the Adult Guardianship Act 1996 (British Columbia).

[68] Section 58(2) of the Adult Guardianship Act 1996 (British Columbia).

[69] Section 56(7) of the Adult Guardianship Act 1996 (British Columbia).

believe a person is an "adult in need of protection".[70] Such an order can be made in respect of a person who is "a source of danger" to the adult in need of protection. An order can be made where the court finds that an adult in need of protection does not have capacity to decide whether or not to accept assistance or is refusing assistance because of duress.[71] An adult in need of protection is defined as an adult who:

> in the premises where he resides,
>
> (i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his protection therefrom, or
>
> (ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention.[72]

[13.43] A protective intervention order can require the person posing a danger to leave the premises where the adult in need of protection resides unless that person is the owner or lessee of the premises.[73] The order can also prohibit or limit the person from contact or association with the adult in need of protection.[74] A protective intervention order expires six months after it is made.[75]

(iv) New Brunswick (Canada)

[13.44] Under the Family Services Act 1980, where the Minister of Social Development "has reason to believe that a person is a neglected or abused adult because of the presence of any person", they can apply to the court for a warrant authorising the removal of an offending person from the premises where a neglected or

[70] Section 9(1) of the Adult Protection Act 1989 (Nova Scotia).

[71] Section 9(3) of the Adult Protection Act 1989 (Nova Scotia).

[72] Section 3(b) of the Adult Protection Act 1989 (Nova Scotia).

[73] Section 9(3)(d)(i) of the Adult Protection Act 1989 (Nova Scotia).

[74] Section 9(3)(d)(ii) of the Adult Protection Act 1989 (Nova Scotia).

[75] Section 9(5) of the Adult Protection Act 1989 (Nova Scotia).

abused adult resides.[76] There is a requirement for any person exercising authority under the 1980 Act to consider the wishes of the neglected or abused adult, where they can be expressed and where the adult is capable of understanding the nature of any choice.[77]

[13.45] Notably, section 36.2 of the 1980 Act provides that the Minister may make a "finding" that a person has endangered the security of another person if, after completing an investigation, the Minister has determined that the security of a person is in danger.

(v) Newfoundland and Labrador (Canada)

[13.46] Under the Adult Protection Act 2021, a court may order that a person "who is found to be a source of neglect or abuse to the adult in need of protective intervention" ceases to live in and stays away from the residence where the adult lives, does not visit or communicate with the adult, ceases all contact or association with the adult, or limits their contact, association or communication with the adult.[78]

(vi) South Australia (Australia)

[13.47] In South Australia two pieces of legislation provide for protective orders. The Intervention Orders (Prevention of Abuse) Act 2009 is aimed at addressing actual or anticipated interpersonal violence in cases of both domestic and non-domestic abuse. The 2009 Act specifically includes carers within the definition of a "relationship", which has the consequence of bringing carers within the 2009 Act's provisions on domestic abuse.[79] The Ageing and Adult Safeguarding Act

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[76] Section 36 of the Family Services Act 1980 (New Brunswick). The Minister can do this if they have reason to believe that a person is a neglected or abused person because of the presence of the other person. They can also seek a warrant to detain a person, if necessary, pending an application for an order under section 39 of the same Act.

[77] Section 36.1(1) of the Family Services Act 1980 (New Brunswick).

[78] Section 25(9) of the Adult Protection Act 2021 (Newfoundland and Labrador).

[79] Section 8(8) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia) provides that if the act of abuse is committed by a defendant against a person with whom the defendant is or was formerly in a relationship, it is referred to in the Act as an act of domestic abuse. A relationship is defined as including a carer relationship. Carer is statutorily defined in section 5 of the Carers Recognition Act 2005: "a person is a carer for

1995 established a statutory body to receive and respond to reports of suspected abuse or neglect of "ageing people and other vulnerable adults". The 1995 Act aims to safeguard rights and prevent abuse, and vests authorised officers[80] with a number of powers, including powers to seek a variety of protective orders.

[13.48] Intervention orders may be made under the 2009 Act in respect of a broad range of abuse, including emotional, sexual, physical, psychological abuse or financial harm.[81] An intervention order may be issued where it is reasonable to suspect that the subject of the order will commit an act of abuse against a person if an intervention is not made.

[13.49] An intervention order can require the subject to take, or to refrain from taking, any specified action. This can include refraining from going to the place of residence or employment of the adult.[82] Intervention orders will only be issued where there is a relationship between the adult and the person who is the subject of the order. A "relationship" is broadly defined to include two people related to each other:

(a) by or through blood, marriage, a domestic partnership or adoption;[83]

(b) according to Aboriginal or Torres Strait Islander kinship rules or where they are both members of some other culturally recognised family group;[84] or

the purposes of this Act if he or she is a natural person who provides ongoing care or assistance to— (a) a person who has a disability within the meaning of the Disability Inclusion Act 2018; or (b) a person who has a chronic illness, including a mental illness within the meaning of the Mental Health Act 1993; or (c) a person who, because of frailty, requires assistance with the carrying out of everyday tasks; or (d) a person of a class prescribed by regulation. (2) A person is not a carer if the person provides the care or assistance— (a) under a contract for services or a contract of service; or (b) in the course of doing community work organised by a community organisation within the meaning of the Volunteers Protection Act 2001. (3) A person is not a carer for the purposes of this Act only because the person— (a) is a spouse, domestic partner, parent or guardian of the person to whom the care or assistance is being provided. ..."

[80] An authorised officer is defined under section 18 of the Ageing and Adult Safeguarding Act 1995 (South Australia) as:

(a) the Director (of the Office for Ageing Well); or

(b) a member of the Adult Safeguarding Unit who is authorised by the Director.

[81] Section 8 of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[82] Section 12(1)(a) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[83] Section 8(8)(i) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[84] Section 8(8)(j) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

(c) where one is the carer of the other.[85]

[13.50] The 2009 Act also provides for interim intervention orders. Both police and the courts have the power to issue interim intervention orders. Interim intervention orders issued by the police must be followed by a court order whereby the court will determine if a final intervention order is necessary.[86]

[13.51] An intervention order can be issued for the protection of any person against whom it is suspected the defendant will commit an act of abuse, even if that person is not the applicant for the order, and there is no requirement to ascertain that person's wishes prior to the granting of the order.[87] An individual can make an application for an order on their own behalf. A "suitable representative" within the meaning of the 2009 Act can also make an application, with the court's permission.[88] Intervention orders can be sought even in cases of anticipated abuse, as there is no requirement to prove an act of abuse before an intervention order is issued.[89] Intervention orders do not have time limits; in fact an issuing authority cannot set an expiry date; the order continues in force until it is revoked.[90]

[13.52] The Ageing and Adult Safeguarding Act 1995, which unlike the 2009 Act is specifically directed at adult safeguarding, permits a court to make orders "in relation to a vulnerable adult", including "an order requiring a specified person to do a specified thing, or to refrain from doing a specified thing, in respect of the vulnerable adult".[91] A vulnerable adult is defined in section 3 as an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse.

[13.53] It is noteworthy that section 35(1) of the 1995 Act sets out a requirement that in any proceedings under the Act "a vulnerable adult to whom the proceedings relate must, unless the Court is satisfied that the vulnerable adult is not capable of doing so, be given a reasonable opportunity to personally present to the Court

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[85] Section 8(8)(k) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[86] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 10.6.2.

[87] Section 7 of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[88] Section 20(1)(b) of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[89] Section 6 of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[90] Section 11 of the Intervention Orders (Prevention of Abuse) Act 2009 (South Australia).

[91] Section 33(1)(b) of the Ageing and Adult Safeguarding Act 1995 (South Australia).

their views relating to the proceedings". Section 24(1) of the Act provides that the Adult Safeguarding Unit "should not take action in respect of a report under this Act unless the vulnerable adult to whom the report or notification relates consents to the action being taken". However, the section goes on to provide for circumstances – primarily immediate risk to life or physical safety or the likelihood of a serious criminal offence being committed against the person – in which emergency action can be taken without the consent of the vulnerable adult, even if the adult has decision-making capacity.

[13.54] The South Australia Law Reform Institute ("SALRI") examined the operation of the 1995 Act and its effects on autonomy and safeguarding in a recent report. The report noted that "[t]he relationship between capacity, consent and coercion proved a prominent issue" throughout the institute's consultation,[92] and stated:

> It is important to clarify the relative roles of capacity, consent and coercion:
>
> • **Capacity**: an adult is presumed to have decision-making capacity. They may exercise this capacity under the [1995] Act by making a decision whether to make or pursue a claim of abuse against their perpetrator or refuse further action.
>
> • **Consent**: in order to provide valid consent, the adult must have decision-making capacity and have given consent freely and voluntarily and without coercion. Consent is expressed or communicated as the decision to pursue a report of abuse, enabling the [Adult Safeguarding Unit]'s intervention.
>
> • **Coercion**: this is an external factor, which may vitiate the voluntariness of the consent provided. However, an adult who is subject to coercive behaviour can still retain full decision-making capacity.[93]

[92] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 6.10.1.

[93] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 6.10.3.

[13.55] The failure of the 1995 Act to mention coercion was described as a significant omission.[94]

[13.56] While acknowledging the sensitivity of non-consensual intervention by a state agency where an apparent victim has decision-making capacity, ultimately SALRI recommended a lowering of the threshold for non-consensual interventions under the 1995 Act. SALRI considered the circumstances in which the 1995 Act allows a refusal of consent to further action to be overridden when a person has capacity to be "very narrow" and "too restrictive".[95] The Report concluded:

> Without in any way diminishing the importance of the individual's autonomy, there are circumstances, as was widely raised in SALRI's consultation and research, where either there is impaired decision-making capacity or the consent provided is not free and voluntary, owing to the presence of coercion and/or the abuse is serious and warrants possible intervention (notwithstanding there is no imminent risk of death or serious physical harm).
>
> …
>
> The request to intervene and act without the consent of an adult with decision-making capacity should not be taken lightly. It must be carefully considered, with regard to the adult's wishes, ability to appreciate the nature of abuse and its extent, the harm caused and their ability to weigh up the advantages and disadvantages of refusal or consenting to intervention. Further, where this lack of consent is overridden in the case of an adult with decision-making capacity, intervention must be necessary, reasonable and proportionate.[96]

[13.57] Rather than intruding on autonomy, SALRI considered that where a person's consent is compromised by coercion, lowering the threshold for intervention

[94] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 7.5.3.

[95] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 7.7.3.

[96] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at paras 7.7.8 – 7.7.10.

provides a means to restore and protect their autonomy.[97] In addition, earlier intervention could prevent escalation of abuse and the harm that results from it.[98] SALRI also recommended a widening of the circumstances in which interventions under the 1995 Act could be made without consent to include serious financial harm.[99] A non-exhaustive list of factors were recommended for consideration by the Adult Safeguarding Unit when determining whether to override the decision of an adult with decision-making capacity:

(a) The decision-making capacity of the adult;
(b) The adult's autonomy and right to make "poor decisions";
(c) The influence of culture, family and language;
(d) The nature/dynamic of the relationship and its significance to the adult;
(e) The underlying premise of the influence (religion, cultural expectation/norm, obligation);
(f) The risk of displacement or destitution from preferred residence;
(g) The validity of consent and whether a decision was made freely and voluntarily;
(h) The gravity of the abuse (whatever form(s) it may take);
(i) The presence of psychological abuse and its severity and effects;
(j) The potential outcomes of the proposed actions for the adult who may be vulnerable to abuse and any other relevant parties; and
(k) Whether the coercive conduct justifies the Adult Safeguarding Unit's intervention and subsequent interference with the adult's decision-making autonomy.[100]

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[97] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 7.7.11.

[98] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 7.7.12.

[99] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at para 7.7.14.

[100] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at Recommendation 30.

SALRI further recommended that where consent is overridden in the case of an adult with decision-making capacity, that intervention should be necessary, reasonable and proportionate.[101]

4. Rights of at-risk adults and third parties

(a) The constitutional rights of at-risk adults and third parties

[13.58] In this section, the Commission considers whether protective orders are needed in the adult safeguarding context in order to meaningfully protect and vindicate the constitutional rights of at-risk adults. In particular, the proposed orders are intended to vindicate an at-risk adult's rights to life, liberty, bodily integrity, autonomy and protection of the person.[102] For example, where a third party is involved in abuse of any kind against an at-risk adult, the adult's right to protection of the person is interfered with. Providing for protective orders would empower the at-risk adult to be free of such interference, by prohibiting the third party from having contact with the adult. Allowing the at-risk adult to apply for such orders would also vindicate their right to autonomy.

[13.59] In the Commission's view, these protective orders are a necessary tool to prevent abuse of at-risk adults, as they provide a method of limiting contact for a range of relationships that are not currently provided for under the law. Such powers also place the onus on the person alleged to have been abusive or exploitative to desist, rather than placing an obligation on the at-risk adult to alter their own behaviour or remove themself from a particular setting or situation. The Commission is thus of the view that protective orders are needed in order to protect and vindicate the constitutional rights of at-risk adults.

[13.60] However, the proposed protective orders also have the potential to interfere with an at-risk adult's or a third party's constitutional rights. In particular, the orders may interfere with their rights to privacy, autonomy and association. The proposed orders also have the potential to interfere with family rights, for example where an order is granted against a close family member of the at-risk adult. However, as was set out in Chapter 4, constitutional rights are not absolute and may be permissibly interfered with. The legitimacy of such interferences is analysed using a proportionality framework.[103] Any proposed protective orders

[101] South Australia Law Reform Institute, *'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022) at Recommendation 30.

[102] These rights are discussed in more detail in Chapter 4.

[103] See Chapter 4.

must be scrutinised to ensure that that they are necessary, proportionate and restrict constitutional rights to the minimum degree possible.

[13.61] The objective of the protective orders is to provide at-risk adults with protection and distance from those who are, or may be, causing them harm. The Commission is of the view that this objective is of sufficient importance to warrant overriding constitutionally protected rights, and that the objective relates to concerns that are pressing and substantial in a free and democratic society. In deciding whether to introduce protective orders as the means to achieve this objective, the Commission has kept in mind that the means must:

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible; and

(c) be such that their effects on rights are proportional to the objective.[104]

[13.62] The Commission has also kept this framework in mind when developing the parameters of the protective orders. For example, the Commission recommends tailored amendments to the Domestic Violence Act 2018 to widen the protection available to at-risk adults, without disproportionately expanding the range of conduct caught by that Act. Similarly, in developing a new adult safeguarding no-contact order, the Commission recommends that it should be possible for individuals who are subject to an order to appeal it, given the impact of such an order on their rights.[105] Such recommendations are necessary to ensure that the proposed orders do not disproportionately interfere with the constitutional rights of at-risk adults and third parties, in particular their rights to privacy, autonomy and association, in addition to family rights.

(b) The ECHR rights of at-risk adults and third parties

[13.63] The proposed orders also engage a number of rights under the European Convention on Human Rights ("ECHR").[106] For example, introducing the proposed orders may allow the State to fulfill its positive obligation under Article 2 of the

[104] See the discussion of this framework, as set out in *Heaney v Ireland* [1994] 3 IR 593 (Costello J) at page 607, in Chapter 4.

[105] The Commission considers whether such appeal should stay the operation of a no-contact order below at section 4(b)(x).

[106] These rights are discussed in more detail in Chapter 4.

ECHR to take "appropriate steps to safeguard the lives of those within their jurisdiction".[107] Similarly, they may allow the State to vindicate the right of individuals to be free from ill-treatment under Article 3 of the ECHR.

[13.64] On the other hand, the proposed orders may interfere with rights which are protected by the ECHR, such as the rights to private and family life under Article 8. In developing the proposed orders, the Commission has had regard to the qualified nature of these rights, and the ways in which they may be permissibly interfered with in certain circumstances. Such interferences must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society in pursuit of that aim. Article 8(2) of the ECHR expressly states that the protection of health and the rights and freedoms of others are such legitimate aims. The European Court of Human Rights has provided guidance on what will suffice as "necessary in a democratic society", and the Commission has carefully considered this in developing the proposed orders.

[13.65] The Commission is of the view that protective orders are required to protect and vindicate the ECHR rights of at-risk adults, and can be framed in such a way as to minimally impair the ECHR rights of at-risk adults and third parties.

(c) The constitutional and ECHR rights engaged where a no-contact order is made against the wishes of the at-risk adult whom the order is intended to protect

[13.66] The most difficult issue the Commission has had to grapple with in this Chapter is whether an adult safeguarding no-contact order should be capable of being made against the wishes of the at-risk adult and, if so, what the appropriate safeguards should be in order to maximise protection and minimise the misuse of such orders. Given the potential for such orders to interfere with the rights of an at-risk adult, in particular their constitutional right to autonomy, such orders require distinct analysis. In considering this issue, the Commission has consulted a range of sources, including case law regarding the right to autonomy, the views of consultees and stakeholders, and the Report of the South Australia Law Reform Institute,[108] as is discussed above, which lucidly articulates the challenges of navigating capacity, consent and coercion.

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[107] *LCB v UK* (1998) 27 EHRR 212 at para 36.

[108] South Australia Law Reform Institute, '*Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (SALRI Report 17 2022)

[13.67] In circumstances where an at-risk adult is found to lack decision-making capacity, the Assisted Decision-Making (Capacity) Act 2015 provides a well-developed framework that can intersect with the proposed adult safeguarding no-contact order. However, it must be presumed that an at-risk adult will have capacity to make decisions about who they interact with.[109] In such cases, the potential for a no-contact order to be made against the at-risk adult's wishes appears to be a significant interference with rights, in particular the at-risk adult's constitutional rights to privacy, autonomy and association, and their ECHR rights to respect for private and family life. However, abuse also has a substantial impact on the rights of at-risk adults.

[13.68] Abuse may impact an at-risk adult's rights to life, bodily integrity and freedom from cruel and degrading treatment. It may also impact their right to autonomy. It is evident from the experiences of other jurisdictions that coercion and dependence can complicate consent to intervention by state agencies. The very dynamics of coercion and control that are the hallmark of the abuse of at-risk adults may also operate to preclude them from accessing the no-contact order mechanism, and indeed other supports. Coercion and control, compounded by dependence for care and for day-to-day living, can mean that an apparent refusal to engage with authorities is not real. It might not be readily ascertainable if an at-risk adult's objection is a consequence of duress or coercion by an abuser. An adult safeguarding no-contact order of limited duration, if capable of being granted against the expressed wishes of the at-risk adult, therefore has obvious utility.

[13.69] Where there are concerns that an at-risk adult is experiencing coercion which is preventing or deterring the adult from making an application for an order of their own accord, the issuing of a no-contact order for a limited period would be an effective tool in safeguarding that at-risk adult. In this way, the order would allow for the vindication of the at-risk adult's right to autonomy which is otherwise being interfered with by a third party. The order would also allow for the vindication of the rights to life, bodily integrity and freedom from cruel and degrading treatment. The Commission is persuaded by the arguments (set out in section 3(b)(i) above) in favour of the Scottish banning order model, which incorporates potential for an order to be sought without the consent of the person whose protection is intended by the order. There is merit in the argument that long term autonomy is fostered by proportionate protection.

[109] Also, even where an at-risk adult is found to lack decision-making capacity, the 2015 Act does not provide a comprehensive regime to resolve all matters that may arise.

[13.70] Providing for such an order has clear implications for the rights of at-risk adults and third parties, but such rights are not absolute. The objective of a no-contact order granted against the wishes of the at-risk adult is to provide a period of separation to assess whether the at-risk adult is in a position to consent to continued contact with the third party. The Commission is of the view that this objective is of sufficient importance to warrant overriding constitutionally protected rights, and that the objective relates to concerns that are pressing and substantial in a free and democratic society. In deciding whether to introduce a protective order as the means to achieve this objective, the Commission has kept in mind the proportionality framework as outlined above. The Commission has also kept this framework in mind when developing high thresholds and statutory safeguards, to ensure that this order achieves the legitimate objective in a proportionate way.

[13.71] The Commission is alert to the risk that such orders might be misused as a means of controlling access to an at-risk adult's family members or friends. If that were possible, the orders could themselves become tools of abuse. However, protection from misuse can be built into the legislative provision by setting robust thresholds and safeguards. In particular, the overarching obligations to ascertain and consider the views of an at-risk adult will provide an important protection against misuse. These obligations are set out below at section 4(b)(i).

[13.72] When considering an at-risk adult's views, it should be noted that two distinct situations may arise. Firstly, the at-risk adult may neither consent nor object to the making of the no-contact order. In such a scenario, an at risk adult may in fact support the order but not wish to be seen to do so (for example, out of fear of an abuser). Secondly, the at-risk adult may be objecting to the making of the no-contact order. The latter scenario raises greater issues, as granting an order in such a case would involve the clear overriding of an at-risk adult's apparent wishes. Having considered the rights implications arising from this scenario, as outlined in this section, the Commission is of the view that a "full" adult safeguarding no-contact order, or interim adult safeguarding no-contact order, should not be open to the court in such a case. However, it should be open to a court to grant an emergency no-contact order, to be valid for a very short period of time. A court could grant such an order if it is satisfied that (among other matters) there are reasonable grounds for believing that the apparent objection of an at-risk adult is not voluntary or there is a doubt as to the at-risk adult's capacity to decide whether to continue to have contact with the intended respondent. In light of the rights of at-risk adults, in particular their constitutional rights to autonomy and dignity, this is the only instance in which their objection could be lawfully overridden. This threshold and other safeguards are discussed throughout section 4(c)(ii) below, which outlines the Commission's proposal for an emergency adult safeguarding no-contact order. The Commission is of the view that this approach is necessary to ensure that the rights of at-risk adults may be vindicated, without disproportionately interfering with the rights of both at-risk adults and third parties.

5. Proposed expansion of the Domestic Violence Act 2018 and a new adult safeguarding no-contact order

[13.73] Having had regard to existing protective orders in Ireland, the need to vindicate the constitutional and ECHR rights of at-risk adults and the experiences of comparative jurisdictions, the Commission is of the view that protective orders should be introduced in the Irish adult safeguarding context. The Commission makes two key recommendations:

(1) The Domestic Violence Act 2018 should be amended so that domestic abuse perpetrated against at-risk adults is appropriately addressed. Amending the 2018 Act will extend the protection available to adults at risk of harm from cohabitants, family members, and those with whom they are in a caring relationship; and

(2) A new adult safeguarding no-contact order should be introduced in Ireland, tailored specifically to the adult safeguarding context. This will provide protection to adults at risk of harm from non-intimate and non-cohabiting third parties.

[13.74] The Commission's recommendations reflect the fact that abuse of at-risk adults may be a subset of domestic abuse, but it can also occur outside the intimate or familial context, in which case it is a separate and distinct form of abuse. Both forms of abuse must be addressed in order to vindicate the rights of at-risk adults.

[13.75] The combined approach of tailoring existing domestic violence legislation to the realities of the caring relationships of at-risk adults, together with the introduction of an adult safeguarding no-contact order, would broaden protection beyond narrowly defined relationships to include at-risk adults who are in need of protection from caregivers, siblings, grandchildren, nieces, nephews and strangers. The introduction of adult safeguarding no-contact orders would also provide a practical means to combat financial abuse and exploitation in which violence or serious alarm are not present.[110]

[13.76] As with domestic abuse orders more generally and harassment restraining orders, the emphasis of these recommendations is on the person alleged to have been abusive or exploitative, with the onus on them to desist, rather than placing an obligation on an at-risk adult who is subject to abuse having to remove

[110] Financial abuse is discussed in Chapter 14 of this Report.

themselves from the situation or source of abuse. In this way, the orders form a useful step in the Commission's tiered approach to safeguarding interventions.

(a) Amendment of domestic violence legislation

(i) Domestic abuse in the adult safeguarding context

[13.77] Domestic abuse involves incidents of controlling, coercive or threatening behaviour, violence or abuse between adult intimate partners, former intimate partners or family members.[111] Domestic abuse can include psychological, sexual, financial and emotional abuse.[112] As is discussed above, there is an elaborate existing regime of protection, safety, interim barring, emergency barring and barring orders to address domestic abuse in Ireland.[113] Domestic abuse can and does affect at-risk adults, and should be recognised and characterised as such. Orders issued under the Domestic Violence Act 2018 are an important existing source of protection for adults at risk of abuse and neglect in a domestic context.[114]

[13.78] However, gaps in protection arise in situations where at-risk adults are abused by individuals who do not fall within the scope of the relationships provided for in the Domestic Violence Act 2018. Adults at risk of harm may be abused by those who take on a caring role for them. This relationship may be defined by the level

[111] The term "domestic abuse" is used instead of "domestic violence" here to reflect the fact that the concept encompasses a wide range of conduct and consequences, beyond simply physical violence and threats of violence. See *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.

[112] See generally Jackson (ed), *Encyclopedia of Domestic Violence* (Routledge 2007).

[113] These are set out in the Domestic Violence Act 2018. See description above.

[114] One study involving observations at District Court domestic violence hearings noted a "high level of applications by parents of adult children. In 15 per cent of domestic violence cases, parents were seeking the protection of the court against an adult child." (This study was carried out mostly before the commencement of the Domestic Violence Act 2018, but is indicative of the relevance of barring orders for at-risk adults.) Conneely, O'Shea and Dempsey, "Domestic Violence in the District Court" (2019) 4 Irish Journal of Family Law 79 at page 80. More recent instances of parents being granted orders under the Domestic Violence Act 2018 against adult children are described in Carolan "'I can't live like this': Desperate parents ask courts to protect them from aggressive adult children" *The Irish Times* (23 March 2024) <https://www.irishtimes.com/crime-law/courts/2024/03/23/i-cant-live-like-this-desperate-parents-ask-courts-to-protect-them-from-aggressive-adult-children/> accessed on 13 April 2024, and Carolan, "Disabled mother gets temporary barring order against 'dangerous' adult daughter" *The Irish Times* (7 January 2024) <https://www.irishtimes.com/crime-law/courts/2024/01/07/disabled-mother-gets-temporary-barring-order-against-dangerous-adult-daughter/> accessed on 8 January 2024.

of dependency of the at-risk adult and the degree of control that the other party exerts over them, rather than the existence of intimacy or family connection. At-risk adults may be sexually or financially exploited (or otherwise harmed) by strangers or by people they know. Currently, however, safety orders may only be used in the context of limited categories of intimate and familial relationships, and cohabitants who live together on a non-contractual basis. Barring orders are confined to spouses, civil partners, adult non-dependent children and (former) cohabitants in an intimate relationship. The 2018 Act does not allow for orders to be made against many categories of people who might abuse at-risk adults, such as non-cohabiting siblings, nieces, nephews, grandchildren, neighbours, family friends, carers (including so called "live-in carers" who may be residing in the dwelling on a contractual basis), taxi-drivers or online acquaintances. The Commission is of the view that domestic abuse legislation should be amended to widen the protection available to at-risk adults.

[13.79] There were mixed responses from consultees on the proposed expansion of Domestic Violence Act orders. Some argued that separate barring orders, protection orders and safety orders should be included in adult safeguarding legislation to cover situations that fall outside the circumstances set out in the 2018 Act.

[13.80] At an early stage in its analysis, the Commission ruled out a broad expansion of the categories of relationship captured by the Domestic Violence Act 2018. The focus of domestic violence legislation is domestic abuse and appropriately so. Rather than a broad expansion, it appeared that tailored amendments were required to ensure that domestic violence legislation functions effectively for adults in close familial, caring or intimate relationships who are also at-risk adults.

[13.81] Equally the introduction of specific barring, protection and safety orders for at-risk adults, running in tandem with but parallel to the existing family law domestic violence orders regime, was ruled out by the Commission. Research from other jurisdictions suggests that social workers working with adults are sometimes uncertain of their role in domestic violence cases and struggle to navigate between safeguarding and domestic abuse procedures operating in parallel.[115] New legislation should not add to that uncertainty, but rather it should plug the gaps that have been identified in existing legal frameworks. The question of whether other kinds of abuse should be targeted with protective orders, outside of the domestic abuse context, should be addressed separately (as is done below). Introducing tailored amendments to existing domestic abuse

[115] McLaughlin, Robbins, Bellamy, Banks and Thackray, "Adult social work and high-risk domestic violence cases" (2018) 18(3) Journal of Social Work 288.

legislation, which contains in-built safeguards for those who are subject to orders, is also a more proportionate interference with rights than developing an entirely separate regime.

[13.82] It is not desirable, and indeed could be counter-productive, to develop a parallel regime of barring, protection and safety orders that apply specifically to at-risk adults, if what they are experiencing is in fact domestic abuse. Rather, existing domestic violence legislation should be amended to reflect the reality of the domestic living arrangements of at-risk adults, so that when domestic abuse occurs in that context it can be addressed as such. Otherwise, there is a risk of domestic abuse being obscured or minimised when the person subjected to that form of abuse is a person who comes within the definition of an at-risk adult. This could have the unintended effect of depriving at-risk adults of the support and protection of the specialised domestic violence protective mechanisms that apply generally, including well-developed civil and criminal sanctions.

(ii) Recommendations regarding the amendment of domestic violence legislation

[13.83] Where abuse is alleged to have been perpetrated by a cohabitant, the appropriate recourse is the existing family law regime, which is well-developed and has in-built protections for the person who is accused of abuse.[116] Amendment of the Domestic Violence Act 2018 is required to ensure that all cohabitants of at-risk adults can be subject to safety and barring orders, including those who reside in the home on a contractual basis (such as a live-in carer) where the contractual arrangement involves caring for an at-risk adult. This would have the effect of including carers but excluding lodgers, for example.

R. 13.1 **The Commission recommends that** the Domestic Violence Act 2018 should be amended as follows:

(a) The category of relationships to which barring orders under the Domestic Violence Act 2018 apply should be expanded to include individuals of full age who cohabit with an "adult at risk of harm" (as defined in the Commission's Adult Safeguarding Bill 2024) on:

(i) a non-contractual basis; and

[116] For example, they may apply to have an order varied or discharged. Various safeguards also apply where an order is obtained on an *ex parte* basis, including that the person subject to the order be served with a copy of the order and note of evidence, and that such orders shall only have effect for short periods.

(ii) a contractual basis where the contractual arrangement involves the individual of full age caring for the adult at risk of harm.

(b) The category of relationships to which safety orders under the Domestic Violence Act 2018 apply should be expanded to include individuals of full age who cohabit with an "adult at risk of harm" (as defined in the Commission's Adult Safeguarding Bill 2024) on a contractual basis where the contractual arrangement involves the individual of full age caring for the adult at risk of harm.

[13.84] The Commission's proposed amendments are intended to fill the gap in the 2018 Act in relation to at-risk adults cohabiting with someone who they do not have an intimate or close family relationship with. The proposed amendments extend the protection of the 2018 Act to an appropriate range of circumstances and relationships involving at-risk adults.

[13.85] It should be noted, however, that incorporating improved protections for at-risk adults within existing domestic abuse legislation has one major disadvantage: the adoption in the adult safeguarding context of what is undoubtedly a paternalistic provision for the making of safety and barring orders without consent. This provision diverges from the Commission's preferred approach which emphasises the need to ascertain the views of the at-risk adult (as discussed below).

[13.86] Section 11(1)(b)-(d) of the Domestic Violence Act 2018 provides that the Child and Family Agency can apply for an order where it:

> (b) has reasonable cause to believe that the aggrieved person has been subjected to molestation, violence or threatened violence or otherwise put in fear of their safety or welfare,
>
> (c) is of the opinion that there are reasonable grounds for believing that, where appropriate in the circumstances, a person would be deterred or prevented as a consequence of molestation, violence or threatened violence by the respondent or fear of the respondent from pursuing an application for a safety order, a barring order or an emergency barring order on their own behalf or on behalf of a dependent person, and
>
> (d) considers, having ascertained as far as is reasonably practicable the wishes of the aggrieved person or, where the aggrieved person is a dependent person, of the person to whom paragraph (c) relates in respect of the dependent person, that it is appropriate in all the circumstances to apply for a safety order, a barring order or an emergency barring order in accordance with this Act on behalf of the aggrieved person.

[13.87] Similar wording was contained in this section's predecessor, section 6 of the Domestic Violence Act 1996. The language does not explicitly refer to vitiating or overriding consent, but the potential is clear.

[13.88] The Commission's preference, which is given effect in its recommendations on a new adult safeguarding no-contact order, is that there should be an obligation on the authorised officer of the Safeguarding Body applying for an order to demonstrate that they made an effort to ascertain the views of the at-risk adult. There should also be an obligation on the court to ensure that, as far as practicable, the views of the at-risk adult have been ascertained. In addition, there should be an obligation on the court to have regard to those views. However, in the context of amendments to the Domestic Violence Act 2018, it must be noted that the Commission is proposing reform solely from the perspective of improving protection for at-risk adults. The Commission is conscious that the more general position in relation to domestic violence orders sought potentially without consent on behalf of another person using section 11 of the Domestic Violence Act 2018 is outside the remit of this project. An amendment to section 11 in relation to procedures for ascertaining and vitiating consent in domestic violence cases more generally is beyond the scope of the Commission's current work, and may benefit from examination by the Government in the future. That being the case, for the time being the Commission's recommendation is that the proposed amendment should take the form of a simple expansion of the categories of relationship to which safety and barring orders apply. Although a different formula for vitiating consent is proposed in the Commission's recommendation on adult safeguarding no-contact orders, no change is proposed in relation to the consent aspect of the 2018 Act, although in the Commission's view it merits further examination.

[13.89] Where protection is at the cost of autonomy, there is much to be said for an approach that makes clear the potential for an order to be made without consent, but which also sets a high bar in terms of necessity and directly addresses the issue of intrusion upon autonomy. For example, there may be a justification on the basis that there is a well-founded concern that the apparent objection to the making of the order is not real but rather is a consequence of coercion or undue influence. This is the approach the Commission recommends in relation to a new adult safeguarding no-contact order, where it is sought against the wishes of the at-risk adult.

(iii) Power of authorised agencies to seek an order in respect of an at-risk adult under the 2018 Act

[13.90] As has been outlined above, the Domestic Violence Act 2018 provides for the issuing of barring, safety or protection orders even in circumstances in which the person who is alleged to be suffering domestic abuse does not consent to the making of the order. In those cases, it is the Child and Family Agency that makes the application.

[13.91] The Commission understands that, in practice, where an application concerns an at-risk adult and there are no children residing in the dwelling, the HSE's Safeguarding and Protection Teams (rather than the Child and Family Agency) has responsibility for the case. To reflect this practice, there is a memorandum of understanding between the Child and Family Agency and the HSE allowing the HSE to bring applications under the 2018 Act on behalf of the Child and Family Agency.[117] Almost all consultees were of the opinion that the power should be extended to the HSE or any future designated safeguarding body.[118] This could be achieved by amending or substituting the definition of "Agency" in section 2 of the 2018 Act.

R. 13.2 **The Commission recommends that** the definition of "agency" in section 2 of the Domestic Violence Act 2018 should be amended to allow both the Child and Family Agency and the Safeguarding Body to make an application for an order in respect of an "adult at risk of harm" (as defined in the Commission's Adult Safeguarding Bill 2024) under the Domestic Violence Act 2018.

(b) A new adult safeguarding no-contact order

[13.92] In addition to broadening existing domestic violence legislation, the Commission recommends that a specific adult safeguarding no-contact order should be introduced in Ireland to address the harmful behaviour of non-cohabitants towards at-risk adults.

[13.93] As is outlined above, the protection of the family courts is an important existing source of protection for adults who are experiencing domestic abuse. The Commission's recommendations in relation to the Domestic Violence Act 2018 are intended to widen that protection for the benefit of at-risk adults. However, there may be adult safeguarding cases involving similar features of abuse but without any intimacy, familial connection or domestic element. For example, safeguarding concerns might arise in the context of relationships between an informal carer and an at-risk adult, or between an at-risk adult and their adult sibling where the two do not reside together. These concerns also may not involve violence or intimidation, as often features in domestic abuse cases. Rather, there may be more insidious forms of harm to at-risk adults such as

[117] HSE, *Wardship Applications – A Guide for Health Care Workers* (2022) at page 17.

[118] In its 2022 Discussion Paper, Safeguarding Ireland argue that "[t]he HSE, or a dedicated safeguarding regulatory body, should similarly have power to apply for protective orders for the purpose of safeguarding [at-risk] adults": Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (2022) at pages 56 and 124.

financial abuse, cuckooing or other forms of exploitation for which a no-contact order would provide an immediate and practical measure of protection.[119]

[13.94] Although the inherent jurisdiction of the High Court can be used in an appropriate case in which the need to limit contact arises, it is an expensive and cumbersome process.[120] As discussed in Chapter 1, the Commission is of the view that there are significant benefits to providing for orders to be made pursuant to a clear statutory scheme. The utility of restraining orders outside the context of familial or intimate partner abuse has long been recognised in harassment cases, and the expansion of such orders in the Criminal Justice (Miscellaneous Provisions) Act 2023 is an acknowledgement of their protective benefits in appropriate cases, as an alternative to the cumbersome and costly process of obtaining an injunction. However, the expansion of harassment and stalking restraining orders is limited to that particular and very specific form of harm.

[13.95] The Commission thus recommends that an adult safeguarding no-contact order should be provided for in adult safeguarding legislation. An adult safeguarding no-contact order would operate outside of the domestic abuse context, to prohibit a non-intimate and non-cohabiting third party from engaging in one or more of the following behaviours:

(a) following, watching, pestering or communicating (including by electronic means) with, or about, the at-risk adult for whose protection the order is made;

(b) attending at, or in the vicinity of, or besetting a place where the at-risk adult resides;

(c) approaching or coming within a specified vicinity of the at-risk adult.

[13.96] Below, the Commission proposes that adult safeguarding no-contact orders should also be available on an interim basis, and on an emergency basis. These orders would have the same effect as the "full" no-contact order, but would have

[119] Safeguarding Ireland have noted that the orders available under the Domestic Violence Act 2018 are generally "aimed at prohibiting behaviour that can be viewed as violent, threatening and causing fear – as opposed to the less visible but equally abusive behaviours that are associated with the concept of coercive control". Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities – The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (2022) at pages 118 – 119. Financial abuse and cuckooing are discussed in Chapters 14 and 19 of this Report.

[120] See discussion in Chapter 1.

shorter validity periods and distinct requirements, as discussed below. Unlike the proposed amendments to the Domestic Violence Act 2018, the proposed scheme of no-contact orders is targeted at individuals who do not live with an at-risk adult and are not a spouse or other intimate partner of the at-risk adult.

[13.97] Notably, in the final stages of drafting this Report, the Department of Health launched its public consultation on Policy Proposals on Adult Safeguarding in the Health and Social Care Sector (the "Policy Proposals").[121] The Policy Proposals include the suggestion that:

> [i]n limited circumstances, where necessary to protect an adult at risk from abuse or harm, the appropriate authorities will be empowered to intervene by making, or obtaining from a Court, an appropriate order to protect the person, including […a] no contact order prohibiting a person from being in a specified place for a specified period, where an adult at risk is likely to be seriously harmed and where an order for no contact with that person will more effectively safeguard the adult at risk than removing the adult at risk from that place.[122]

[13.98] Although no further detail as to the parameters of the proposed powers are included in the Policy Proposals, and the development of such proposals is ongoing at the time of writing, the Commission welcomes this point of apparent alignment with its own recommendations contained in this Report.

R. 13.3 **The Commission recommends that** an adult safeguarding no-contact order should be provided for in adult safeguarding legislation. An adult safeguarding no-contact order would prohibit a non-intimate and non-cohabiting third party from engaging in one or more of the following behaviours:

(a) following, watching, pestering or communicating (including by electronic means) with, or about, the at-risk adult for whose protection the order is made;

[121] Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/282259/c941dc0c-c220-4a3a-8da5-460ba6af51bd.pdf#page=null> accessed on 13 April 2024.

[122] Government of Ireland, *Public Consultation – Policy Proposals on Adult Safeguarding in the Health and Social Care Sector* (Department of Health 2024) at page 27.

(b) attending at, or in the vicinity of, or watching or besetting a place where the at-risk adult resides;

(c) approaching or coming within a specified vicinity of the at-risk adult.

(i) Obligation to ascertain and consider the views of the at-risk adult, independent advocacy, and overriding the at-risk adult's objection

[13.99] As is discussed above, protective orders have significant implications for the rights of at-risk adults and third parties. In light of this, and particularly in light of the importance of the at-risk adult's right to autonomy, the Commission is of the view that the views and preferences of the at-risk adult should be considered in every case in which an adult safeguarding no-contact order is sought.

[13.100] As is discussed below, the Commission recommends that the at-risk adult and an authorised officer of the Safeguarding Body should be permitted to apply for an adult safeguarding no-contact order. In cases in which the at-risk adult is applying for the order, these views will be readily apparent. However, where an authorised officer of the Safeguarding Body is the applicant, the Commission recommends that they must make reasonable efforts to ascertain the views of the at-risk adult before making an application for a no-contact order, and must consider any such views in deciding whether to make the application.

[13.101] Upon such application, the authorised officer should provide evidence to the District Court to demonstrate the reasonable efforts made to ascertain the wishes of the at-risk adult, and information regarding the use of any methods or supports such as speech and language therapists or independent advocacy services. In Chapter 8, the Commission discusses the benefits of independent advocacy in safeguarding at-risk adults and ensuring that their views are heard. In that Chapter, the Commission recommends that adult safeguarding legislation should introduce a duty on the Safeguarding Body to facilitate, insofar as is reasonably practicable, access to independent advocacy services for an adult who is or is believed to be an at-risk adult, where it engages with such adult directly for the purposes of exercising its functions. This would include where the Safeguarding Body, or its authorised officers, engage with an adult who is, or is believed to be, an at-risk adult for the purposes of ascertaining their views in advance of an application for a no-contact order. This duty applies only where an adult who is, or is believed to be, an at-risk adult may experience significant challenges in doing particular things and where there is no suitable person who could effectively support the adult to enable their involvement with the Safeguarding Body, as explained in detail in section 4(b) of Chapter 8.

[13.102] This duty would apply to a number of interventions, including the ascertaining of views for the purposes of making a no-contact order, as most interventions would require the Safeguarding Body to engage directly with the at-risk adult. The Commission is of the view that access to independent advocacy services would be a useful tool in this context. Unlike the authorised officers of the

Safeguarding Body, an independent advocate would not be trying to persuade or counsel the adult to take a specific course of action, rather they would help them to understand what is happening and assist them in communicating their views.

[13.103] In addition, the Commission recommends that upon any application for a no-contact order, the District Court must enquire as to whether reasonable efforts have been made to ascertain the views of the at-risk adult in relation to the proposed order, and have regard to any views expressed by the at-risk adult in determining whether to grant the order. This obligation will ensure an additional safeguard for the at-risk adult's rights.

[13.104] The Commission carefully considered whether it should be possible for no-contact orders to be made against the wishes of the at-risk adult whose protection they are intended to secure. As is discussed above, where the at-risk adult themself is applying for the order, the matter of their views, and support for the making of the order, will be straightforward. It is likely that in many cases in which an authorised officer of the Safeguarding Body is the applicant, the at-risk adult will also expressly or tacitly support the making of the no-contact order. However, once the at-risk adult's views have been ascertained by the authorised officer, or by the Court, it may become clear that the at-risk adult objects to the making of a no-contact order. In such cases, the Commission is of the view that a no-contact order should not be sought or granted. Rather, in cases of objection on the part of the at-risk adult, the only order that should be available is the Commission's proposed emergency no-contact order, discussed below.[123]

[13.105] This approach is necessary to ensure that the proposed power does not constitute a disproportionate interference with the rights of the at-risk adult, in particular their constitutional right to autonomy. The Commission thus recommends that adult safeguarding legislation should provide that an adult safeguarding no-contact order cannot be sought by an authorised officer, or granted by the District Court, where it is clear that the at-risk adult objects to the making of the order.

R. 13.4 **The Commission recommends that** adult safeguarding legislation should provide that an authorised officer of the Safeguarding Body must:

(a) make reasonable efforts to ascertain the views of the at-risk adult before making an application for a no-contact order; and

[123] See section 4(c)(ii).

(b) have regard to any views expressed by the at-risk adult in determining whether to apply for a no-contact order.

R. 13.5 **The Commission recommends that** where an authorised officer of the Safeguarding Body is the applicant for a no-contact order, they should provide evidence to the District Court to demonstrate the reasonable efforts made to ascertain the wishes of the at-risk adult, and information regarding the use of any methods or supports such as speech and language therapists or independent advocacy services.

R. 13.6 **The Commission recommends that** adult safeguarding legislation should provide that, upon any application for a no-contact order, the District Court must:

(a) where the at-risk adult is not the applicant, enquire as to whether reasonable efforts have been made to ascertain the views of the at-risk adult in relation to whom the order is sought; and

(b) in determining whether to grant any such order, have regard to any views expressed by the at-risk adult.

R. 13.7 **The Commission recommends that** adult safeguarding legislation should provide that an adult safeguarding no-contact order cannot be sought or granted where the at-risk adult objects to the making of the order.

(ii) Obligation to consider respective interests in property

[13.106] As the adult safeguarding no-contact order is targeted as non-cohabiting third parties, it constitutes a less significant interference with the rights of those third parties than some of the orders available under the Domestic Violence Act 2018, which may operate to exclude an individual from their own home. However, it is still possible that an at-risk adult could have a lesser legal or beneficial interest in a relevant property than that of the person subject to the no-contact order. For example, an at-risk adult may live in a house that their adult child owns, while their adult child lives elsewhere. In recognition of such cases, the Commission recommends that the court, in considering whether to make any no-contact order (including an interim and emergency no-contact order, discussed below), must have regard to the respective rights, title or interests in the property wherein the at-risk adult resides. Having done so, the court might decide, for example, to modify the behaviour that is prohibited under the order. This obligation ensures that the rights of third parties, in particular the property rights of individuals who may be subject to a no-contact order, are not disproportionately interfered with.

[13.107] The adult safeguarding no-contact order is intended to prohibit contact with the at-risk adult, rather than disturbing the property rights, title or interests of the individual subject to the order. Thus, the making of any no-contact order would not affect rights, title or interests in the property wherein the at-risk adult resides. While the individual subject to the order might be barred from entering the

property wherein the at-risk adult resides, their existing property rights, title or interests would remain enforceable in the usual way. If, for example, the individual subject to a no-contact order sought to recover possession of their property, that action would be open to them. In such cases, the Safeguarding Body should direct the at-risk adult to any services or supports which would assist them in finding alternative accommodation.

R. 13.8 **The Commission recommends that** adult safeguarding legislation should provide that upon any application for a no-contact order, the court shall have regard to the respective rights, title or interests in the property wherein the at-risk adult resides.

R. 13.9 **The Commission recommends that** an adult safeguarding no-contact order should neither affect rights, title or interests in the property wherein the at-risk adult resides nor disturb the existing property law mechanisms open to an individual with superior rights, title or interests in the property wherein the at-risk adult resides.

(iii) Application for an adult safeguarding no-contact order

[13.108] In recognition of the at-risk adult's rights, as discussed above, and the general principle of empowerment, the Commission is of the view that the at-risk adult should be entitled to apply for a no-contact order for their own protection. This is also in line with orders sought under the Domestic Violence Act 2018.

[13.109] The Commission recommends above that the power to make applications for orders under the 2018 Act in respect of at-risk adults should be extended to the Safeguarding Body. The same approach should be taken in relation to adult safeguarding no-contact orders. The Commission recommends that authorised officers of the Safeguarding Body should be permitted to make an application for an adult safeguarding no-contact order. Even where an at-risk adult does not object to the making of the order, this does constitute a significant step and a potential interference with constitutional and ECHR rights. The Commission is thus of the view, as in Chapters 10, 11 and 12, that in order to apply for a no-contact order, an authorised officer of the Safeguarding Body must first reach a

specified threshold. In this instance, they must have a reasonable belief that the health, safety or welfare of the at-risk adult requires it.[124]

[13.110] The Commission also recommends that an application for an adult safeguarding no-contact order should be made on an *inter partes* basis. This means that the application must be made on notice to the person who is intended to be subject to the order, with an opportunity for that person to respond and attend the relevant court hearing.[125] This is necessary to respect the intended respondent's rights, in particular their constitutional right to fair procedures.

R. 13.10 **The Commission recommends that** the following persons should be permitted to make an application for an adult safeguarding no-contact order provided for in adult safeguarding legislation:

(a) the at-risk adult whose protection is sought by the making of the order; and

(b) an authorised officer of the Safeguarding Body.

R. 13.11 **The Commission recommends that** in order to apply for an adult safeguarding no-contact order, an authorised officer of the Safeguarding Body must have a reasonable belief that the health, safety or welfare of the at-risk adult requires the order.

R. 13.12 **The Commission recommends that** an application for an adult safeguarding no-contact order should be made on an *inter partes* basis.

(iv) Special sitting of the District Court

[13.111] As in Chapters 10, 11 and 12, the Commission is of the view that the appropriate jurisdiction to hear applications for no-contact orders is the District Court. Some consultees suggested that the Circuit Court would be the appropriate jurisdiction to hear applications for the interventions discussed in this Chapter and Chapters 10, 11 and 12, as the Circuit Court has expertise in dealing with applications under the Assisted Decision-Making (Capacity) Act 2015. However, the applications for interventions that are proposed in this Report are distinct, and will not inevitably require expertise in matters regarding capacity.

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[124] This is a lower threshold than that required to apply for the interventions proposed in Chapters 10, 11 and 12, in light of the fact that the no-contact order, unlike those other interventions, cannot be sought where the at-risk adult objects to its making. The proposed threshold to apply for a no-contact order is also closely aligned with the threshold set out in the Domestic Violence Act 2018.

[125] For the procedural approach in relation to interim and emergency no-contact orders, see below.

The District Court is also quicker and less expensive to access than the Circuit Court. The District Court is frequently used for urgent orders, including in the domestic violence context and in relation to care orders, including interim and emergency care orders, in respect of children.[126] The possible urgency of the scenarios requiring a no-contact order supports the view that such orders should be sought in the District Court. The Commission is of the view that this is also preferable to the more costly avenue of the High Court.

[13.112] Given the local and limited nature of the District Court, a no-contact order should be sought in the District Court area wherein the at-risk adult resides. However, given the potential urgency of situations requiring a no-contact order, the Commission is of the view that it should be possible to hold a special sitting of the District Court to facilitate an order being sought within three days of the intended application, where a sitting is not otherwise available.[127] This is in line with the Commission's recommendations in Chapters 10, 11 and 12.

R. 13.13 The Commission recommends that adult safeguarding legislation should provide that, in the event that the next sitting of the District Court for the District Court area wherein the at-risk adult resides is not due to be held within three days of the intended application for a no-contact order, an application for an order may be made at a sitting of the District Court, which has been specially arranged, held within the said three days.

(v) Threshold for granting an adult safeguarding no-contact order

[13.113] The advantage of an adult safeguarding no-contact order is that it would not be contingent on an intimate or familial relationship, but rather it could apply to any individual where the court is satisfied that there are reasonable grounds for believing that the health, safety or welfare of the at-risk adult requires the making of such an order. In line with the Domestic Violence Act 2018, such a threshold appears to the Commission to set the appropriate bar for the making of such an order. The Commission is of the view that this proposed threshold, in tandem with the obligations set out above, will ensure that no-contact orders may be used to vindicate the rights of at-risk adults, without disproportionately interfering with the rights of at-risk adults and third parties.

[126] See the Domestic Violence Act 2018 and Child Care Act 1991, respectively.

[127] Similar provisions are available under the Domestic Violence Act 2018 and Child Care Act 1991.

[13.114] Although the Domestic Violence Act 2018 uses the terminology of "safety or welfare", the Commission favours the consistent use of "health, safety or welfare" throughout adult safeguarding legislation. The Commission thus recommends that the threshold for granting an adult safeguarding no-contact order should be that the court is satisfied that there are reasonable grounds for believing that the health, safety or welfare of the at-risk adult requires it.

R. 13.14 **The Commission recommends that** the threshold for granting an adult safeguarding no-contact order should be that the court is satisfied that there are reasonable grounds for believing that the health, safety or welfare of the at-risk adult requires it.

(vi) Validity period of a no-contact order

[13.115] The Commission recommends that a maximum duration of two years (from the date of the making of the order) is appropriate for an adult safeguarding no-contact order applied for by or on behalf of an at-risk adult. Should the situation require a no-contact order to continue beyond this period, it would be open to an applicant to return to court to seek another order. The court could grant the no-contact order for any period that appears to be required in the circumstances of the case, up to that maximum period.

R. 13.15 **The Commission recommends that** a validity period of a maximum of two years (from the date of the making of the order) should apply to an adult safeguarding no-contact order applied for by, or on behalf of, an at-risk adult.

(vii) Potential for application for discharge

[13.116] It is conceivable that the at-risk adult might change their mind in relation to contact with the respondent whilst a no-contact order is in place. As such, the Commission recommends that the at-risk adult whose protection is intended by the no-contact order should be permitted by adult safeguarding legislation to make an application to discharge the order. This is an important safeguard to ensure that constitutional rights are respected, in particular the at-risk adult's right to autonomy.

[13.117] The making of a no-contact order will also have a significant impact on the rights of the person who is subject to it. The Commission thus recommends that the respondent should be permitted to appeal the making of an order, and apply for it to be discharged. This mirrors the approach taken in relation to other protective orders, such as those provided for under the Domestic Violence Act 2018.

[13.118] The Commission also recommends that where the Safeguarding Body has applied for a no-contact order, it should be permitted to apply to discharge the order. This will also authorised officers of the Safeguarding Body to take such

steps on behalf of an at-risk adult, for example, where it is apparent that the respondent no longer poses a risk to the at-risk adult, or where the at-risk adult expresses their desire to resume contact with the respondent, but is not in a position to make an application to discharge the order.

R. 13.16 **The Commission recommends that** the at-risk adult whose protection is intended by a no-contact order should be permitted by adult safeguarding legislation to make an application to discharge the order.

R. 13.17 **The Commission recommends that** the respondent to a no-contact order should be permitted by adult safeguarding legislation to make an application to discharge the order.

R. 13.18 **The Commission recommends that** where the Safeguarding Body has applied for a no-contact order, it should be permitted by adult safeguarding legislation to make an application to discharge the order.

(viii) Penalty for non-compliance

[13.119] Wilful non-compliance with the order by the person who is subject to it would be a criminal offence. There is precedent for this in section 33 of the Domestic Violence Act 2018 that criminalises contravention of a safety, barring or protection order and related interim orders,[128] and in section 10(8) of the Non-Fatal Offences against the Person Act 1997 (as recently amended) criminalising breaches of orders made under that legislation.[129] Civil restraining orders made under the Criminal Justice (Miscellaneous Provisions) Act 2023 will also be criminalised, with a summary-only penalty.

[13.120] Whether that is an adequate response to the breach of a court order is a separate debate, which in the view of the Commission would benefit from further research and analysis. Arguably, given the seriousness of the matters which an order is directed at addressing, a hybrid offence prosecutable on indictment at the election of the prosecutor would give more latitude for appropriate disposal of cases involving serious violence.

[13.121] The Commission considers that a breach of a no-contact order will not necessarily be a minor matter fit to be tried summarily. The Commission therefore

[128] This provides for a summary-only penalty.

[129] Section 10(9) provides the penalty for an offence under section 10. It provides for conviction summarily or on indictment. The increased penalty may reflect the fact that a conviction for harassment or stalking is required to impose the relevant order, unlike the position under the 2018 and 2023 Acts.

recommends that contravention of a no-contact order should be a hybrid offence, capable of being tried summarily or on indictment. This allows for a flexible approach, wherein the penalty reflects and is proportionate to the particular circumstances of the case.

R. 13.19 **The Commission recommends that** wilful non-compliance with the terms of a no-contact order should be a criminal offence capable of being tried summarily or on indictment.

(ix) No sanction for the at-risk adult in the event of non-compliance

[13.122] As is noted above, it is conceivable that an at-risk adult might change their mind about contact with the person who is subject to the order. The at-risk adult might decide to contact the person notwithstanding that there is a no-contact order in place. The Commission is of the view that, as in family law, there should be no sanction imposed on an at-risk adult if they choose to engage with the person against whom an order is made. As with other forms of statutory injunction, a no-contact order is merely a means of directing the person whose behaviour is problematic to desist from such behaviour. This also ensures minimal interference with the rights of at-risk adults.

R. 13.20 **The Commission recommends that**, as in family law, there should be no legal sanction imposed on an at-risk adult if they choose to engage with the person against whom an order is made.

(x) Provision for stay on appeal of a no-contact order

[13.123] Given the impact of a no-contact order on a respondent, and in particular the interference with their constitutional and ECHR rights, it should be possible for individuals who are subject to an order to appeal it. This is a necessary safeguard to ensure that no-contact orders do not constitute a disproportionate interference with the rights of individuals who are subject to them, in particular their constitutional rights to privacy and association, and their rights under Article 8 of the ECHR, where relevant.

[13.124] The Commission considered whether any such appeal by an individual should stay or suspend the operation of the no-contact order. Given the possible length of a no-contact order and the impact on the rights of the respondent, the Commission believes that it may, in some cases, be appropriate for an appeal to stay the operation of the order. However, in other cases, it will be more appropriate for the order to remain in operation pending the determination of the appeal. The court will be best-placed to make this assessment. The Commission thus recommends that the legislation providing for an adult safeguarding no-contact order should provide that an appeal of a no-contact order shall, if the court that made the order or the court to which the appeal is

brought so determines (but not otherwise), stay the operation of the order on such terms (if any) as may be imposed by the court making the determination.

[13.125] In the sections below, the Commission discusses the need to also provide for interim no-contact orders and emergency no-contact orders in adult safeguarding legislation. Given the urgent and temporary nature of these orders, the Commission is of the view that it would be inappropriate for an appeal of an interim or emergency order to stay their operation. Providing otherwise would likely allow the purpose of the order to be frustrated. The Commission thus recommends that the legislation providing for an interim no-contact order or an emergency no-contact order should provide that an appeal of an interim no-contact order or an emergency no-contact order shall not stay the operation of the order.

[13.126] In the Commission's view, this approach to appeals strikes the appropriate balance between the rights and interests engaged by no-contact orders, interim no-contact orders and emergency no-contact orders. This approach also aligns with that taken under the Domestic Violence Act 2018 in relation to the range of orders provided for under that Act.

R. 13.21 **The Commission recommends that** the legislation providing for an adult safeguarding no-contact order should provide that an appeal of a no-contact order shall, if the court that made the order or the court to which the appeal is brought so determines (but not otherwise), stay the operation of the order on such terms (if any) as may be imposed by the court making the determination.

R. 13.22 **The Commission recommends that** the legislation providing for an interim no-contact order or an emergency no-contact order should provide that an appeal of an interim no-contact order or an emergency no-contact order shall not stay the operation of the order.

(c) Interim and Emergency Adult Safeguarding No-Contact Orders

[13.127] The Domestic Violence Act 2018 allows for some orders under the Act to be granted on an interim basis, pending the determination by the court of the application for the longer-term order, and for a barring order to be granted on an emergency basis. Such interim and emergency orders are an important protective tool in the domestic violence context, and are frequently granted in urgent cases. The Commission is of the view that similar provisions should be introduced in the context of adult safeguarding no-contact orders. The introduction of an interim adult safeguarding no-contact order and an emergency adult safeguarding no-contact order, which could be sought and granted on an *ex parte* basis, would allow for shorter-term orders to be made in particularly urgent cases, where the relevant threshold is met.

[13.128] Apart from their validity periods, interim and emergency adult safeguarding no-contact orders would have the same effect as that of a no-contact order,

prohibiting the same type of specified behaviour, as set out above. Various matters discussed in the context of no-contact orders above also apply to the proposed interim and emergency adult safeguarding no-contact orders, and should be read as being so applicable. These matters are:

(a) ascertaining and considering the views of the at-risk adult (apart from the matter of whether the emergency no-contact order can be sought against the wishes of the at-risk adult);
(b) considering respective interests in property;
(c) applications being brought in the District Court;
(d) breach of a no-contact order by the respondent being a criminal offence;
(e) stay of an order on appeal – as discussed above.

[13.129] It will be noted that the proposed thresholds for interim and emergency no-contact orders are higher than the threshold for a "full" no-contact order, as outlined above. This mirrors the approach of the Domestic Violence Act 2018, and is reflective of the fact that interim and emergency no-contact orders may be granted on an *ex parte* basis, and in the case of an emergency no-contact order, may be sought and granted even where the at-risk adult objects to the making of an order.

(i) Interim Adult Safeguarding No-Contact Orders

[13.130] As with orders available under section 8 of the Domestic Violence Act 2018, in certain circumstances it should be possible to make an adult safeguarding no-contact order on an interim basis pending determination of the application for a ("full") no-contact order. An interim order would allow courts to respond quickly and effectively in situations of urgency or immediacy, bridging the gap in cases where an application for a no-contact order has been made, but the case has not yet been decided. A similar order is provided for in South Australia, British Columbia and Scotland.

[13.131] The Commission thus recommends that an interim adult safeguarding no-contact order should be provided for in adult safeguarding legislation to be available, on an *inter partes* or *ex parte* basis, where an application for a ("full") adult safeguarding no-contact order has been made. The Commission is of the view that both the at-risk adult and the Safeguarding Body should be permitted to apply for an interim order. Where an authorised officer of the Safeguarding Body seeks to apply for such an order, they must first reach a specified threshold. Specifically, they must have a reasonable belief that there is an immediate risk to the health, safety or welfare of the at-risk adult such that an interim no-contact order is required. This is a higher threshold than that required to apply for the "full" no-contact order. However, both thresholds require that the risk is such that the relevant order is required. This means, in essence, that the risk must be caused by the third party, and so mitigated or addressed by ceasing contact between the at-risk adult and the third party.

R. 13.23 **The Commission recommends that** an interim adult safeguarding no-contact order should be provided for in adult safeguarding legislation to be available, on an *inter partes* or *ex parte* basis, where an application for a ("full") adult safeguarding no-contact order has been made.

R. 13.24 **The Commission recommends that** the following should be permitted to make an application for an interim adult safeguarding no-contact order provided for in adult safeguarding legislation:

(a) an at-risk adult whose protection is sought by the making of the order; and

(b) an authorised officer of the Safeguarding Body.

R. 13.25 **The Commission recommends that** in order to apply for an interim adult safeguarding no-contact order, an authorised officer of the Safeguarding Body must have a reasonable belief that there is an immediate risk to the health, safety or welfare of the at-risk adult such that an interim no-contact order is required.

[13.132] Similarly, there must be a corresponding threshold to be met before a court may grant an interim adult safeguarding no-contact order. The Commission recommends that the threshold for granting an interim adult safeguarding no-contact order should be that a judge of the District Court is satisfied that there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult such that an interim no-contact order is required. This heightened threshold, which is above the threshold required for a "full" no-contact order, reflects the fact that the situation must involve urgency for an interim no-contact order to be granted. It also ensures that such orders are only granted where this is a proportionate and necessary intervention in the circumstances of the case.

R. 13.26 **The Commission recommends that** the threshold for granting an interim adult safeguarding no-contact order should be that a judge of the District Court is satisfied that there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult such that an interim no-contact order is required.

[13.133] If granted on an *ex parte* basis, an interim no-contact order should have a validity period not exceeding 8 working days after the day it is issued. This short period is necessary in light of the constitutional and ECHR rights of the individual

who is to be made subject to the order.[130] The no-contact order interferes significantly with the rights of individuals who are made subject to it, in particular their constitutional right to fair procedures. Where the individual subject to an order has not yet been given an opportunity to be heard in relation to the order, it must only be in place for a very short period.

[13.134] If granted on an *inter partes* basis, allowing the respondent the opportunity to be heard, the interim no-contact order would be valid until the determination of the pending application for the "full" no-contact order. It would lapse upon such determination.

R. 13.27 **The Commission recommends that** an interim adult safeguarding no-contact order granted on an *inter partes* basis should be valid until the determination of the pending application for the adult safeguarding no-contact order.

R. 13.28 **The Commission recommends that** a validity period not exceeding 8 working days after the day it is issued should apply to an interim adult safeguarding no-contact order granted on an *ex parte* basis.

(ii) Emergency Adult Safeguarding No-Contact Orders

[13.135] The Commission is also of the view that an emergency adult safeguarding no-contact order should be available for urgent cases, on an *ex parte* basis and without any requirement for an application for a ("full") no-contact order.

[13.136] The emergency order is designed for two scenarios: the first is a straightforward case of urgency, where there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult and a no-contact order is required to address or mitigate that risk. Provision for a no-contact order in such a case would allow courts to respond quickly and effectively in situations of urgency or immediacy, without any obligation to have also applied for a full no-contact order.

[13.137] The second scenario is an urgent case in which the at-risk adult is objecting to the making of a no-contact order. In such cases, an emergency no-contact order would be available where there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult, and a no-contact order is required to assess the voluntariness of the at-risk adult's objection to the order, and where necessary to facilitate a capacity assessment.

[130] In particular, this short period is necessary in light of the person's constitutional right to fair procedures. See *DK v Crowley* [2002] 2 IR 744. This validity period also mirrors the position in the Domestic Violence Act 2018.

As mentioned above, this is the only instance in which an adult safeguarding no-contact order may be granted where the at-risk adult objects to the making of an order. The court should be permitted to grant an emergency no-contact order, even where doing so is contrary to the express objection of the at-risk adult being protected by the order. The Commission is of the view that this is necessary, and does not represent a disproportionate interference with rights, given the very short time period involved and the threshold to be met, as set out below.

[13.138] The Commission thus recommends that an emergency adult safeguarding no-contact order may be sought and granted against the wishes of the at-risk adult whose protection is intended by the making of the order.

[13.139] Both the at-risk adult and an authorised officer of the Safeguarding Body should be permitted to make an application for an emergency adult safeguarding no-contact order provided for in adult safeguarding legislation, although clearly it will only be an authorised officer the Safeguarding Body applying in the case of the second scenario discussed above. As with other interventions proposed throughout this Report, the Commission is of the view that there should be a clear threshold to be met before an authorised officer may apply for an emergency adult safeguarding no-contact order.

[13.140] The Commission recommends that in order to apply for an emergency adult safeguarding no-contact order, an authorised officer of the Safeguarding Body must have a reasonable belief that there is an immediate risk to the health, safety or welfare of the at-risk adult, and a no-contact order is required:

(a) to address or mitigate that risk, or
(b) to assess the voluntariness of the at-risk adult's objection to the making of a no-contact order, and where necessary to facilitate a capacity assessment.

[13.141] In light of the rights implications involved in seeking a no-contact order against the express wishes of the at-risk adult, there should be an additional threshold for such cases. The Commission thus recommends that if the emergency no-contact order is sought in the context of apparent objection on the part of the at-risk adult, an authorised officer of the Safeguarding Body must also have a reasonable belief that the apparent objection of the at-risk adult is not voluntary, or the at-risk adult may lack capacity to decide whether to continue to have contact with the intended respondent to the emergency no-contact order.

R. 13.29 **The Commission recommends that** an emergency adult safeguarding no-contact order should be provided for in adult safeguarding legislation to be available on an *ex parte* basis, without any requirement that an application for a "full" adult safeguarding no-contact order has been made.

R. 13.30 **The Commission recommends that** the following should be permitted to make an application for an emergency adult safeguarding no-contact order provided for in adult safeguarding legislation:

(a) an at-risk adult whose protection is sought by the making of the order; and

(b) an authorised officer of the Safeguarding Body.

R. 13.31 **The Commission recommends that** an emergency adult safeguarding no-contact order may be sought and granted against the wishes of an at-risk adult whose protection is intended by the making of the order.

R. 13.32 **The Commission recommends that** in order to apply for an emergency adult safeguarding no-contact order, an authorised officer of the Safeguarding Body must have a reasonable belief that there is an immediate risk to the health, safety or welfare of the at-risk adult and a no-contact order is required:

(a) to address or mitigate that risk; or

(b) to assess the voluntariness of the at-risk adult's objection to the making of a no-contact order, and where necessary to facilitate a capacity assessment.

R. 13.33 **The Commission recommends that** if the emergency no-contact order is sought in the context of apparent objection on the part of the at-risk adult, an authorised officer of the Safeguarding Body must also have a reasonable belief that that the apparent objection of the at-risk adult is not voluntary, or the at-risk adult may lack capacity to decide whether to continue to have contact with the intended respondent to the emergency no-contact order.

[13.142] As with the other interventions discussed in this Report, the application for an emergency adult safeguarding no-contact order will be made in the District Court. The Commission recommends that the threshold for granting an emergency adult safeguarding no-contact order should be that the District Court is satisfied that there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult and a no-contact order is required:

(a) to address or mitigate that risk, or
(b) to assess the voluntariness of the at-risk adult's objection to the making of a no-contact order, and where necessary to facilitate a capacity assessment.

[13.143] Although the second scenario is not targeted at mitigation of risk, there will be an element of mitigation, as the emergency no-contact order will be necessary to allow for a period of space and separation between the at-risk adult and the individual of concern, and so facilitate an assessment of the voluntariness of the at-risk adult's objection (and, where required, an assessment of their capacity to decide whether to continue to have contact with the intended respondent to the emergency no-contact order).

[13.144] Again, given the rights implications of granting an order against the express wishes of the at-risk adult, there should be an additional threshold to grant an emergency no-contact order where the at-risk adult objects to it. The Commission recommends that if the emergency no-contact order is sought in the context of apparent objection on the part of the at-risk adult, the court must also be satisfied that there are reasonable grounds for believing that the apparent objection of the at-risk adult is not voluntary, or the at-risk adult may lack capacity to decide whether to continue to have contact with the intended respondent to the emergency no-contact order.

R. 13.34 **The Commission recommends that** the threshold for granting an emergency adult safeguarding no-contact order should be that the judge of the District Court is satisfied that there are reasonable grounds for believing that there is an immediate risk to the health, safety or welfare of the at-risk adult, and a no-contact order is required:

(a) to address or mitigate that risk, or

(b) to assess the voluntariness of the at-risk adult's objection to the making of a no-contact order, and where necessary to facilitate a capacity assessment.

R. 13.35 **The Commission recommends that** if the emergency adult safeguarding no-contact order is sought in the context of apparent objection on the part of the at-risk adult, the judge of the District Court must also be satisfied that there are reasonable grounds for believing that the apparent objection of the at-risk adult is not voluntary, or the at-risk adult may lack capacity to decide whether to continue to have contact with the intended respondent to the emergency no-contact order.

[13.145] The Commission is of the view that an emergency adult safeguarding no-contact order should be valid for a period not exceeding 8 working days after the day it is issued. The court would have discretion to grant for a shorter period, where appropriate in the particular case. This short period would be sufficient to mitigate an immediate risk to the health, safety or welfare of the at-risk adult, while potentially gathering information to support the making of an application for a "full" no-contact order.

[13.146] Equally, this short period would be sufficient to facilitate breathing space on the part of at-risk adult and an assessment of their objection to the making of the emergency adult safeguarding no-contact order. In particular, it would facilitate assessment of the voluntariness of the apparent objection, and where necessary a capacity assessment. If an emergency no-contact order is granted in circumstances of objection, the breathing space allowed for during this period may result in the at-risk adult changing their mind about objecting to the emergency no-contact order. In some cases, during the period of the order, the at-risk adult may be assessed as lacking capacity to decide whether to have contact with the respondent, and so additional supports could be put in place.

[13.147] The short validity period of emergency orders ensures that they impair constitutional rights as little as possible, and that their effect on rights is proportional to the objective of providing urgent protection or facilitating an assessment of voluntariness or capacity, as the case may be. After this period, it would be open to the at-risk adult or authorised officer Safeguarding Body to apply for a ("full") adult safeguarding no-contact order, if the relevant thresholds were met. The Commission is of the view that it should not be possible to renew or extend emergency orders.

[13.148] It may quickly become apparent that the at-risk adult is voluntarily objecting to the no-contact order, and there are no capacity concerns. In such a case, in order to respect the rights of the at-risk adult, the no-contact order must be revoked as soon as is practicable. For this reason, the Commission recommends that a provision in adult safeguarding legislation should oblige the Safeguarding Body to make an application for immediate revocation of the order where, following the making of an emergency no-contact order, the voluntariness of the at-risk adult's objection to the making of a no-contact order is confirmed, and the at-risk adult has, at the time concerned, capacity to object to the making of the order. Such an application must be brought as soon as is practicable.

R. 13.36 **The Commission recommends that** a validity period not exceeding 8 working days after the day it is issued should apply to an emergency no-contact order. There should be no possibility for renewal or extension of an emergency no-contact order.

R. 13.37 **The Commission recommends that** a provision in adult safeguarding legislation should oblige the Safeguarding Body to make an application for immediate revocation of the order where, following the making of an emergency no-contact order, the voluntariness of the at-risk adult's objection to the making of a no-contact order is confirmed, and the at-risk adult has, at the time concerned, capacity to object to the making of the order. Such an application must be brought as soon as is practicable.

[13.149] As is outlined above, the Commission if of the view that it should be possible for an emergency no-contact order to be sought and granted in circumstances

wherein the at-risk adult lacks, or is believed to lack, capacity to consent to the making of a no-contact order. In such cases, the Safeguarding Body must endeavour to support the at-risk adult to make the decision regarding whether to have contact with the intended respondent. They should do so before taking more interventionist steps, such as considering formal supports under the Assisted Decision-Making (Capacity) Act 2015 and notifying the Director of the Decision Support Service. This would be a similar approach to that taken in Scotland, where statutory guidance states that the Office of the Public Guardian should be contacted about any supports being in place in relation to the potentially non-capacitous adult. The Commission is of the view that this inter-agency approach is necessary to ensure that the objectives of both adult safeguarding legislation and the Assisted Decision-Making (Capacity) Act 2015 are achieved, and that all at-risk adults can benefit from the range of supports provided for under Irish legislation.

R. 13.38 **The Commission recommends that** where an emergency no-contact order is made in circumstances wherein the at-risk adult is believed to lack capacity to consent to the making of a no-contact order, the Safeguarding Body must endeavour to support the at-risk adult to make the decision and, where necessary, consider supports under the Assisted Decision-Making (Capacity) Act 2015 and notifying, in writing, the Director of the Decision Support Service.

(d) Anonymity of at-risk adults and respondents

[13.150] As with the interventions discussed in Chapters 10, 11 and 12, applications for no-contact orders of all types are likely to involve highly sensitive facts and personal details – in particular, about the relationship between individuals and possible details about abuse and harm. It is important that the at-risk adult's right to privacy is carefully observed in the context of such applications. The Commission thus recommends that in relation to any proceedings for a no-contact order, it should be an offence for a person to publish, distribute or broadcast any information likely to identify the at-risk adult concerned, unless the court directs otherwise.

[13.151] It may be that the court considers that it is in the interests of justice that certain information should be published, distributed or broadcast. In such situations, the court should be permitted to specify in a written direction the manner in which such information can be published, distributed or broadcast and impose any conditions it considers necessary. Contravening a direction of this sort should also be an offence.

[13.152] The Commission is of the view that it may be in the public interest for the respondent to a no-contact order, interim no-contact order or emergency no-contact order to be named. As the respondent is a non-intimate and non-cohabiting third party, they are less likely to have a close personal or familial connection to the particular at-risk adult that the no-contact order relates to, and

more likely to go on to pose a risk to other at-risk adults. As such, the Commission recommends that the respondent to a no-contact order of any type should be identified, unless doing so would identify the at-risk adult.

[13.153] As with the offence of obstruction above, it should not be an offence for an at-risk adult to publish, distribute or broadcast any information identifying themself, or to contravene a direction of the court in this regard.

R. 13.39 **The Commission recommends that** in relation to any proceedings for a no-contact order (including an interim or an emergency no-contact order), it should be an offence for a person, other than an at-risk adult, to publish, distribute or broadcast any information likely to identify the at-risk adult concerned, unless the court directs otherwise. (See the relevant section of the Commission's Adult Safeguarding Bill 2024 regarding the anonymity of adults at risk of harm and others.)

R. 13.40 **The Commission recommends that** the respondent to a no-contact order, interim no-contact order, or emergency no-contact order should be identified, unless doing so would identify the at-risk adult. (See the relevant section of the Commission's Adult Safeguarding Bill 2024 regarding the anonymity of adults at risk of harm and others.)

(e) Availability of legal aid for purposes of applications

[13.154] Finally, the Commission recommends that free legal aid should be extended to applications by at-risk adults for no-contact orders, interim no-contact orders, and emergency no-contact orders. This would allow legal aid to be available to applicants on the same basis as applicants for an order under the Domestic Violence Act 2018. The Commission believes that a provision should be introduced providing that no contribution shall be payable by an applicant where the subject matter of the application relates solely to proceedings in the District Court (or on appeal from the District Court to the Circuit Court) where the only remedy sought by the applicant in those proceedings is a no-contact order (including an interim no-contact order and emergency no-contact order).

[13.155] The Commission recommends that an amendment should be made to the Civil Legal Aid Regulations 1996 to achieve this.[131] This would be similar to the

[131] Civil Legal Aid Regulations 1996 (SI No 273 of 1996).

amendments made by the Civil Legal Aid Regulations 2017,[132] in relation to applications for orders under the Domestic Violence Act 2018.

R. 13.41 **The Commission recommends that** free legal aid should be extended to applications by at-risk adults for no-contact orders, interim no-contact orders and emergency no-contact orders.

R. 13.42 **The Commission recommends that** the Civil Legal Aid Regulations 1996 should be amended to state that no contribution shall be payable by an applicant where the subject matter of the application relates solely to proceedings in the District Court (or on appeal from the District Court to the Circuit Court) where the only remedy sought by the applicant in those proceedings is a no-contact order (including an interim no-contact order and emergency no-contact order).

(f) A code of practice for authorised officers exercising powers, and a statutory immunity

(i) Statutory code of practice

[13.156] Consultees, including professionals working in the area of adult safeguarding, stressed to the Commission the need for practitioners to be provided with guidance on the use of powers under any new adult safeguarding legislation, and meeting statutory thresholds for interventions. Given the complex and intrusive nature of the proposed protective orders, the Commission is of the view that it would be beneficial for authorised officers to be provided with a code of practice regarding the usage of them. This would offer practical guidance, and could set out the internal, operational detail as to how the powers to make applications for orders under the Domestic Violence Act 2018, and for adult safeguarding no-contact orders, are to be used and put into practice by relevant professionals. Such a code could be drafted by the relevant Minister, in consultation with the Safeguarding Body and others as it sees fit. Statutory codes of practice regarding adult safeguarding legislation are a feature in other jurisdictions, such as Scotland.[133] Such a code would allow authorised officers to be thoroughly apprised of their duties and obligations under the legislation, in addition to the relevant thresholds and safeguards.

[132] Civil Legal Aid Regulations 2017 (SI No 626 of 2017).

[133] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (2022).

(ii) A statutory immunity for authorised officers exercising powers

[13.157] In relation to the interventions proposed in this Chapter and in Chapters 10, 11 and 12, the Commission considered whether a statutory immunity should be provided for, to clarify that no action would lie against an authorised officer who exercised powers or functions in accordance with the proposed provisions of adult safeguarding legislation. On balance, the Commission was of the view that such a provision would be unnecessary and inappropriate. Where there are issues in relation to the exercise of the powers or allegations of non-compliance with statutory requirements, the ordinary common law rules would apply.[134]

6. Conclusions and recommendations

[13.158] Throughout this Chapter, the Commission has explained the rationale for two key recommendations:

(1) the amendment of the Domestic Violence Act 2018, so that domestic abuse perpetrated against at-risk adults is appropriately addressed; and

(2) a new adult safeguarding no-contact order, tailored specifically to the adult safeguarding context and available on an interim basis and on an emergency basis in limited cases.

[13.159] Amending the 2018 Act will ensure that domestic abuse against at-risk adults is recognised and addressed as such. It will fill the gaps that currently exist, broadening the protections available to adults who are at risk of harm from a wider range of cohabitants and family members, and from those with whom they are in a caring relationship.

[13.160] Introducing a new adult safeguarding no-contact order will provide protection to adults who are at risk of harm from non-intimate and non-cohabiting third parties. In limited circumstances, such orders should be available on an interim basis and on an emergency basis. The potential impact of such orders on the rights of at-risk adults and third parties is mitigated by the inclusion of a range of statutory safeguards. These include strict time limits, thresholds and protections for the at-risk adult who seeks to discharge or contravene a no-contact order. This is in addition to the general obligation on courts to adopt the least intrusive means possible to meet the objective of safeguarding the health, safety or

[134] See, for example, actions in negligence against members of the Garda Síochána in relation to the exercise of their public order functions: *Fagan v Garda Commissioner* [2014] IEHC 128.

welfare of the at-risk adult.[135] In a similar way to the interventions proposed in Chapters 10, 11 and 12, authorised officers of the Safeguarding Body should only apply for no-contact orders as a last resort, where other measures to safeguard the at-risk adult, or reduce the relevant risk, have failed.

[135] See Chapter 4.

CHAPTER 14 FINANCIAL ABUSE

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1. Introduction

[14.1] The Commission's Issues Paper on a Regulatory Framework for Adult Safeguarding asked consultees about the adequacy of existing statutory and regulatory powers to address financial abuse in the adult safeguarding context. In particular, the Issues Paper asked if sectoral regulators and bodies, such as the Central Bank of Ireland ("CBI") and the Department of Social Protection, have sufficient powers to combat financial abuse in the adult safeguarding context. This Chapter examines these issues and discusses the adequacy of current and proposed measures. Moreover, this Chapter sets out proposals to prevent and address actual or suspected financial abuse of at-risk adults in Ireland.

[14.2] In this Chapter, the Commission uses the term "at-risk customer" in addition to the term "at-risk adult". The term "at-risk customer" is used to describe an "at-risk adult" who is a customer of a regulated financial service provider ("RFSP"). RFSPs are regulated by the CBI and are "regulated entities" for the purposes of the Consumer Protection Code ("CPC"). The CPC uses the term "vulnerable person" and the CBI's draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations use the term "consumer in vulnerable circumstances". To avoid using stigmatising language such as "vulnerable", the term "at-risk customer" is used in this Chapter.

(a) Prevalence and types of financial abuse

(i) Introduction

[14.3] Financial abuse is one of the most prevalent forms of abuse reported by at-risk adults over the age of 65.[1] The CBI recently stated in its Consultation Paper on the CPC that financial frauds and scams create a risk of loss and distress to consumers.[2] In 2021 and 2022, financial abuse was the third most significant category of alleged abuse reported by adults aged 65 to 79 years to the National Safeguarding Office ("NSO") of the Health Service Executive ("HSE"), with 16% of reports concerning financial abuse.[3] According to the NSO, the levels of reported

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[1] Health Service Executive National Safeguarding Office, *Annual Report 2021* (2022) at page 25 <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-annual-report-2021.pdf> accessed on 5 April 2024.

[2] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 54 <https://www.centralbank.ie/docs/default-source/publications/consultation-papers/cp158/cp158-consultation-paper-consumer-protection-code.pdf?sfvrsn=45d631a_4> accessed on 5 April 2024.

[3] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 29; Health Service Executive National Safeguarding Office, *NSO Annual Report 2022* (2023) at page 33.

financial abuse increase with age.[4] For adults over 80 years, financial abuse was the second most significant category of alleged abuse reported to the NSO in 2021, with 21% of reports concerning financial abuse.[5] In 2022, financial abuse was the third most significant category of alleged abuse reported to the NSO by adults over 80 years, with 21% of reports concerning financial abuse.[6]

[14.4] In a 2010 Irish study, financial abuse was identified as the most common form of mistreatment of older persons.[7] In addition, women were found to experience financial abuse more than men[8] and adult children (50%) were most frequently identified by older persons as the perpetrators of financial abuse, followed by other relatives (24%), spouses or partners (20%), friends (4%) and health care workers (2%).[9]

[14.5] Moreover, in a recent global survey by STEP[10] which involved 680 respondents from various countries, 57% of respondents (388 responses) noted that they had encountered instances of actual or suspected financial abuse of "vulnerable persons".[11] In response to a question regarding whether respondents had

<https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-office-annual-report-20221.pdf> accessed on 5 April 2024.

4 HSE National Safeguarding Office, *NSO Annual Report 2022* (2023) at page 29.

5 HSE National Safeguarding Office, *NSO Annual Report 2022* (2023) at page 29.

6 HSE National Safeguarding Office, *NSO Annual Report 2022* (2023) at page 33.

7 Naughton, Drennan, Lyons, Lafferty, Treacy, Phelan, O'Loughlin and Delaney, "Elder abuse and neglect in Ireland: results from a national prevalence study" (2012) Age and Ageing 41(1) at pages 98 to 103.

8 Naughton, Drennan, Lyons, Lafferty, Treacy, Phelan, O'Loughlin and Delaney, "Elder abuse and neglect in Ireland: results from a national prevalence study" (2012) Age and Ageing 41(1) at page 100.

9 Naughton, Drennan, Lyons, Lafferty, Treacy, Phelan, O'Loughlin and Delaney, "Elder abuse and neglect in Ireland: results from a national prevalence study" (2012) Age and Ageing 41(1) at page 100.

10 STEP is a global professional body with more than 21,000 members comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures. <https://www.step.org/about-step> accessed on 8 April 2024.

11 STEP, *Loss of Mental Capacity: A Global Perspective* (Research Report, November 2023) at page 22 <https://www.step.org/research-reports/mental-capacity> accessed on 8 April 2024. STEP conducted a research survey in June and July 2023. A survey was sent to STEP members. STEP received 756 responses from respondents in 44 countries.

observed an increase in financial abuse in the last two years, 40% of respondents (143 responses) stated that they had observed such an increase.[12]

[14.6] Despite the prevalence of financial abuse, this type of abuse is under-identified, under-reported and under-prosecuted.[13] Financial abuse can have a serious impact on those who are subject to it.[14] Financial capacity has been found to be an advanced activity of daily life. Financial capacity has been found to be significantly impaired in persons with a mild form of Alzheimer's disease, and such capacity can decline rapidly, in particular with regard to reviewing bank statements, paying bills and exercising financial judgment.[15]

[14.7] Online banking has superseded the chequebook and presents new avenues for financial abuse. While weekly usage of online banking is considerably lower among older persons as compared to younger persons in Ireland, there has been a noticeable increase in the online activity of older persons since 2022. Over half (55%) of those aged 55 to 64 years use online banking weekly, and over 1 in 3 (36%) of those aged 65 years or older use online banking weekly.[16] Older people, who are more likely to have a higher credit limit and less likely to check their balance online than younger people, are particularly at risk of bank account takeovers.[17] Poor physical or mental health, or intellectual disability, may place

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[12] STEP, *Loss of Mental Capacity: A Global Perspective* (Research Report, November 2023) at page 23.

[13] Phelan, O'Donnell and McCarthy, "Financial abuse of older people by third parties in banking institutions: a qualitative exploration" (2021) 43(9) Ageing and Society 1 at page 1.

[14] Naughton, Drennan, Treacy, Lafferty, Lyons, Phelan, Quin, O'Loughlin and Delaney, *Abuse and Neglect of Older People in Ireland* (National Centre for the Protection of Older People, 2010) at page 58 <https://safeguardingireland.org/wp-content/uploads/2020/02/National-Prevalence-Study- FullReport2010.pdf> accessed on 8 April 2024.

[15] Sherod, Griffith, Copeland, Belue, Krzywanski, Zamrini, Harrell, Clark, Brockington, Powers and Marson, "Neurocognitive predictors of financial capacity across the dementia spectrum: Normal aging, mild cognitive impairment, and Alzheimer's disease" (2009) 15(2) Journal of the International Neuropsychological Society 258; Marson, Sawrie, Snyder, McInturff, Stalvey, Boothe, Aldridge, Chatterjee and Harrell, "Assessing financial capacity in patients with Alzheimer's disease: A conceptual model and prototype instrument" (2000) 57(6) Archives of Neurology 877.

[16] Department of Finance, Consumer Sentiment Banking Survey (August 2023) at pages 6 and 37 <https://www.gov.ie/en/publication/ff55f-consumer-sentiment-banking-survey-august-2023/> accessed on 8 April 2024.

[17] Age UK, *Fraudscape: depicting the UK's fraud landscape* (2014) cited in "Only the tip of the iceberg: fraud against older people evidence review" (April 2015).

certain individuals at a greater risk of financial abuse. Notably, the majority of financial abuse is perpetrated by family members.[18]

[14.8] Unlike other forms of abuse, financial abuse can be perpetrated remotely and without the victim's knowledge.[19] Financial abuse can include the breach of a fiduciary relationship, the misuse of a joint account, the abuse of a power of attorney, the improper appropriation of social welfare payments, or financial mis-selling. Technological advances have increased the potential for everyone to fall victim to financial abuse. Financial scams are now global in reach and at-risk adults are particularly susceptible to financial abuse.[20] The rapid evolution of financial products and services impacts customers who may not be able to access, or who may struggle with, technology. The CBI recently stated in its Consultation Paper on the CPC that responses to its Consumer Protection Code Review Discussion Paper noted that consumers who are not 'tech savvy' are at a heightened risk of financial abuse.[21] Cutting across all of these issues is an apparent reluctance on the part of RFSPs to take action—for fear of legal repercussion, prosecution or administrative sanction—and inadequate inter-sectoral and multi-agency cooperation.[22]

[14.9] In the absence of clearly defined statutory obligations to address financial abuse, or sufficiently detailed provisions in regulations or a statutory code of conduct, it may be that RFSPs are reluctant to take action, are unsure what to do, or await the CBI's review of the CPC. On 7 March 2024, the CBI published draft Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations, draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations, and draft Guidance on Protecting Consumers in Vulnerable

[18] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 65; Griffin 'Social worker for Cork and Kerry warns of 'disgusting' elder abuse by families to swindle money' *Irish Examiner* (4 December 2023) <https://www.irishexaminer.com/news/munster/arid-41282566.html> accessed on 8 April 2024.

[19] Phelan, Fealy and Downes "Piloting the older adult financial exploitation measure in adult safeguarding services" (2017) 70 Archives of Gerontology and Geriatrics at page 148.

[20] Gundur, Levi and Topalli, "Evaluating Criminal Transactional Methods in Cyberspace as Understood in an International Context" (2021) *CrimRxiv* <https://doi.org/10.21428/cb6ab371.5f335e6f> accessed on 8 April 2024.

[21] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 54.

[22] Law Reform Commission, *A Regulatory Framework for Adult* Safeguarding (LRC IP 18–2019).

Circumstances. The CBI has stated that the revised CPC will be reflected in these two regulations.[23]

[14.10] An action taken to tackle financial abuse of an at-risk adult may constitute an interference with the rights of the at-risk adult, even though the motivation behind such action may be well-intentioned and directed towards the protection of the financial interests of the at-risk adult. RFSPs are understandably cautious about the potential for such interference, without the clarity and comfort that a legislative basis to intervene would provide, for example in the form of a statutory obligation or power to intervene in cases of actual or suspected financial abuse of at-risk customers.

(ii) Definition of "financial abuse"

[14.11] There are many definitions of financial abuse.[24] For example, financial abuse has been defined by the HSE as:

> theft, fraud, exploitation, pressure in connection with wills, property, inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits.[25]

[14.12] On 7 March 2024, the CBI published draft Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. In its Consultation Paper on the CPC, which was also published on 7 March 2024, the CBI stated that the revised CPC will be reflected in these two regulations.[26] It is notable that in both draft regulations, the CBI defines "financial abuse" as any of the following:

(a) the wrongful or unauthorised taking, withholding, appropriation, or use of a customer's money, assets or property;

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[23] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 19.

[24] Law Reform Commission, *A Regulatory Framework for Adult* Safeguarding (LRC IP 18–2019) at para 4.1.

[25] HSE, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 9.

[26] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 19.

(b) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a customer, to–

(i) obtain control, through deception, intimidation or undue influence, over the customer's money, assets or property; or

(ii) wrongfully interfere with or deny the customer's ownership, use, benefit or possession of the customer's money, assets or property.[27]

(iii) Cuckooing

[14.13] In some situations, financial abuse can take the form of 'cuckooing', which is a term used to describe a situation where a person is pressured into allowing their home to be used by others to conduct criminal activities, for example drug dealing.[28] Victims of cuckooing are usually older people and people with learning difficulties, disabilities or mental health issues.[29] While cuckooing involves

[27] See draft Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-code-review/draft-central-bank-reform-act-2010-section-17a-regulations.pdf?sfvrsn=dc5f631a_1> accessed on 8 April 2024; and draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-code-review/central-bank-supervision-and-enforcement-act-2013-section-48.pdf?sfvrsn=d45f631a_1> accessed on 8 April 2024.

[28] See Coyle, 'Cuckooing': Calls for government to introduce new criminal offence' *BBC News* (1 February 2024); Elgueta, "Cuckooing crimes on rise across London" *BBC News* (18 May 2023); Costu, "Landmark Conviction: Lewis Grady, Key Figure in Drug Trafficking, Receives 3-Year Sentence in Wigan Crackdown" BNN (13 February 2024); O'Keefe, "Council secures return of 19 homes subject to 'hostile takeovers' by gangs" *Irish Examiner* (17 April 2021); Windle and Sweeney, "How out-of-town drug dealers are exploiting vulnerable people in Ireland" *RTÉ* (15 January 2020); Spicer, Moyle and Coomber, "The variable and evolving nature of 'cuckooing' as a form of criminal exploitation in street level drug markets" (2020) 23(4) Trends in Organized Crime 301; University of Leeds, School of Law, Understanding and Preventing Cuckooing Victimisation Symposium (3 May 2023); The Centre for Social Justice, *The case for strengthening the law against slavery in the home* (November 2021); Macdonald, Donovan, Clayton and Husband, "Becoming cuckooed: conceptualising the relationship between disability, home takeovers and criminal exploitation" (2024) 39(2) Disability & Society 485-505; Doherty, "Prejudice, friendship and the abuse of disabled people: an exploration into the concept of exploitative familiarity ('mate crime')" (2020) 35(9) Disability & Society 1457-1482.

[29] College of Policing, Understanding and preventing 'cuckooing' victimisation <https://www.college.police.uk/research/projects/understanding-and-preventing-cuckooing-victimisation> accessed on 8 April 2024; Chakraborti and Garland, *Hate crime: impacts, causes and responses* 2nd ed (Sage London 2015).

criminal activity, it does not necessarily involve the financial abuse of an at-risk adult. For example, individuals may be able to conduct cuckooing by dealing drugs at the dwelling of an at-risk adult but without stealing from, or abusing the finances of, the at-risk adult. Given that cuckooing involves criminal activity but does not necessarily involve financial abuse, cuckooing is further discussed in Chapter 19, which deals with the abuse and neglect of at-risk adults and the criminal law.

(b) Online banking and joint accounts: exacerbating, rather than counteracting, financial abuse

[14.14] In response to the Issues Paper, a consultee highlighted the challenge that the move to online banking presents for those who require additional support. The consultee argued that the closure of local bank branches has been disastrous for at-risk adults because it has deprived them of the ability to communicate face-to-face with bank personnel. Branch closures, and the ease with which financial technology facilitates the instantaneous transfer of funds, has resulted in at-risk adults being exposed to financial abuse in ways that were not previously envisaged or possible.

[14.15] The shift away from face-to-face interactions and traditional levels of personal contact in the banking sector to online and impersonal ways of doing business has created barriers to the monitoring of risk and the detection of financial abuse.[30] As Safeguarding Ireland has noted, there continues to be gaps in the practice of post offices and credit unions in respect of the management and detection of financial abuse, which may be perpetrated by an agent nominated by an at-risk adult to collect monies on their behalf.[31]

(i) Agency accounts

[14.16] A joint account set up for the convenience of the original account holder is known as an agency account. The joint account holder becomes an agent of the original account holder, and there is no intention to transfer any beneficial interest to the joint account holder. Any withdrawal from the account should be for the care and maintenance of the original account holder (the "principal"). If the principal becomes mentally incapacitated, the relationship changes and the

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[30] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190.

[31] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190.

account will be operated by an attorney pursuant to an enduring power of attorney or a decision-making representation order.[32] On the death of the principal, the money in the account passes to the estate of the principal. The money does not pass to the surviving joint account holder. The surviving account holder has no beneficial interest in the account because they were merely an agent of the principal.

[14.17] Financial abuse may occur in the absence of a full and correct understanding of the operation of a joint account which is, in fact, an agency account. For example, an agent may attempt to withdraw funds from the account in circumstances where the funds will not be used for the care and maintenance of the principal, and the financial service provider who is managing the account may erroneously believe that the funds will be used for the care and maintenance of the principal. Moreover, upon the death of the principal, the financial service provider may erroneously believe that the surviving account holder has a beneficial interest in the account and that the money passes to the surviving joint account holder.

[14.18] In 2019, a study was conducted to examine how financial abuse was experienced and responded to by staff in five Irish banks.[33] Findings from the survey demonstrated that more than half of bank staff (66.5%) had previously suspected a customer to be experiencing some form of financial abuse.[34] Findings from interviews with bank staff demonstrated the complexity and wide variation of financial abuse cases experienced by staff, which involved older persons, undue influence, scams and fraud.[35] In a 2016 survey conducted by Age Action and Ulster Bank involving 493 bank staff, 52% stated that they had encountered one suspected case of financial abuse in the past year, and 43% stated that they encountered more than one, but less than five, suspected financial abuse cases in

[32] DSS, Decision-Making Representation Order <https://decisionsupportservice.ie/services/decision-support-arrangements/decision-making-representation-order> accessed on 8 April 2024.

[33] Phelan, O'Donnell and McCarthy, "Safeguarding Older People from Financial Abuse: Experiences of Irish Banks" (2019) Innovation in Aging 3(1) at page 575 <https://academic.oup.com/innovateage/article/3/Supplement_1/S575/5616902> accessed on 8 April 2024.

[34] Phelan, O'Donnell and McCarthy, "Safeguarding Older People from Financial Abuse: Experiences of Irish Banks" (2019) Innovation in Aging 3(1) at page 575.

[35] Phelan, O'Donnell and McCarthy, "Safeguarding Older People from Financial Abuse: Experiences of Irish Banks" (2019) Innovation in Aging 3(1) at page 575.

the past year.[36] In 2019, Bank of Ireland launched a 'vulnerable customer' unit to provide enhanced support to customers. In a 2019 review of 150 cases where the unit provided assistance, Bank of Ireland estimated that 30 cases (20%) related to financial abuse.[37]

(ii) Post offices

[14.19] In 2022, 29.5% of all social welfare payments were made in cash at post offices.[38] If an at-risk adult is unable to personally collect a social welfare payment at their local post office, they can nominate an agent to collect the payment on their behalf.[39] When attending the post office on behalf of an at-risk adult, an agent must produce the at-risk adult's Public Services Card, as issued by the Department of Social Protection, and their own valid photo identification. The agent must sign a certificate in the presence of the paying officer, certifying that the customer is alive, is unable to attend the post office, and that the agent undertakes to give the payment to the customer without a deduction of any kind.[40] Agents are responsible for ensuring that any changes in a customer's circumstances, including deterioration in their capacity to make informed decisions regarding their financial affairs, are reported without delay to the Department of Social Protection. The Department, or An Post, may cancel an agency 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 customer. If an agency arrangement is cancelled, the agent must return the payment, on request.

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[36] Age Action, Raising Awareness about Financial Abuse (2016) at page 10 <https://www.ageaction.ie/sites/default/files/attachments/29253-age_action_ulster_bank_report_lr4.pdf> accessed on 8 April 2024.

[37] Bank of Ireland, Bank of Ireland launches dedicated unit to support vulnerable customers<https://www.bankofireland.com/about-bank-of-ireland/press-releases/2019/bank-of-ireland-launches-dedicated-unit-to-support-vulnerable-customers/> accessed on 8 April 2024.

[38] Dáil Éireann Debates 21 March 2023 vol 1035 no 4 <https://www.oireachtas.ie/en/debates/question/2023-03-21/859/> accessed on 8 April 2024.

[39] An Post, Community Focus, Supporting the Vulnerable in our Communities, Initiatives for the Elderly and Vulnerable <https://www.anpost.com/Community/Supporting-the-vulnerable-in-our-communities> accessed on 8 April 2024.

[40] An Post, Appointment of Temporary Agent Form <https://www.anpost.com/AnPost/media/PDFs/Appointment-of-Temporary-Agent.pdf> accessed on 8 April 2024.

[14.20] The facility to nominate an agent, whilst useful, may be used by an unscrupulous individual, for example an adult child of an at-risk adult, to perpetrate financial abuse against the at-risk adult. To guard against the risk of financial abuse, Safeguarding Ireland has stated that there is a need to ensure that the financial sector maintains an accessible human presence for safeguarding purposes, that effective tech-driven systems are implemented that are capable of signalling suspected financial abuse, and that post office personnel receive safeguarding awareness training.[41]

(iii) Credit unions

[14.21] Credit unions are separate entities with no centralised head office or management structure, which may make it difficult to manage or detect financial abuse of at-risk adults.[42] To combat financial abuse, Safeguarding Ireland believes that credit union personnel should receive safeguarding awareness training.[43]

(iv) Joint accounts

[14.22] Practical measures identified by the Banking & Payments Federation Ireland to assist with financial safeguarding include the establishment of a joint account or

[41] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190; Gallagher, "Post office worker who stole by skimming elderly people's pensions avoids jail" *Irish Independent* (9 December 2016) <https://www.independent.ie/irish-news/courts/post-office-worker-who-stole-by-skimming-elderly-peoples-pensions-avoids-jail/35282139.html> accessed on 8 April 2024; "Post office worker who stole from pensioners avoids jail" *Irish Examiner* (9 December 2016) <https://www.irishexaminer.com/news/arid-30767946.html> accessed on 8 April 2024; "Post office worker jailed over theft and forgery" *RTÉ* (1 October 2015) <https://www.rte.ie/news/2015/1001/731759-mary-kerin-court/> accessed on 8 April 2024.

[42] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190; Gallagher, "Post office worker who stole by skimming elderly people's pensions avoids jail" *Irish Independent* (9 December 2016); "Post office worker who stole from pensioners avoids jail" *Irish Examiner*; "Post office worker jailed over theft and forgery" *RTÉ* (1 October 2015).

[43] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190; Gallagher, "Post office worker who stole by skimming elderly people's pensions avoids jail" *Irish Independent* (9 December 2016); "Post office worker who stole from pensioners avoids jail" *Irish Examiner*; "Post office worker jailed over theft and forgery" *RTÉ* (1 October 2015).

a third-party authority and the execution of a power of attorney.[44] However, each of these measures, although designed to tackle financial abuse, may in fact expose a person to financial abuse. For example, respondents to the CBI's Consumer Protection Code Review Discussion Paper noted that perpetrators of financial abuse are often 'trusted' and are frequently family members.[45] In addition, consultees have informed the Commission that the joining of adult children to the bank accounts and credit union accounts of parents has given rise to substantial financial abuse of parents.

[14.23] Safeguarding Ireland has noted that it is often suggested that those who find it difficult to manage their finances should put their account into the joint names of themselves and another person in order for the latter to assist them with their finances.[46] The Law Society of Ireland notes in its Guidelines for Solicitors on Joint Bank Accounts that older people are often encouraged to add the name of a family member or carer to their bank account for reasons of convenience.[47] However, as discussed in the Issues Paper, there is a lack of awareness of the consequences of opening a joint account and the potential entitlement of the survivor to the funds in the account rather than the distribution of the funds as part of the estate of the deceased.[48] As the Law Society of Ireland note in its Guidelines for Solicitors on Joint Bank Accounts, the relationship between joint account holders may be such as to give rise to a presumption that the original account holder intended to make a gift to the surviving account holder, unless it can be shown that the original account holder intended otherwise.

(c) Autonomy, will and preferences, and the freedom to make unwise decisions

[14.24] Article 12(5) of the United Nations' Convention on the Rights of Persons with Disabilities ("UNCRPD") obliges State Parties to:

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[44] Banking & Payments Federation Ireland, *Guide to Safeguarding your Money Now and in the Future* (2020) <https://bpfi.ie/wp-content/uploads/2020/08/BPFI-Safeguarding-Customers-Guide-FINAL.pdf> accessed on 8 April 2024.

[45] Central Bank of Ireland, *Consumer Protection Code Review Discussion Paper – Engagement Update* (July 2023) at page 28.

[46] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 89.

[47] Law Society of Ireland, *Joint Bank Accounts – Guidelines for Solicitors* (8 December 2008).

[48] Law Reform Commission, *A Regulatory Framework for Adult* Safeguarding (LRC IP 18–2019) at para 4.10.

> take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and … ensure that persons with disabilities are not arbitrarily deprived of their property.

[14.25] The Assisted Decision-Making (Capacity) Act ("2015 Act"), similar to the UNCRPD, emphasises the need to have due regard to the right of a relevant person to autonomy and control over their financial affairs and property, and to respect their decision even if other people think such decision is an unwise decision.[49] The 2015 Act's guiding principles state that a relevant person "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".[50]

[14.26] The CPC is currently under review by the CBI, and there is scope within that process for the adoption of a more robust protective regime to safeguard at-risk adults from actual or suspected financial abuse.[51] In its Consultation Paper on the CPC, the CBI invites consultees to share their views on the proposed introduction of a definition of "financial abuse" to explain the circumstances that the standards for business, contained in the CBI's draft Central Bank Reform Act 2010 (Section 17A) (Standards For Business) Regulations, should apply to, including financial frauds and scams.[52] The CBI is currently seeking views on initiatives that it and other State agencies should consider to collectively protect consumers from financial abuse, including frauds and scams, and whether there are any other circumstances that it should consider within its proposed definition of "financial abuse".[53]

[49] See sections 2(1), 8(4), 8(6)(b) and 8(7)(b) of the Assisted Decision-Making (Capacity) Act 2015.

[50] Section 8(4) of the Assisted Decision-Making (Capacity) Act 2015.

[51] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158).

[52] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 55.

[53] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 57. The CBI's proposed definition of "financial abuse" is contained in section 1(a)(ii) of this Chapter.

[14.27] Financial services legislation was designed to place obligations on RFSPs to act in an appropriate way and to an appropriate standard. Financial services legislation was not specifically designed with the need to safeguard at-risk customers in mind. The commencement of the assisted decision-making regime on 26 April 2023 pursuant to the 2015 Act means that a radical overhaul of the approach of RFSPs to at-risk customers is now required. There is potential for RFSPs to use their business processes and technology to safeguard their customers, with particular regard to those who require additional support. This Chapter explores the protection of at-risk customers from actual or suspected financial abuse against this backdrop and highlights how RFSPs could be better supported to lawfully protect their customers' interests while ensuring that customers' privacy and autonomy over their assets and property is respected.

(d) Challenges identified in the Commission's consultation process

(i) The need for cooperation, including information sharing

[14.28] Consultees who responded to the Issues Paper noted that cooperation, including information sharing, is important to tackle actual or suspected financial abuse of at-risk adults. For example, one consultee observed that if a person reports suspected financial abuse of an at-risk adult who is a "relevant person" for the purposes of the 2015 Act to the Gardaí, and the alleged perpetrator is a decision supporter of the at-risk adult, the Decision Support Service ("DSS") will be unable to carry out its functions, including the removal of the decision supporter, unless the allegation is communicated to the DSS.[54] Although the allegation relates to a decision support arrangement under the 2015 Act, the absence of clear legal bases for information sharing in the adult safeguarding context may make it unclear whether such information can lawfully be shared, which highlights the importance of clear legal bases for, and guidance on, the sharing of information in the adult safeguarding context.[55]

[54] According to the DSS, there are three types of decision supporters for people who currently face challenges when making decisions: (1) decision-making assistant; (2) co-decision maker; and (3) decision-making representative. Furthermore, there are two types of decision supporters for people who wish to plan ahead for a future time when they may be unable to make certain decisions: (1) designated healthcare representative; and (2) attorney. See DSS, Decision Supporters <https://www.decisionsupportservice.ie/services/decision-supporters#:~:text=Decision%20supporters%20are%20individuals%20with,will%20be%20able%20to%20provide> accessed on 8 April 2024.

[55] Information sharing is discussed in Chapter 16.

(ii) Compliance with data protection law

[14.29] In response to the Issues Paper, consultees queried the legal basis or bases for the sharing, recording and retention of information for the purposes of tackling financial abuse in a manner that is compliant with data protection law. Consultees in the financial services industry take steps to tackle financial abuse, for example by monitoring customers' behaviour and engagement with financial products and services to identify customers who may potentially be at-risk customers. For example, in May 2020, Bank of Ireland introduced a carers' debit card to provide a safe and secure way for trusted relatives, friends and carers to manage the day-to-day living expenses of those who are in their care. Usage and spending is monitored by Bank of Ireland's Vulnerable Customer Unit.[56] Accounts that are classified as 'vulnerable' are monitored by staff on a nightly basis to check for unusual withdrawal or payments, for example a withdrawal or payment in relation to a foreign holiday in circumstances where the customer is known to reside in a nursing home.[57]

[14.30] With respect to monitoring, some consultees were concerned that monitoring could result in the profiling of customers. Article 22(1) of the General Data Protection Regulation ("GDPR") provides that a data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly affects them. Recital 71 of the GDPR defines "profiling" as any form of automated processing of a person's personal data that analyses or predicts their performance at work, economic situation, health, preferences, interests, reliability, behaviour, location or movements. Article 22(2)(a)-(c) of the GDPR provides that profiling "may" occur where profiling is: (a) necessary in order to enter or perform a contract between a data subject and a data controller, for example a contract between a customer and a RFSP; (b) authorised by Union or Member State law to which the controller is subject and which lays down suitable measures to safeguard the data

[56] Bank of Ireland, Bank of Ireland introduces carers' card to support vulnerable customers (14 May 2020) <https://www.bankofireland.com/about-bank-of-ireland/press-releases/2020/bank-of-ireland-introduces-carers-card-to-support-vulnerable-customers/> accessed 8 April 2024.

[57] Reddan, "Bank establishes vulnerable customer unit as cases of financial abuse rise" *The Irish Times* (4 July 2019) <https://www.irishtimes.com/business/financial-services/bank-establishes-vulnerable-customer-unit-as-cases-of-financial-abuse-rise-1.3945681> accessed on 8 April 2024.

subject's rights, freedoms and legitimate interests; or (c) based on the data subject's explicit consent.

[14.31] The Commission notes that there is clearer and more comprehensive guidance provided to UK financial institutions on how to comply with data protection law than is the case in Ireland. In Chapter 16, the Commission discusses information sharing and recommends the publication of guidance on information sharing in the adult safeguarding context.

(iii) The absence of legal protection to take action against actual or suspected financial abuse of at-risk customers

[14.32] Consultees highlighted their fear of legal consequences if they were to act on information to safeguard customers' financial interests.

(iv) Disconnect between principles and practice

[14.33] Consultees spoke of a disconnect between the principles to which RFSPs are committed, in terms of the protection of at-risk adults, and what happens in practice. There is a disconnect and lack of uniformity of approach, which is perhaps exacerbated by the lack of secondary legislation (i.e. regulations) or a dedicated statutory code of practice on the prevention of actual or suspected financial abuse of at-risk customers in Ireland.

(v) The need to educate and train legal and financial services professionals

[14.34] Consultees highlighted numerous examples of poor practice on the part of legal and financial services professionals which adversely impacted the financial interests of at-risk adults. The core aim of this law reform project is the development of a statutory and regulatory framework for adult safeguarding in Ireland. While financial abuse is a core adult safeguarding issue—and legal and financial services professionals have a key role to play in combatting financial abuse—specific details relating to existing professional regulatory frameworks are ancillary matters that go beyond the scope of this law reform project. The Commission would, however, strongly encourage legal and financial regulatory bodies to examine how they can better protect at-risk adults from actual or suspected financial abuse, for example through cooperation, policy development and regular adult safeguarding training.

2. Existing measures to combat actual or suspected financial abuse of at-risk adults

[14.35] Many consultees expressed the view that there are insufficient statutory and regulatory powers to combat financial abuse in Ireland. While consultees indicated that there is widespread support for revision of the CPC, there were few concrete suggestions as to where regulatory gaps are located and how these gaps should be filled. In this regard, while a problem may be widespread, that does not necessarily mean that there is inadequate regulation. Non-regulatory barriers to enforcement include the transnational nature of 'phishing', romance scams and malware fraud, victims' reluctance to participate in proceedings involving abuse perpetrated by family members, and challenges for victims in giving evidence and participating in proceedings. For example, a victim may be too physically frail to give evidence, or their memory may be impaired to such an extent that, although they have likely been defrauded, they cannot objectively counter an assertion by a suspect that they freely chose to give their money or property to the suspect. These difficulties cannot be remedied solely by the introduction of additional statutory or regulatory powers. Many of the required remedial steps are matters of policy and cooperation rather than pure matters of law. In Chapter 15, the Commission highlights the need for cooperation to protect at-risk adults.

[14.36] The existing regulatory measures that can be used to combat financial abuse against at-risk adults encompass an extensive multi-agency regime of regulatory and criminal law, with shared responsibility for regulation and enforcement in relation to financial matters that affect the general public and at-risk adults. The Safeguarding Body[58] could, in a specific adult safeguarding context, coordinate responses to financial abuse across agencies—such as the Department of Social Protection, the Health Information and Quality Authority ("HIQA"), the CBI, the Competition and Consumer Protection Commission and relevant government departments—either through a forum, mutual cooperation agreements or memoranda of understanding. Each agency has existing regulatory and enforcement powers, but there are knowledge gaps concerning how these powers are specifically used, or interact with the powers of other agencies, to tackle actual or suspected financial abuse of at-risk adults. Equally, the frequency of use of such powers to tackle actual or suspected financial abuse of at-risk adults is unknown. There is also a lack of insight into the barriers that prevent the use of such powers. The Commission's research suggests that cooperation is not

[58] See Chapter 5, which discusses the functions, duties and powers of the Safeguarding Body.

as effective as it could be in Ireland, and that concerns about potential adverse consequences from sharing information, in particular the penalties that can arise for breach of the GDPR, are inhibitors to cooperation, in particular information sharing.[59]

[14.37] Before the Commission sets out its proposals for reform, it is worth briefly touching upon some key existing sources of protection from financial abuse, in order to identify any gaps in protection.

(a) Criminal legislation

[14.38] In Ireland, theft and fraud are extensively criminalised. The Criminal Justice (Theft and Fraud Offences) Act 2001 sets out the law relating to theft and fraud generally. The offences of theft,[60] deception[61] and coercion[62] apply to the financial abuse of at-risk adults just as they do to everyone else. Section 19 of the Criminal Justice Act 2011 criminalises failure, without reasonable excuse, to share information with the Garda Síochána which a person knows or believes might be of material assistance in preventing the commission of, among others, most of the offences in the Criminal Justice (Theft and Fraud Offences) Act 2001.

[14.39] Section 15A of the 2015 Act[63] introduced a new offence in circumstances where a person uses fraud, coercion or undue influence to force another person to make, vary or revoke a decision-making assistance agreement. Section 34 of the 2015 Act provides that a person who uses fraud, coercion or undue influence to force another person to make, vary or revoke a co-decision-making agreement commits an offence.[64] Section 80 of the 2015 Act provides for offences in relation to enduring powers of attorney.

[14.40] In response to the Issues Paper, consultees suggested that adult safeguarding legislation should provide that any person who uses fraud, coercion or undue influence to force another person to transfer property or assets commits an

[59] Information sharing is discussed in Chapter 16.

[60] Section 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

[61] Section 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

[62] Section 9 of the Non-Fatal Offences against the Person Act 1997.

[63] As inserted by section 14 of the Assisted Decision-Making (Capacity) (Amendment) Act 2022.

[64] Similarly, section 80 of the Assisted Decision-Making (Capacity) Act 2015 provides for the same offence in relation to enduring powers of attorney, and section 90 of the Assisted Decision-Making (Capacity) Act 2015 provides for the offence in relation to advance healthcare directives.

offence. Dishonest appropriation, appropriation by deception and compelling someone to do something they do not want to do are already criminalised in Ireland. Irish law states that consent obtained by deception or intimidation is not true consent for the purpose of establishing theft.[65]

[14.41] Having carefully considered consultees' submissions, the Commission considers that Irish law does not require the enactment of a new offence of using fraud, coercion or undue influence in relation to the transfer of property, because such is already provided for in the Criminal Justice (Theft and Fraud Offences) Act 2001 and section 9 of the Non-Fatal Offences against the Person Act 1997. However, the Commission recommends the enactment of a new offence of coercive exploitation, which is discussed in Chapter 19. The aim of this recommendation is to combat financial abuse which is not necessarily motivated by dishonesty or preceded by intimidation, which are requirements to establish offences under the Criminal Justice (Theft and Fraud Offences) Act 2001.

(b) The Central Bank of Ireland, the Financial Services and Pensions Ombudsman, and the Competition and Consumer Protection Commission

[14.42] On 25 June 2021, the Director of Consumer Protection of the CBI wrote[66] to the chief executive officers ("CEOs") of Ireland's main retail banks to set out specific consumer protection expectations.[67] The CBI stated that it is committed to ensuring that customers are protected and treated fairly throughout the fundamental changes and consolidation activities that are proposed across the Irish retail banking sector over the coming months and years.[68] The CBI noted that by clearly outlining its expectations, this will inform regulated entities' actions and decisions to ensure that customers' interests are protected and

[65] Section 4(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001.

[66] Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021) <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-expectations-in-a-changing-retail-banking-landscape-2021.pdf?sfvrsn=4> accessed on 8 April 2024.

[67] Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021).

[68] Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021).

potential risks are mitigated.[69] Of particular note was the CBI's expectations on the issue of customers in vulnerable circumstances. The CBI informed the CEOs of Ireland's main retail banks that all customers are potentially vulnerable to the risk of making uninformed decisions or decisions that are not in their best interests, particularly during times of uncertainty and change, and recognised that "vulnerability" can be transient, temporary or permanent.[70]

[14.43] The CBI expects Ireland's retail banks to consider the impact of their decisions on customers in vulnerable circumstances, provide the necessary assistance to reasonably mitigate those impacts and retain access to basic financial services, and to have specific and effective processes and communications plans in place to support customers in vulnerable circumstances.[71] At the CBI's Financial System Conference 2022, one of the key themes was consumer protection, in particular the effect of the rapid evolution of financial products and services on customers in vulnerable circumstances who may not be able to access, or who may struggle with, technology.[72]

[14.44] The Financial Services and Pensions Ombudsman ("Ombudsman") plays a role in tackling the actual or suspected financial abuse of at-risk adults. Under section 44(1)(a)(i)-(iii) of the Financial Services and Pensions Ombudsman Act 2017 ("2017 Act"), a complainant may make a complaint to the Ombudsman in relation to the conduct of a RFSP involving the provision of a financial service, an offer to provide a service, or a failure to provide a particular service requested by the complainant.

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69 Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021).

70 Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021).

71 Letter from the Director of Consumer Protection of the CBI to the CEOs of Ireland's retail banks regarding the CBI's consumer protection expectations in a changing retail banking landscape (25 June 2021).

72 Central Bank of Ireland, *Financial System Conference 2022, Summary of Conference Themes* <https://www.centralbank.ie/docs/default-source/tns/events/summary-of-financial-system-conference.pdf?sfvrsn=464c981d_1> accessed on 8 April 2024; Central Bank of Ireland, *Financial System Conference 2022* <https://www.centralbank.ie/events/financial-system-conference-2022?utm_source=CBI-Plaza&utm_medium=website&utm_campaign=financial-system-conference> accessed on 8 April 2024.

[14.45] The functions of the Competition and Consumer Protection Commission ("CCPC") include the promotion and protection of the interests and welfare of consumers. The CCPC has an investigative role in relation to statutory breaches and an advisory role in relation to consumer protection and welfare. Consultees submitted that the CBI and the CCPC should have more robust powers to address financial abuse but did not make any specific proposals regarding the detail or nature of such powers.

(i) The Consumer Protection Code

[14.46] The CPC is a set of rules and principles that all regulated financial services firms must follow when providing financial products and services to customers. The CPC was introduced by the CBI in August 2006 and has been revised on a number of occasions.[73] The CPC was issued pursuant to section 117 of the 1989 Act.[74] In the recent High Court decision of *Ulster Bank Ireland DAC v Financial Services & Pensions Ombudsman*, Bolger J noted that "the Central Bank [CPC] is law".[75]

[14.47] The provisions of the CPC are binding on "regulated entities" and must be complied with when providing financial services.[76] A "regulated entity" is defined in the CPC as a financial services provider authorised, registered or licensed by the CBI or a European Union or European Economic Area Member State that provides "regulated activities" in the State on a branch or cross-border basis.[77] Banks licensed pursuant to section 9 of the Central Bank Act 1971 ("1971 Act") are "regulated entities" and subject to the CPC.[78] As of 20 March 2024, 17 banks

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[73] See Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023) <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/unofficial-consolidation-of-the-consumer-protection-code.pdf?sfvrsn=edd0811d_9> accessed on 8 April 2024.

[74] Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023) at page 6.

[75] *Ulster Bank Ireland DAC v Financial Services & Pensions Ombudsman* [2023] IEHC 350 at para 27.

[76] Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023) at page 6.

[77] Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023) at page 7.

[78] For example Bank of Ireland's Terms of Business confirm that the terms are provided in accordance with the CPC, the bank is a licensed bank pursuant to section 9 of the Central Bank Act 1971, the bank is regulated by the CBI, and the bank is subject to the CPC.

are licensed pursuant to section 9 of the 1971 Act and authorised to carry on banking business in the State.[79] A "regulated activity" is a product or service provided in the State by a regulated entity which is subject to regulation by the CBI. The "regulated activity" of banks licensed pursuant to section 9 of the 1971 Act is banking, taking deposits, making loans and providing financial services and products.[80]

[14.48] Section 3.1 of the CPC 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 [them] in [their] dealings with the regulated entity". The CPC's duty in relation to "vulnerable consumers" was added to the CPC following a review in 2012 that was aimed at ensuring that "vulnerable" people can access mainstream financial services. A "vulnerable consumer" is defined in Chapter 12 (Definitions) of the CPC as a natural person who has:

(a) the capacity to make their own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); or

(b) limited capacity to make their own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties).

[14.49] The CBI's Consumer Protection Code 2012 Guidance advises that the identification of a consumer's "vulnerability" or otherwise will require the exercise of judgement and common sense, and should be based on a consumer's ability to make a particular decision at a point in time.[81] The 2012 Guidance also notes another category of consumers who should have their circumstances taken into account, namely consumers who are "capable of making decisions but their particular life stage or circumstances should be taken into account when

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[79] Central Bank of Ireland, Register of Credit Institutions (20 March 2024).

[80] For example Bank of Ireland's Terms of Business confirms that the bank's principal business is banking and the provision of financial services generally. The bank takes deposits, makes loans and provides a range of other financial services and products. The Terms of Business confirm that "these activities are regulated by the [CBI]."

[81] Central Bank of Ireland, *Consumer Protection Code 2012 Guidance* (May 2021) <https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/brokers-retail-intermediaries/guidance/updated-2012-code-guidance-document.pdf?sfvrsn=8> accessed on 8 April 2024.

assessing suitability", for example, their age, poor credit history, low income, serious illness, or the fact that they have experienced a bereavement.[82]

[14.50] Submissions received by the Commission in response to the Issues Paper stated that the CPC should have a stronger focus on financial safeguarding matters in relation to at-risk adults, including ways of preventing and addressing actual or suspected financial abuse. The CPC neither includes a duty of care towards adults who are at risk of financial abuse nor does it impose an obligation on RFSPs to proactively monitor accounts of at-risk adults for suspicious activity and respond to concerns regarding a customer's ability to make decisions.

[14.51] Consultees repeatedly noted the limitation of the CPC in its application to regulated entities only. The reference to "vulnerable" consumers has also drawn criticism on the basis that it is neither sufficient in providing guidance for consumers and RFSPs nor does it use language that accords with the 2015 Act or the UNCRPD. As outlined in Chapter 2, the Commission recommends the abandonment of the language of "vulnerability" in the Irish adult safeguarding context.

[14.52] There was widespread support among consultees for revision of the CPC. The revision process is currently underway by the CBI.[83] Among the most important changes proposed are the need to revise the CPC pursuant to regulations made under the Central Bank Acts 1942 to 2018 ("Central Bank Acts"), the need to depart from the language of "vulnerability", the need to comply with the requirements of the UNCRPD, and the need to align with, and reflect, the changes introduced by the 2015 Act and its functional capacity test for assessing decision making ability. Consultees referred to the need for clear guidance from the CBI to ensure a consistent approach by RFSPs.

[14.53] The General Principles in the CPC include ensuring that a regulated entity acts "in the best interests of its customers".[84] Acting in the best interests of customers appears to be a similar concept to giving effect, insofar as practicable, to the past and present will and preferences of a relevant person under the 2015 Act. The 2015 Act provides that any actions, orders or directions taken or made under the

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[82] Central Bank of Ireland, *Consumer Protection Code 2012 Guidance* (May 2021).

[83] Department of Children, Equality, Disability, Integration and Youth, *Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities* (2021) at para 161.

[84] Central Bank of Ireland, Consumer Protection Code 2012 at page 7 <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/4-gns-4-2-7-cp-code-2012.pdf?sfvrsn=6> accessed on 8 April 2024.

2015 Act should give effect, insofar as is practicable, to the past and present will and preferences of the relevant person, insofar as that will and those preferences are reasonably ascertainable.[85] The 2015 Act also addresses 'unwise decisions' and provides that a relevant person shall not be considered as unable to make a decision in respect of a matter, for example a financial matter, simply because they are making, have made or are likely to make an unwise decision.[86] This is one of the most challenging aspects of financial abuse in cases where a person has a certain degree of capacity, which includes the freedom to make unwise financial decisions. However, where a person lacks capacity and that has been determined in accordance with the procedures in the 2015 Act, there does not appear to be a barrier to RFSPs adopting a more rigorous approach to consumer protection.

[14.54] The Commission notes the relative strength of the resources available to banks in the UK, including the guidance for firms on the fair treatment of vulnerable customers published by the Financial Conduct Authority ("FCA") and the Financial Abuse Code published by UK Finance.[87] While the CPC provides RFSPs with a guide to minimum regulatory requirements, the UK resources are a better guide to ensuring best practice.

[14.55] The Commission also notes the utility of the Group of 20 ("G20")/Organisation for Economic Co-operation and Development ("OECD") High-Level Principles on Financial Consumer Protection, which are regarded as the leading international standard for effective and comprehensive financial consumer protection frameworks.[88] In its Consultation Paper on the CPC, the CBI states that it proposes to introduce a new definition of "consumer in vulnerable circumstances" in the revised CPC, by way of insertion in the CBI's draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business)

[85] Section 8(7)(b) of the Assisted Decision-Making (Capacity) Act 2015.

[86] Section 8(4) of the Assisted Decision-Making (Capacity) Act 2015.

[87] FCA, *Guidance for firms on the fair treatment of vulnerable customers* (FG21/1) (February 2021) <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf> accessed on 8 April 2024; UK Finance, *2021 Financial Abuse Code* (December 2021) <https://www.ukfinance.org.uk/system/files/2022-12/Financial-Abuse-Code-2021_Updated_2022.pdf> accessed on 8 April 2024.

[88] G20/OECD High-Level Principles on Financial Consumer Protection (2022) < https://web-archive.oecd.org/2022-12-12/648348-G20_OECD%20FCP%20Principles.pdf> accessed on 8 April 2024.

Regulations.[89] The CBI notes that Principle 6 of the High-Level Principles on Financial Consumer Protection introduced a broader understanding of "vulnerability".[90] Principle 6 states that special attention should be paid to the treatment of consumers who may be experiencing "vulnerability" or financial hardship, and that approaches may take into account that consumer "vulnerability" can take different forms and be applicable in different circumstances, and may be due to a combination of personal and economic characteristics and situations, behavioural biases and market conditions. The Commission welcomes this proposal by the CBI.

(ii) Sanctions for breach of the Consumer Protection Code

[14.56] In the adult safeguarding context, particular provisions of the CPC that may be contravened by a regulated entity providing a regulated activity in the State are section 3.1 of Chapter 3 (General Requirements) and sections 5.1-5.25 of Chapter 5 (Knowing the Consumer and Suitability). Section 3.1 of Chapter 3 that where a regulated entity has identified a personal consumer as a "vulnerable consumer", the regulated entity must ensure that the vulnerable consumer is provided with such reasonable arrangements or assistance that may be necessary to facilitate them in their dealings with the regulated entity.[91] With regard to sections 5.1-5.25 of Chapter 5, the CBI has advised that it considers the identification of a "vulnerability" to be an inherent part of the 'knowing the consumer' process.[92]

[14.57] The CBI may administer sanctions for breach of the CPC under the administrative sanctions procedure in Part IIIC of the Central Bank Act 1942 ("1942 Act") which deals with the enforcement of "designated enactments".[93] For the purposes of Part IIIC, a "prescribed contravention" means, amongst other things, a contravention of "a code made … under [a provision of a designated enactment]".

[89] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 60.

[90] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at footnote 38.

[91] A "vulnerable consumer" is defined in Chapter 12 of the CPC as a natural person who: (a) has the capacity to make their 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 their own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties).

[92] Central Bank of Ireland, *Guidance on the Consumer Protection Code* (May 2021) at page 15.

[93] Central Bank of Ireland, Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023) at page 6.

Where a concern arises that a prescribed contravention has been or is being committed, the CBI may investigate. Following an investigation, the CBI may hold an inquiry where it suspects, on reasonable grounds, that a prescribed contravention is being, or has been, committed.[94] The inquiry shall decide if the prescribed contravention has occurred and determine the appropriate sanction(s). The administrative sanction procedure under Part IIIC of the 1942 Act provides that at any time before the conclusion of an inquiry, the matter may be resolved by the CBI and the regulated entity entering into a settlement agreement.[95] The CBI may, following an inquiry or under a settlement agreement, impose one or more of the following sanctions:

(a) a caution or reprimand;
(b) a direction to a regulated entity to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service;
(c) a direction to a body corporate or an unincorporated body to pay a monetary penalty the greater of €10 million or 10% of the turnover of the body for its last complete financial year;
(d) a direction to a natural person to pay a monetary penalty not exceeding €1 million;
(e) the suspension of a regulated entity’s authorisation in respect of any one or more of its regulated activities for such period not exceeding 12 months;
(f) the submission of a proposal to the European Central Bank (”ECB”) to suspend a regulated entity’s authorisation in respect of any one or more of its regulated activities for such period not exceeding 12 months;
(g) the submission of a proposal to the ECB to withdraw a regulated entity’s authorisation;
(h) a direction disqualifying a natural person for such period as the CBI considers appropriate from performing a controlled function in relation to a regulated entity;
(i) a direction imposing such conditions as the CBI considers appropriate on the performance by a natural person of a controlled function in relation to a regulated entity; and

[94] The CBI may hold an inquiry under section 33AO of the Central Bank Act 1942 or, if the prescribed contravention is admitted but the sanction cannot be agreed, under section 33AR of the Central Bank Act 1942.

[95] Section 33AV(1) of the Central Bank Act 1942.

(j) a direction ordering a regulated entity to cease committing a prescribed contravention.96

(iii) Sanctioning factors in the adult safeguarding context

[14.58] All the circumstances of a case will be taken into account by the CBI to determine the appropriate sanction(s) and regard may be had to the nature, seriousness and impact of the prescribed contravention, the conduct of the regulated entity after the prescribed contravention, and the previous record of the regulated entity. Regarding the seriousness and impact of a prescribed contravention, the CBI advises that the effect, if any, of a prescribed contravention on "vulnerable consumers" is a relevant sanctioning factor.[97] In considering whether a sanction should be imposed, the CBI considers the effect of a prescribed contravention, including whether any loss or detriment has affected, or may affect, "vulnerable persons".[98]

[14.59] The term "vulnerable person" is not defined in the 1942 Act. However, the CBI's Administrative Sanctions Procedure Guidelines advise that "vulnerable person" means "those who have the capacity to make their own decisions but, because of their individual circumstances, may require assistance to do so; or those who have limited capacity to make their own decisions and require assistance to do so".[99] The Administrative Sanctions Procedure Guidelines state that a prescribed contravention "will ordinarily be viewed more seriously" by the CBI when it affects:

> vulnerable consumers, customers or investors, such as: those who have the capacity to make their own decisions but, because of their individual circumstances, may require assistance to do so; or those who have limited capacity to make their own decisions and require assistance to do so.[100]

[96] Sections 33AQ and 33AV(2) of the Central Bank Act 1942.

[97] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedure* (2018) at page 36.

[98] Section 33ARA(1)(b)(iii) of the Central Bank Act 1942.

[99] Central Bank of Ireland, *Administrative Sanctions Procedure Guidelines* (December 2023) at page 97 <https://www.centralbank.ie/docs/default-source/publications/consultation-papers/cp154/administrative-sanctions-procedure-guidelines-december-2023.pdf> accessed on 8 April 2024.

[100] Central Bank of Ireland, *Administrative Sanctions Procedure Guidelines* (December 2023) at page 97.

(iv) Prosecution of offences

[14.60] Proceedings for an offence under the 1942 Act or a designated enactment may be brought and prosecuted summarily by the CBI.[101] If the CBI imposes a monetary penalty on a body corporate, unincorporated body or a natural person in accordance with section 33AQ or 33AR of the 1942 Act and the prescribed contravention in respect of which the sanction is imposed is an offence under the law of the State, the person is not liable to be prosecuted for the offence under that law.[102] The CBI may not impose a monetary penalty on a body corporate, unincorporated body or natural person if they have been charged with having committed an offence under the law of the State, have been found guilty or not guilty, and the offence involved a "prescribed contravention".[103]

(v) Civil action

[14.61] Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 ("2013 Act") provides for an action for damages against a RFSP by any customer who suffers loss or damage as a result of a failure by a RFSP to comply with any obligation under financial services legislation.[104] "Financial services legislation" is defined in section 3(1) of the 2013 Act as the "designated enactments" listed in Schedule 2, Part 1 of the 1942 Act, the "designated statutory instruments" listed in Schedule 2, Part 2 of the 1942 Act, the Central Bank Acts, and statutory instruments made under the Central Bank Acts.

[14.62] The CPC was introduced pursuant to section 117(1) of the 1989 Act. The 1989 Act is a "designated enactment". Section 117 is a provision of a "designated enactment". However, the CPC is not a "designated enactment" in Schedule 2, Part 1 of the 1942 Act, is not a "designated statutory instrument" in Schedule 2, Part 2 of the 1942 Act, is not part of the Central Bank Acts, and is not a statutory instrument made under the Central Bank Acts.

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[101] Section 61DA of the Central Bank Act 1942.

[102] Section 33AT(1) of the Central Bank Act 1942.

[103] Section 33AT(2)(a)-(b) of the Central Bank Act 1942.

[104] Section 44 of the 2013 Act commenced on 1 August 2013 pursuant to Article 2 of the Central Bank (Supervision and Enforcement) Act 2013 (Commencement) Order 2013 (SI No 287 of 2013).

[14.63] In its recent Consultation Paper on the CPC, the CBI stated that the CPC will be revised by regulations to be issued by the CBI under the Central Bank Acts.[105] The Commission understands that the replacement of the CPC with such regulations will mean that the provisions of section 44 of the 2013 Act will apply to contraventions of such regulations because "financial services legislation" in section 44 of the 2013 Act is defined in section 3(1) of the 2013 Act to include regulations issued by the CBI pursuant to powers under the Central Bank Acts. The upshot of this is that any issues regarding the status and effect of the CPC, or the consequences for breach of the CPC, should be resolved once such regulations are enacted in the future.

(vi) Financial Services and Pensions Ombudsman

[14.64] The powers of the Ombudsman are an aid to combatting financial abuse because a remedy may be afforded where a RFSP has failed to appropriately protect a consumer. As Clarke J noted in *Irish Life and Permanent v Dunne:*

> it is worth noting that the jurisdiction conferred on the Financial Services [and Pensions] Ombudsman to consider a much wider range of factors in assessing the conduct of regulated financial institutions is now well established. The remit, in that regard, of the Financial Services [and Pensions] Ombudsman is much wider than the remit of the courts which … currently does not extend beyond determining whether a legal right to possession has arisen.[106]

[14.65] The Ombudsman can require a bank to do things that a court could not require; even in a case where there would not be a legal remedy, the Ombudsman can require a bank to take remedial action if it considers that the bank has not acted properly. The Ombudsman is not confined to determine cases in which a legally enforceable right exists. This is an important part of the protective ecosystem in the area of financial abuse.

(vii) Complaint to the Financial Services and Pensions Ombudsman

[14.66] Under section 44(1)(a)(i)-(iii) of the 2017 Act, a complainant may make a complaint to the Ombudsman in relation to the conduct of a RFSP involving the

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[105] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 60.

[106] *Irish Life and Permanent PLC v Dunne* [2015] IESC 46 at para 5.23, [2016] 1 IR 92 at para 68.

provision of a financial service, an offer to provide a service, or a failure to provide a particular service requested by the complainant.

(viii) Breach of the Consumer Protection Code may ground a complaint to the Financial Services and Pensions Ombudsman

[14.67] A complainant may make a complaint to the Ombudsman in relation to the conduct of a RFSP involving the provision of a financial service, an offer to provide such a service, or a failure to provide a particular service requested by a complainant.[107] The CPC regulates RFSPs. The conduct of a RFSP involving the provision of a financial service, an offer to provide a service, or a failure to provide a particular service requested by a complainant, may breach the CPC. Accordingly, a breach of the CPC can ground a complaint to the Ombudsman when it involves the provision by a RFSP of a financial service, an offer to provide a service, or a failure to provide a particular service requested by a complainant.

(ix) Jurisdiction of the Central Bank of Ireland and the Financial Services and Pensions Ombudsman

[14.68] Where a complaint concerns an actual or suspected breach of the CPC by a RFSP, there is potential for the jurisdictions of the CBI and the Ombudsman to overlap. If the conduct of a RFSP involving the provision of a financial service, an offer to provide a service, or a failure to provide a service requested by a complainant amounts to a breach of the CPC, there may be legal consequences for the RFSP under both the CBI's administrative sanctions procedure pursuant to Part IIIC of the 1942 Act and the Ombudsman's complaints procedure under Part 6 of the 2017 Act.

[14.69] The 2017 Act clarifies which body must cede jurisdiction to the other body, which may occur when there is a breach of the CPC. Where the CBI receives a complaint that appears to be within the jurisdiction of the Ombudsman, the CBI shall, without delay, refer the complaint to the Ombudsman for investigation.[108] Similarly, the Ombudsman shall not investigate or make a decision on a complaint where the complaint relates to a matter that is within the jurisdiction of "an alternative suitable forum or tribunal."[109] Where a complaint to the Ombudsman relates to an actual or suspected breach of the CPC by a RFSP, such

[107] Section 44(1)(a)(i)-(iii) of the Financial Services and Pensions Ombudsman Act 2017.

[108] Section 44(11) of the Financial Services and Pensions Ombudsman Act 2017.

[109] Section 50(3)(c) of the Financial Services and Pensions Ombudsman Act 2017.

complaint would relate to a matter that is within the "alternative suitable forum" of the jurisdiction of the CBI under the administrative sanctions procedure pursuant to Part IIIC of the 1942 Act because such would amount to a "prescribed contravention" under the 1942 Act. In such a situation, the Ombudsman must cede jurisdiction to the CBI and must not investigate or make a decision under the 2017 Act.

[14.70] The 2017 Act requires the Ombudsman to inform the CBI of any matter that would be of concern to the CBI where the Ombudsman considers, during an investigation or following the completion of an investigation, that there is a matter that would be of concern to the CBI, for example an actual or suspected breach of the CPC.[110]

(x) Review of the Consumer Protection Code

[14.71] On 7 March 2024, the CBI published its Consultation Paper on the CPC.[111] The CBI noted that while the CPC has served consumers well, a review is timely.[112] The CBI's Consumer Protection Code Review Discussion Paper facilitated a wide-ranging public conversation on consumer protection issues. There was extensive stakeholder engagement with the CBI's Consumer Protection Code Review Discussion Paper, which was reflected in the CBI's Consultation Paper on the CPC. The CBI is currently seeking to modernise the CPC though reframing, clarifying and enhancing consumer protections across a range of issues, including fraud, scams and "vulnerability".

[14.72] Specifically, the CBI intends to integrate the regulatory format and structure of the CPC by:

(a) consolidating a range of existing CBI rules and codes into the revised CPC, to address fragmentation and enhance the coherence of the framework;[113] and
(b) converting the revised CPC into the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central

[110] Section 56(7)(c) of the Financial Services and Pensions Ombudsman Act 2017.

[111] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158).

[112] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 4.

[113] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 5.

Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. Drafts of these regulations were published by the CBI on 7 March 2024.[114]

[14.73] The CBI seeks to engage with stakeholders on its proposals. The consultation period opened on 7 March 2024 and will close on 7 June 2024.

(xi) Movement towards a broader concept of "vulnerability"

[14.74] In its Consultation Paper on the CPC, the CBI notes that consumers in vulnerable circumstances are more likely to suffer detriment or harm, and make poor decisions, especially when RFSPs are not acting with an appropriate level of care.[115] The CBI believes that is it vital that RFSPs consider the needs of such consumers. Feedback on the CBI's Consumer Protection Code Review Discussion Paper indicated an overwhelming acceptance of the view that "vulnerability" is not merely an inherent characteristic of an adult but rather should be viewed as a spectrum of risk. Feedback recognised that adults may move in and out of states of "vulnerability", and may be vulnerable in respect of some categories of financial transactions but not others. The CBI's consumer research found that there was broad support for initiatives to protect consumers in vulnerable circumstances, including the formulation of a clear definition of "vulnerability" and the provision of further training to staff.[116]

[14.75] The proposals outlined in the CBI's Consumer Protection Code Review Discussion Paper represent a move by the CBI towards improving the culture and preparedness of RFSPs to deal with a broader concept of "vulnerability" in Ireland.[117] The CBI noted that "vulnerability" is not always a static, innate or permanent characteristic of an adult.[118] Any circumstance, whether an innate characteristic, temporary condition or life event, that makes an adult more prone to suffer poor outcomes if RFSPs do not act with the appropriate degree of care

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[114] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 5.

[115] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 58.

[116] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 58.

[117] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 58.

[118] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 59.

makes that adult vulnerable to poor outcomes.[119] The CBI noted that these conditions can arise through health, life events, lack of capability or financial hardship.[120] The Commission welcomes this move by the CBI towards recognition of a broader concept of "vulnerability" in Ireland.

[14.76] On 7 March 2024, the CBI published draft Guidance on Protecting Consumers in Vulnerable Circumstances.[121] The Commission welcomes the publication of this draft guidance, in particular the statement at section 1.2.2 therein that the definition of "consumer in vulnerable circumstances" reflects the G20/OECD's approach to "vulnerability" under the High-Level Principles on Financial Consumer Protection.

(xii) Trusted contact person

[14.77] In its Consumer Protection Code Review Discussion Paper published in October 2022, the CBI presented the concept of a "trusted contact person" as a means of combatting financial abuse. The CBI noted that:

> in other jurisdictions a facility allowing consumers to provide the name and contact information for a trusted contact person; someone who a firm may contact where they may have difficulty in dealing with a customer, or where financial exploitation or fraud is suspected. While the main beneficiaries of a trusted contact person might be [older persons], consideration could be given to extending the concept to all customers who might need or want the assistance of another person they trust, in their dealings with firms.[122]

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[119] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 59.

[120] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 59.

[121] Central Bank of Ireland, *Guidance on Protecting Consumers in Vulnerable Circumstances* (7 March 2024) <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-code-review/guidance-on-protecting-consumers-in-vulnerable-circumstances.pdf?sfvrsn=d55f631a_1> accessed on 8 April 2024.

[122] Central Bank of Ireland, *Consumer Protection Code Review Discussion Paper* (October 2022) at page 57 <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-code-review/consumer-protection-code-review-discussion-paper.pdf> accessed on 8 April 2024.

[14.78] In its July 2023 engagement update on its review of the CPC, the CBI noted that while there had been some positive feedback regarding the facility to appoint a trusted contact person, some respondents were cautious of this facility. Some respondents noted that the perpetrators of financial abuse are often 'trusted' and are frequently family members.[123] In its recently published Consultation Paper on the CPC, the CBI states that it proposes to introduce a requirement for firms to facilitate customers, who wish to do so, to provide the name and contact information of a trusted contact person who a firm may communicate with when there may be difficulty in dealing with a customer or where financial abuse is suspected.[124] The CBI notes that this initiative has been successfully introduced in the United States and Canada, and believes that it can be effectively introduced in the Irish regulatory framework.[125] The introduction or non-introduction of the concept of a trusted contact person in Ireland remains an issue to be determined by the CBI as part of its ongoing review of the CPC.

(c) Wardship

[14.79] Where a person was determined by the High Court to lack capacity to manage their own affairs and taken into wardship under the Lunacy Regulation (Ireland) Act 1871, a committee of the estate of the ward ("Committee") was appointed by order of the court. The Committee was one or more persons to whom the financial affairs of a ward had been committed. The proceeds of accounts held in financial institutions in the name of a ward were generally lodged in the court. The Committee could only take actions that were authorised by the court. Traditionally, the persons appointed by the court to act as the Committee were family members of the ward. However, where there were no suitable relative who was prepared to act or where there was disagreement among a ward's relatives about how a ward's affairs should be managed, the court appointed the General Solicitor for Minors and Wards of Court to act as the Committee. The Committee was accountable to the Office of Wards of Court for all monies received and payments made on a ward's behalf. The Committee had to account to the court annually for monies received and disbursed. The court could decide to replace the Committee in certain circumstances where it deemed the Committee to be no

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123 Central Bank of Ireland, *Consumer Protection Code Review Discussion Paper – Engagement Update* (July 2023) at page 28.

124 Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 62.

125 Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 62.

longer suitable to act in the ward's best interests. While there were disadvantages to the system of wardship, the fact that the Committee could only act upon the authorisation of the court meant that the courts protected wards from financial abuse. It also meant that the Office of General Solicitor for Minors and Wards of Court was empowered to investigate allegations or suspicions of financial abuse of a ward. The Office built substantial expertise in undertaking such cases and invested significant resources in completing investigations.

[14.80] Most of the provisions of the 2015 Act were commenced on or before 26 April 2023 and the 2015 Act was amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022. The 2015 Act, as amended, has replaced wardship with a new, progressive, rights-based system of supported decision-making. From 26 April 2023, wardship has been abolished and the more than 2,000 wards of court which existed in the State on this date will have a review of their circumstances undertaken by the Wardship Court. Wards of court will exit wardship on a phased basis across a three-year period.[126]

(d) Assisted Decision-Making (Capacity) Act 2015

[14.81] Where a person requires support to make financial decisions, decision-making support arrangements may be put in place under the 2015 Act, including the appointment of a decision-making assistant, co-decision-maker, decision-making representative or attorney. Persons appointed under the 2015 Act to assist a relevant person with making decisions must provide reports to the Director of the DSS and notify the DSS and other relevant authorities, including the Garda Síochána, if the person knows or suspects that a relevant person has been financially abused.

[14.82] The Director of the DSS has regulatory oversight functions in respect of decision-making support arrangements under the 2015 Act. If a third party knows or suspects that a person appointed to provide supports under the 2015 Act is, or has been, financially abusing a relevant person, the third party can bring this to

[126] Department of Children, Equality, Disability, Integration and Youth, *Minister O'Gorman and Minister Rabbitte announce the abolition of wardship and the operationalisation of the Assisted Decision-Making Acts and Decision Support Service* (26 April 2023) <https://www.gov.ie/en/press-release/3544a-minister-ogorman-and-minister-rabbitte-announce-the-abolition-of-wardship-and-the-operationalisation-of-the-assisted-decision-making-acts-and-decision-support-service/> accessed on 8 April 2024; 'Date set for final scrapping of wardship system' Law Society Gazette (24 February 2023) <https://www.lawsociety.ie/gazette/top-stories/2023/february/date-set-for-final-scrapping-of-wardship-system> accessed on 8 April 2024.

the attention of the DSS. The Director of the DSS can investigate the allegation using the investigative powers provided to the Director under section 96 of the 2015 Act. Section 15 of the 2015 Act imposes a duty on the Director to investigate a complaint regarding a decision-making assistant. Sections 30, 47, 76 and 88 of the 2015 Act provide for a similar duty in respect of complaints against co-decision makers, decision-making representatives, attorneys and designated healthcare representatives respectively. However, duties only apply in respect of complaints about persons appointed under the 2015 Act. In this regard, it is important to note that complaints of actual or suspected financial abuse may involve perpetrators who are not persons appointed under the 2015 Act.

[14.83] If the Director decides not to investigate, they must set out written reasons for their decision not to investigate. The Director's decision can be appealed to the Circuit Court within 3 months of receipt of the decision.[127] Additionally, there are offences under the 2015 Act when someone uses fraud, coercion or undue influence to force another person to make, vary or revoke a decision-making assistance agreement or a co-decision-making agreement.[128] Statutory codes of practice have been published under the 2015 Act to provide guidance to various people, including financial service providers, when interacting with relevant persons or those appointed to provide them with decision-making supports under the 2015 Act.[129] These codes, which apply to people subject to arrangements under the 2015 Act, include a Code of Practice for Financial Service Providers.[130]

[14.84] In response to the Issues Paper, one consultee noted the following:

(a) while the formal decision support arrangements under the 2015 Act may help to prevent the sort of financial abuse that occurs in the grey area of informal decision making, such arrangements potentially provide an opportunity for unscrupulous decision supporters to take advantage of an at-risk adult who is a "relevant person" under the 2015 Act; and

[127] Sections 15(7), 30(7), 47(7) and 76(6B) of the Assisted Decision-Making (Capacity) Act 2015.

[128] Sections 15A and 34 of the Assisted Decision-Making (Capacity) Act 2015.

[129] Section 103 of the Assisted Decision-Making (Capacity) Act 2015.

[130] DSS, *Code of Practice for Financial Service Providers* (April 2023) <https://decisionsupportservice.ie/sites/default/files/2023-04/11.%20COP_for_financial_service_providers.pdf> accessed on 8 April 2024.

(b) the investigative powers of the Director of the DSS should not be conflated with a broader safeguarding function. The Director may investigate complaints only in respect of decision support arrangements under the 2015 Act, and such arrangements likely facilitate only a small percentage of cases of financial abuse in Ireland.

(e) Health Act 2007 and HIQA's National Standards

[14.85] Under the Health Act 2007 ("2007 Act"), HIQA has powers to undertake inspections of designated centres, including nursing homes and residential centres for people with disabilities. Inspections seek to ensure that services meet the requirements set out under the 2007 Act, regulations made under the 2007 Act, and HIQA's national standards.[131] During inspections, inspectors can review designated centres' existing procedures for the management of residents' finances and make relevant findings because HIQA's National Standards for Residential Centres for Adults with Disabilities and Residential Care Settings for Older People require that each resident is safeguarded from abuse and neglect.[132] The National Standards for Residential Care Settings for Older People require the management and protection of each resident's personal property and finances.[133] However, HIQA does not have a role in investigating reports or allegations of financial abuse of individual residents.

(f) Social welfare legislation

[14.86] Social welfare inspectors have broad investigative powers in relation to claims for social welfare benefits.[134] The Department of Social Protection has a Special Investigation Unit that assesses and detects social welfare fraud. The Commission understands that the Special Investigation Unit focuses on social welfare fraud that affects the Department of Social Protection rather than at-risk adults.

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[131] HIQA, *National Standards for Residential Services for Children and Adults with Disabilities (*2013); HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (2016).

[132] HIQA, *National Standards for Residential Services for Children and Adults with Disabilities (*2013) at page 15 (standard 3.1); HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (2016) at page 14 (standard 3.1).

[133] HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (2016) at page 14 (standard 3.6).

[134] Section 250 of the Social Welfare Consolidation Act 2005.

[14.87] Although social welfare legislation does not contain specific adult safeguarding provisions, various provisions empower the Inspectorate of the Department of Social Protection to engage in social welfare scheme-related house calls and interviews. The Department of Social Protection also has a dedicated Safeguarding Unit. The Commission understands that engagement between social welfare customers and inspectors has a protective function. Such engagement enables inspectors to make contact with social welfare customers who may be isolated and enables inspectors to inform the Safeguarding Unit of safety and welfare concerns, including signs of neglect or self-neglect. This can lead to urgent calls to the relevant HSE Safeguarding Protection Team, public health nurse, the Garda Síochána or other relevant bodies. The Department of Social Protection's Safeguarding Unit acts on reports of alleged abuse involving the misappropriation of social welfare payments. In responding to reports of abuse, the Safeguarding Unit liaises with the Department of Social Protection's scheme areas and Inspectorate and consults and involves, as appropriate, relevant agencies such as the HSE's Safeguarding Protection Team(s), medical and social workers, the Garda Síochána and advocacy groups.

(g) Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012

[14.88] The Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012 (SI No 375 of 2012) prohibit a solicitor from acting for both vendor and purchaser, with limited exceptions. This is an important source of protection from financial abuse which relates to property. The Commission previously recommended that the Law Society and the Medical Council should produce guidelines on the assessment of testamentary capacity for the benefit of their members.[135] It was recommended that these guidelines should highlight the importance of contemporaneous notetaking when assessing testamentary capacity.[136] Under the 2015 Act, a code of practice for legal practitioners has been prepared.[137]

[135] Law Reform Commission, *Vulnerable Adults and the Law* (LRC 83–2006) at para 8.30.

[136] Law Reform Commission, *Vulnerable Adults and the Law* (LRC 83–2006) at para 8.30.

[137] DSS, *Code of Practice for Legal Practitioners* (April 2023) <https://decisionsupportservice.ie/sites/default/files/2023-04/10.%20COP_for_legal_practitioners.pdf> accessed on 8 April 2024.

3. Previous Recommendations of the Commission and Subsequent Home Care Regulatory Proposals

[14.89] In its 2011 Report on Legal Aspects of Professional Home Care, the Commission recommended statutory regulation of professional home care services by HIQA.[138] Such regulation would assist in creating stronger safeguards in circumstances where a person is in receipt of homecare services. It was recommended that National Standards for Professional Home Care should be prepared by HIQA under the 2007 Act. The Commission noted that financial abuse is one of the most common types of abuse reported to HSE senior case workers and, as such, protective measures adopted in the context of professional home care must address financial protection, alongside health and safety work practices.[139] The Commission also recommended that the National Standards for Professional Home Care require specific provisions that set out, in plain and simple language, the fee arrangements involved in a contract for the provision of home care.[140]

[14.90] In the Programme for Government 2020, the Government committed to the introduction of a statutory scheme for the regulation of home care services.[141] The Department of Health is currently developing primary and secondary legislation in line with this commitment.[142] The Commission's recommendations in its 2011 Report are currently being considered in the drafting of the Health (Amendment) (Licensing of Professional Home Support Providers) Bill, the Heads of which are currently being prepared. In June 2022, the Department of Health launched a public consultation on draft regulations for providers of home

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[138] Law Reform Commission, *Legal Aspects of Professional Home Care* (LRC-105-2011) at para 2.05.

[139] Law Reform Commission, *Legal Aspects of Professional Home Care* (LRC-105-2011) at para 2.45.

[140] Law Reform Commission, *Legal Aspects of Professional Home Care* (LRC-105-2011) at para 2.102.

[141] Government of Ireland, *Programme for Government – Our Shared Future* (2020) at 51. Separately, the Health (Amendment) (Professional Home Care) Bill 2020, a private members' Bill which drew on the Commission's recommendations in its 2011 Report on *Legal Aspects of Professional Home Care* (LRC–105–2011), was introduced and reached second stage in Dáil Éireann in 2020.

[142] HIQA, *Regulation of Homecare: Research Report* (2021) at page 52 <https://www.hiqa.ie/sites/default/files/2021-12/Regulation-of-Homecare-Research-Report-Long-version.pdf> accessed on 8 April 2024.

support services, which included a proposed regulation on financial procedures.[143]

4. Comparative analysis

(a) Statutory obligations on, and powers of, financial service providers

[14.91] RFSPs are often in a good position to detect financial abuse and protect at-risk customers.[144] Branch managers, directors, officers, employees, agents or other representatives of RFSPs may be in the most appropriate position—and sometimes the only position—to recognise financial abuse.[145] RFSPs can play an important role in recognising actual or suspected financial abuse.[146] Accordingly, some jurisdictions have imposed statutory obligations on RFSPs to take action to stop, prevent or address actual or suspected financial abuse of those who are at-risk, "elderly" or "vulnerable".[147] Some jurisdictions have also enacted statutory protections or immunities to protect RFSPs and their staff from liability where they take action in good faith to prevent or address actual or suspected financial abuse of customers who are at-risk, "elderly" or "vulnerable".

(i) Australia: Federal law

[14.92] Currently, there is no specific legislation for dealing with financial abuse of adults who are at-risk, "elderly" or "vulnerable" in Australia. The current bank reporting framework for financial abuse is voluntary and imposes limited obligations on Australian banks to respond to financial abuse. Australian banks have been, and continue to be, reluctant to intervene in cases of suspected financial abuse because of concerns regarding privacy, liability and the absence of a consistent reporting framework. In June 2016, the Australian Law Reform Commission

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[143] Department of Health, *Public Consultation on Draft Regulations for Providers of Home Support Services* (16 June 2022), draft regulation 16 (financial procedures) <https://www.gov.ie/en/consultation/81506-public-consultation-on-draft-regulations-for-providers-of-home-support-services/> accessed on 8 April 2024.

[144] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017) at para 9.16.

[145] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017) at para 9.16; National Seniors Australia, Submission 154.

[146] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017) at para 9.16; Australian Bankers' Association, Submission 107.

[147] The terms "elderly" and "vulnerable" are still used in some jurisdictions and contexts.

("ALRC") launched an inquiry into protecting the rights of older Australians from abuse. The ALRC's Discussion Paper on Protecting the Rights of Older Australians from Abuse was published in February 2017. Although the ALRC recommended changes to banking industry guidelines, it did not go so far as to recommend the mandatory reporting of financial abuse by banks. The ALRC noted that while a number of consultees supported mandatory reporting, they did not outline the implementation of any reporting framework which would require banks to report financial abuse.

(ii) Australia: State and territorial law

[14.93] According to Senior Rights Victoria, the mandatory reporting of abuse of older persons in Australia would not offer solutions that prevent or respond to the abuse of older Australians because: (1) older persons can make their own decisions; (2) older persons lacking capacity have a separate regime involving lawyers, guardians or administrators who can assist them; (3) there is no proof that mandatory reporting leads to better outcomes for older persons; (4) reporting may affect the relationship with the older person; and (5) established, coordinated community services are more important than requiring people to report, and would render mandatory reporting unnecessary.[148]

(iii) Canada: Federal law

[14.94] Section 7(3)(d.3)(i)-(iii) of the Personal Information Protection and Electronic Documents Act ("PIPEDA") provides that an "organisation" may disclose personal information without the knowledge or consent of an individual if the disclosure is made on the initiative of the organisation to a government institution, a part of a government institution, the individual's next of kin or authorised representative and: (i) the organisation has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse; (ii) the disclosure is made solely for purposes related to preventing or investigating the financial abuse; and (iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the financial abuse.[149] An "organisation" is defined in section 2(1) of PIPEDA as, among other things, "a person", which appears to be broad enough to include legal and

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[148] Senior Rights Victoria, Should Victoria have mandatory reporting of elder abuse? (May 2018) at pages 6 to 8.

[149] Section 7(3)(d.3)(i)-(iii) of the Personal Information Protection and Electronic Documents Act, SC 2002, c 5 (Canada)<https://laws-lois.justice.gc.ca/eng/acts/p-8.6/index.html> accessed on 4 April 2024.

natural persons, such as financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

(iv) Canada: Provincial and territorial law

[14.95] Section 46(1) of the Adult Guardianship Act of British Columbia provides that "anyone" who has information indicating that an adult is abused or neglected, and is unable because of physical restraint, a physical impairment that limits their ability to seek help, or an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect may report the circumstances to a designated agency.[150] Section 1 of the Adult Guardianship Act defines "abuse" as the deliberate mistreatment of an adult that causes the adult physical, mental or emotional harm "or damage or loss in respect of the adult's financial affairs". "Financial affairs" is defined in section 1 as "an adult's business and property, and the conduct of the adult's legal affairs".

[14.96] Sections 40.5(2) and 40.6(1) of the Public Guardian and Trustee Act of Saskatchewan provides that a financial institution or public guardian and trustee may suspend the withdrawal or payment of funds from a person's account for up to five business days or 30 days respectively where the financial institution or public guardian and trustee has reasonable grounds to believe that the person is a vulnerable adult and is being subjected to financial abuse by another person or is unable to make reasonable judgments on matters relating to their estate, which is likely to suffer serious damage or loss.[151]

[14.97] Section 61(1) of the Adult Protection and Decision Making Act of the Yukon provides that "anyone" may make a report to a designated agency where they have information indicating that an adult is abused or neglected and is unable to seek support and assistance because of physical or chemical restraint, a physical or intellectual disability that limits their ability to seek help, an illness, disease, injury or other condition that affects their ability to seek help, or any similar

[150] Adult Guardianship Act, RSBC 1996, c 6 (British Columbia) <https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-6/latest/rsbc-1996-c-6.html> accessed on 4 April 2024.

[151] Sections 40.5(2) and 40.6(1) of the Public Guardian and Trustee Act, SS 1983, c P-36.3 (Saskatchewan)<https://www.canlii.org/en/sk/laws/stat/ss-1983-c-p-36.3/latest/ss-1983-c-p-36.3.html> accessed on 8 April 2024.

reason.[152] Section 58 of the Adult Protection and Decision Making Act defines "abuse" as the deliberate mistreatment of an adult that causes the adult physical, mental or emotional harm, "or causes financial damage or loss to the adult". The word "anyone" appears to be broad enough to apply to financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

(v) United States: Federal law

[14.98] The Financial Exploitation Prevention Bill of 2023 passed the House of Representatives on 30 January 2023 and has been referred to the United States Senate Committee on Banking, Housing and Urban Affairs.[153] Section 2 of the Bill proposes to allow for the delay of the redemption of a security issued by an open-end investment management company if the company reasonably believes the redemption involves the financial exploitation of an individual aged 65 or older. The company may initially delay the redemption for up to 15 days and, upon making a determination of exploitation, may delay the redemption by an additional 10 days. In the event of delay, the company must hold the amounts related to the redemption in a demand deposit account. Section 2 proposes to require the Securities and Exchange Commission ("SEC") to make legislative and regulatory recommendations to the United States Congress to address the financial exploitation of individuals aged 65 or older.

(vi) United States: State law

[14.99] Maryland's Corporation and Associations Code provides for the reporting of financial exploitation of "vulnerable adults" and states that a broker-dealer, investment adviser, agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser who reasonably believes that a vulnerable adult has been, is currently or will be the subject of actual or attempted financial exploitation shall notify the commissioner, a local government and a third party designated by the

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[152] Adult Protection and Decision Making Act, SY 2003, c 21, Sch A (Yukon) <https://www.canlii.org/en/yk/laws/stat/sy-2003-c-21-sch-a/latest/sy-2003-c-21-sch-a.html> accessed on 8 April 2024.

[153] United States Congress, Legislation, 118th Congress, HR 500–Financial Exploitation Prevention Act of 2023 <https://www.congress.gov/bill/118th-congress/house-bill/500> accessed on 8 April 2024.

vulnerable adult.[154] A broker-dealer, investment adviser, agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser may delay a disbursement from an account of a vulnerable adult or an account on which a vulnerable adult is a beneficiary if they reasonably believe, after initiating an internal review of the requested disbursement and any suspected financial exploitation, that the requested disbursement may result in the financial exploitation of a vulnerable adult.[155]

[14.100] The New Hampshire Revised Statutes contains provisions to combat the financial exploitation of vulnerable adults.[156] If an agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser reasonably believes that financial exploitation of an "eligible adult" may have occurred, may have been attempted or is being attempted, they may promptly notify the secretary of state and any third party previously designated by the eligible adult, provided that disclosure shall not be made to any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.[157]

[14.101] The South Carolina Code of Laws provides that if a financial institution believes that the financial exploitation of a "vulnerable adult" has occurred or may occur, it may, but is not required to, decline or place on hold any transaction involving the account of a vulnerable adult, an account in which the vulnerable adult is a beneficiary, or the account of a person who is suspected of engaging in the financial exploitation of the vulnerable adult.[158] A financial institution may decline or place on hold any transaction if an investigative entity or law enforcement agency provides information to the financial institution demonstrating that it is reasonable to believe that the financial exploitation of a vulnerable adult has

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[154] Section 11-307 (2022) (b)(1)(i)-(ii) of the Maryland Corporations and Associations Code <https://law.justia.com/codes/maryland/2022/corporations-and-associations/title-11/subtitle-3/section-11-307/> accessed on 8 April 2024.

[155] Section 11-307 (2022) (c)(1) of the Maryland Corporations and Associations Code.

[156] Section 421-B:5-507-A (2022) of the New Hampshire Revised Statutes <https://law.justia.com/codes/new-hampshire/2022/title-xxxviii/title-421-b/section-421-b-5-507-a/> accessed on 8 April 2024.

[157] Section 421-B:5-507-A (2022) (2)(A)-(B) of the New Hampshire Revised Statutes.

[158] Section 43-35-87 (2022) (B)(1)-(3) of the South Carolina Code <https://law.justia.com/codes/south-carolina/2022/title-43/chapter-35/> accessed on 8 April 2024.

occurred or may occur.[159] A financial institution is not required to decline or place on hold a transaction. Such a decision is in the financial institution's discretion, based on information available to it.[160]

[14.102] Tennessee's Code provides that if a financial service provider has reasonable cause to suspect that financial exploitation may have occurred, may have been attempted or is being attempted, the financial service provider may, but is not required to, refuse or delay a financial transaction on an account of a "vulnerable adult", an account in which a vulnerable adult is a beneficiary or an account of a person suspected of financially exploiting a vulnerable adult.[161] A financial service provider may refuse or delay a financial transaction if the department of human services or a law enforcement agency provides information to the financial service provider demonstrating that it is reasonable to believe that financial exploitation may have occurred, may have been attempted or is being attempted.[162] Except as ordered by a court, a financial service provider is not required to refuse or delay a financial transaction when provided with information by the department of human services or a law enforcement agency alleging that financial exploitation may have occurred, may have been attempted or is being attempted. Rather, a financial service provider may use its discretion to determine whether to refuse or hold a financial transaction based on available information.[163]

[14.103] The Texas Financial Code provides for the reporting of suspected financial exploitation of "vulnerable adults".[164] If an employee of a financial institution has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring or has been attempted, the employee shall notify the financial institution of the suspected financial exploitation.[165] If a financial institution is notified of suspected financial exploitation or has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring or has been attempted, the financial institution shall assess

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[159] Section 43-35-87 (2022) (C) of the South Carolina Code.

[160] Section 43-35-87 (2022) (D) of the South Carolina Code.

[161] Section 45-2-1203 (2021) (a)(1)-(3) of the Tennessee Code.

[162] Section 45-2-1203 (2021) (b)(1) of the Tennessee Code.

[163] Section 45-2-1203 (2021) (b)(2) of the Tennessee Code.

[164] Section 281.002 (2022) of the Texas Financial Code.

[165] Section 281.002 (2022) (a) of the Texas Financial Code.

the suspected financial exploitation and submit a report to the department of family and protective services.[166] If a financial institution submits a report, the financial institution may notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the financial institution suspects the third party of financial exploitation of the vulnerable adult.[167] A financial institution may place a hold on any transaction that involves an account of a vulnerable adult if the financial institution submits a report of suspected financial exploitation of the vulnerable adult to the department of family and protective services and has cause to believe that the transaction is related to the suspected financial exploitation alleged in the report.[168]

[14.104] Section 7-26-301(1) of the Utah Code provides that a financial institution may delay a transaction involving a "vulnerable adult" if a branch manager, director, officer, employee, agent or other representative of a financial institution reasonably believes that executing the transaction will result in financial exploitation of the vulnerable adult or a law enforcement agency provides the financial institution with information demonstrating that it is reasonable to believe that financial exploitation of a vulnerable adult is occurring, has or may have occurred, is being attempted, or has or may have been attempted.[169] No later than two business days after the day on which the transaction is delayed, a financial institution must send notice of the delay and the reason for the delay to each party authorised to transact business on the account (i.e. the account holder(s)) and for which the financial institution has contact information.[170] A financial institution may also send notice of the delay, the reason for the delay and any additional information about the transaction to a law enforcement agency or those responsible to investigate abuse, neglect and exploitation of vulnerable adults and those who provide appropriate protective services.[171]

[14.105] However, a financial institution may decide not to provide notice to one of the parties mentioned above if a branch manager, director, officer, employee, agent or other representative of the financial institution reasonably believes such party

[166] Section 281.002 (2022) (b) of the Texas Financial Code.

[167] Section 281.003 (2022) of the Texas Financial Code.

[168] Section 281.004 (2022) (1)(A)-(B) of the Texas Financial Code.

[169] Section 7-26-301(1)(A)-(B) of the Utah Code <https://le.utah.gov/xcode/Title7/Chapter26/7-26-S301.html> accessed on 9 April 2024.

[170] Section 7-26-201(2)(a)(i)(A)-(B) of the Utah Code.

[171] Section 7-26-201(2)(a)(ii)(A)-(B) of the Utah Code.

has engaged in attempted financial exploitation of the vulnerable adult.[172] The delay of the transaction expires when the financial institution reasonably determines that the transaction will not result in financial exploitation of a vulnerable adult or 15 business days after the day on which the financial institution first initiated the delay of the transaction.[173] If a financial institution receives a request from law enforcement to extend the delay of a transaction beyond the expiration of the period mentioned above, the financial institution may extend the delay no more than 25 business days after the day on which the financial institution first initiated the delay.[174] A court in the State of Utah may enter an order extending or shortening the delay of a transaction.[175]

[14.106] The Revised Code of Washington makes provision aimed at combatting the financial exploitation of vulnerable adults.[176] If a financial institution reasonably believes that financial exploitation of a vulnerable adult may have occurred, may have been attempted or is being attempted, the financial institution may, but is not required to, refuse a transaction requiring disbursal of funds contained in an account of a vulnerable adult, an account in which a vulnerable adult is a beneficiary or an account of a person suspected of financially exploiting a vulnerable adult.[177] A financial institution may also refuse to disburse funds if the department, law enforcement or prosecuting attorney's office provides information to the financial institution demonstrating that it is reasonable to believe that financial exploitation of a vulnerable adult may have occurred, may have been attempted or is being attempted.[178] A financial institution is not required to refuse to disburse funds when provided with information alleging that financial exploitation may have occurred, may have been attempted or is being attempted, but may use its discretion to determine whether or not to refuse to disburse funds based on available information.[179]

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[172] Section 7-26-201(2)(b)(i)-(ii) of the Utah Code.

[173] Section 7-26-201(3)(a)(i)-(ii) of the Utah Code.

[174] Section 7-26-201(3)(b)(i) of the Utah Code.

[175] Section 7-26-201(3)(b)(ii)(A) of the Utah Code.

[176] Section 74.34.215 of the Revised Code of Washington.

[177] Section 74.34.215(1)(a)-(c) of the Revised Code of Washington.

[178] Section 74.34.215(2) of the Revised Code of Washington.

[179] Section 74.34.215(3) of the Revised Code of Washington.

(vii) South Africa

[14.107] Section 7 of the Aged Persons Amendment Act 1998 ("1998 Act") inserted section 6A into the Aged Persons Act 1967 ("1967 Act"), which obliged every registered dentist, medical practitioner, nurse or social worker "or any other person who examines, attends to or deals with an aged person and suspects that that aged person: (a) has been abused; or (b) suffers from any injury" to notify the Director-General of the Department of Social Development in South Africa.[180] Although not specifically included as a class of persons subject to the notification obligation, it is reasonable to believe that the words "or any other person" were broad enough to include financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

[14.108] Section 1 of the 1998 Act inserted a new definition of "abuse" into section 1 of the 1967 Act which defined "abuse" as, among other things, "the infliction of … financial power on an aged person which adversely affects that person". An "aged person" was defined in section 1(1) of the 1967 Act as "a person who, in the case of a male, [was] sixty-five years of age or older, and, in the case of a female, [was] sixty years of age or older".[181] Section 6A(4) of the 1967 Act provided that any dentist, medical practitioner, nurse, social worker "or other person" who failed to comply with section 6A(1) was guilty of an offence and was liable on conviction to a fine or imprisonment for a term not exceeding five years, or to both such fine and imprisonment.

[14.109] The 1967 Act and the 1998 Act were repealed by section 35(1) of the Older Persons Act 2006 ("2006 Act"). The 2006 Act, by providing for and defining "economic abuse" as a sub-form of "abuse", goes further than section 1 of the repealed 1998 Act which inserted "the infliction of … financial power" into the definition of "abuse" in section 1 of the 1967 Act because the 2006 Act specifically provides for "economic abuse" as a sub-form of "abuse" for the purposes of the 2006 Act. Section 30(3)(d) of the 2006 Act defines "economic

[180] Section 6A(1) of the Aged Persons Act 1967 (South Africa) (as inserted by section 7 of the Aged Persons Amendment Act 1998 (South Africa)). The Aged Persons Act 1967 (South Africa) and the Aged Persons Amendment Act 1998 (South Africa) were repealed by section 35(1) of the Older Persons Act 2006 (South Africa).

[181] As amended by section 1(1) of the Aged Persons Amendment Act 1971 (South Africa). This definition of "aged person" is still used in South Africa but it is now contained in section 1 of the Older Persons Act 2006 (South Africa) and defines an "older person" rather than an "aged person".

abuse" of an "older person"[182] as "(i) the deprivation of economic and financial resources to which an older person is entitled under any law; (ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or (iii) the disposal of household effects or other property that belongs to the older person without the older person's consent".

[14.110] Similar to section 6A of the repealed 1967 Act, section 26 of the 2006 Act provides for the notification of abuse of older persons. Whilst section 6A(1) of the 1967 Act required every registered dentist, medical practitioner, nurse or social worker "or any other person who examines, attends to or deals with an aged person and suspects that [the] aged person: (a) has been abused; or (b) suffers from any injury" to notify the Director-General of the Department of Social Development in South Africa, section 26(1) of the 2006 Act adopts a more general approach towards those who must notify and receive the notification. Section 26(1) of the 2006 Act obliges "any person" who suspects that an older person has been abused or suffers from an abuse-related injury to immediately notify the Director-General of the Department of Social Development "or a police official" of their suspicion. Similar to section 6A(4) of the repealed 1967 Act, sections 26(3) and 33(b) of the 2006 Act provide that "a person" who fails to comply with the notification requirement in section 26(1) of the 2006 Act shall be guilty of an offence and liable to a fine or imprisonment for a term not exceeding five years, or both. The words "a person" appear to be broad enough to include legal and natural persons, such as financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

(b) Statutory immunity provisions

[14.111] To ensure that statutory obligations on financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers to take actions to stop, prevent or address financial abuse of at-risk adults are effective in encouraging the reporting of suspected financial abuse, some jurisdictions provide protection and immunity from legal proceedings to those who report suspected financial abuse. The combination of mandated action, permissible action and statutory immunity encourages branch

[182] Section 1 of the Older Persons Act 2006 (South Africa) defines an "older person" as a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older". This is the same definition that was used for an "aged person" in section 1(1) of the Aged Persons Act 1967 (South Africa) (as amended by section 1(1) of the Aged Persons Amendment Act 1971 (South Africa)).

managers, directors, officers, employees, agents or other representatives of financial service providers to make reports about suspected financial abuse to the relevant authorities, safe in the knowledge that they can do so without fear of legal repercussion.

(i) Australia: Federal, state and territorial law

[14.112] The ALRC has recommended that people who report suspected financial abuse to adult safeguarding agencies should be afforded immunity from certain legal obligations or liability that might otherwise prevent or dissuade them from reporting such abuse.[183] The Australian Bankers' Association ("ABA") has noted that legal obligations, privacy laws, anti-discrimination laws, confidentiality obligations and concerns about possible actions in defamation present challenges for banks in reporting suspected financial abuse.[184] ABA has recommended statutory immunity for banks that choose to report suspected financial abuse.[185]

(ii) Canada: Provincial and territorial law

[14.113] Section 46(3) of the Adult Guardianship Act of British Columbia states that no action for damages may be brought against "a person" for making a report to a designated agency under section 46(1) of the Adult Guardianship Act based on information indicating that an adult is abused or neglected and is unable because of physical restraint, a physical impairment that limits their ability to seek help, or an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect, unless the person makes a report falsely and maliciously.[186] The words "a person" appear to be broad enough to include legal and natural persons, such as financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

[14.114] Sections 40.5(2) and 40.6(1) of the Public Guardian and Trustee Act of Saskatchewan provides that a financial institution or public guardian and trustee may suspend the withdrawal or payment of funds from a person's account for up

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[183] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017) at para 9.54.

[184] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (May 2017) at para 9.54; Australian Bankers' Association, Submission 107.

[185] Australian Bankers' Association, Submission 107.

[186] Adult Guardianship Act, RSBC 1996, c 6 (British Columbia).

to five business days or 30 days respectively where the financial institution or public guardian and trustee has reasonable grounds to believe that the person is a "vulnerable adult" and is being subjected to financial abuse by another person or is unable to make reasonable judgments relating to their estate which is likely to suffer serious damage or loss.[187] Section 40.5(5) and 40.6(3) of the Public Guardian and Trustee Act provide that a financial institution acting pursuant to section 40.5 and 40.6 is not in breach of any other Act.

[14.115] Section 61(1) of the Adult Protection and Decision Making Act of the Yukon provides that "anyone" may make a report to a designated agency where they have information indicating that an adult is abused or neglected and is unable to seek support and assistance because of physical or chemical restraint, a physical or intellectual disability that limits their ability to seek help, an illness, disease, injury or other condition that affects their ability to seek help, or any similar reason.[188] Section 61(4) of the Adult Protection and Decision Making Act provides an immunity to "anyone" who makes a report and states that no legal action, including professional disciplinary action, may be brought against a person for making a report or for assisting in the making of inquiries, unless the person acted falsely and maliciously. The word "anyone" appears to be broad enough to include legal and natural persons, such as financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

(iii) United States: Federal law

[14.116] Section 3423, Chapter 35, Title 12 of the United States Code[189] extends immunity from liability to certain individuals employed at financial institutions who, in good faith and with reasonable care, disclose suspected exploitation of an individual who is at least 65 years of age to a state financial regulatory agency, a securities association, the SEC, a law enforcement agency or a state or local agency responsible for administering adult protective service laws. The immunity is provided to those who serve as a supervisor or in a compliance or legal function for a financial institution. To benefit from the immunity, the individual employed at a financial institution must, at or before the time of the disclosure, have received training on: (a) how to identify and report the suspected exploitation of

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[187] Sections 40.5(2) and 40.6(1) of the Public Guardian and Trustee Act, SS 1983, c P-36.3 (Saskatchewan).

[188] Adult Protection and Decision Making Act, SY 2003, c 21, Sch A (Yukon).

[189] Section 3423, Title 12, Chapter 35 of the United States Code.

an individual who is at least 65 years of age; and (b) the need to protect the privacy and respect the integrity of each customer.

(iv) United States: State law

[14.117] Maryland's Corporations and Associations Code provides that a broker-dealer, investment adviser, agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser who, in good faith and exercising reasonable care, makes a notification to the commissioner or a local department or delays a disbursement shall have immunity from any administrative or civil liability that might otherwise arise from the notification or delay.[190]

[14.118] The Revised Statutes of New Hampshire provide that an agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser who, in good faith and exercising reasonable care, makes a disclosure of information in relation to a vulnerable adult shall be immune from administrative or civil liability that might otherwise arise from such disclosure, or for any failure to notify the customer of the disclosure.[191]

[14.119] The South Carolina Code of Laws provides that if the determinations and actions of a financial institution or an employee of a financial institution are made in good faith, the financial institution or employee shall be immune from criminal, civil or administrative liability for declining transactions to disburse monies or for taking actions in furtherance of a determination, including making a report or providing access to, or copies of, relevant records to an investigative entity or law enforcement agency.[192]

[14.120] Tennessee's Code provides that a financial service provider or an employee of a financial service provider is immune from criminal, civil and administrative liability for refusing or not refusing a financial transaction or for holding or not holding a financial transaction.[193]

[14.121] The Financial Code of Texas provides an immunity to: (a) employees of a financial institution who notify the financial institution of suspected financial exploitation;

[190] Section 11-307 (2022) (e)(1) and (2) of the Maryland Corporations and Associations Code.

[191] Section 421-B:5-507-A (2022) of the New Hampshire Revised Statutes.

[192] Section 43-35-87 (2022) (H) of the South Carolina Code.

[193] Section 45-2-1203 (2021) (H)(1) of the Tennessee Code.

(b) financial institutions that submit reports to the department of family and protective services or notify third parties; and (c) employees who, or financial institutions that, testify or otherwise participate in judicial proceedings arising from a notification or report.[194] Such employees and financial institutions shall be immune from any civil or criminal liability arising from the notification, report, testimony or participation in judicial proceedings, unless they acted in bad faith or with a malicious purpose.[195] A financial institution that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability, or disciplinary action resulting from that act or omission.[196]

[14.122] Utah's Code provides that a state or federally chartered bank, savings and loan association, savings bank, industrial bank, credit union, trust company, depository institution or a financial institution or a director, officer, employee, attorney, accountant, agent or other representative is immune from all criminal, civil and administrative liability for delaying a transaction involving a "vulnerable adult", or for notifying law enforcement, adult protective services or a third party associated with a vulnerable adult unless the delay or notification was made in bad faith and caused pecuniary loss to a vulnerable adult suspected of being a victim of financial exploitation.[197]

[14.123] The Revised Code of Washington protects against the financial exploitation of "vulnerable adults" and provides that a financial institution and an employee of a financial institution is immune from criminal, civil and administrative liability where it or they decide to refuse to disburse funds and for actions taken in furtherance of that decision if the decision was made in good faith.[198]

(v) South Africa

[14.124] The 1967 Act and the 1998 Act were repealed by section 35(1) of the 2006 Act. Section 6A(3) of the 1967 Act clarified that any dentist, medical practitioner, nurse, social worker "or other person" was not liable in respect of any notification given in good faith in accordance with section 6A(1) of the 1967 Act. Section 26(2) of the 2006 Act states that "a person" is "not liable in respect of any

[194] Section 281.005 (2022) (a) of the Texas Financial Code.

[195] Section 281.005 (2022) (a) of the Texas Financial Code.

[196] Section 281.005 (2022) (b) of the Texas Financial Code.

[197] Section 7-26-401 (2022) (2) of the Utah Code.

[198] Section 74.34.215(7) of the Revised Code of Washington.

notification given in good faith …". The words "a person" in section 26(2) of the 2006 Act appear broad enough to include legal and natural persons, such as financial service providers and branch managers, directors, officers, employees, agents or other representatives of financial service providers.

5. Proposals to address actual or suspected financial abuse of at-risk adults in Ireland

(a) Enactment and imposition of statutory obligations on regulated financial service providers to prevent and address actual or suspected financial abuse of at-risk customers

[14.125] The approaches adopted in other jurisdictions to the imposition of statutory obligations on RFSPs is reflective of the crucial role such institutions play in preventing and addressing financial abuse. A comparison may be drawn between the approach to tackling financial abuse of at-risk adults and the approach of financial institutions and professional bodies to anti-money laundering ("AML") obligations. Extensive legislative progress has been made in Ireland to address money laundering.[199]

[14.126] However, the Commission acknowledges the challenges. There are many more layered complexities in financial abuse than apply in money-laundering, which is comparatively more straightforward to address. In both financial abuse and money-laundering, suspicious transactions can be flagged. However, branch managers, directors, officers, employees, agents or other representatives of banks, post offices or credit unions are not always in a position to assess capacity or determine whether an unwise financial decision is motivated by free choice, coercion or exploitation. The 2015 Act and the codes of practice published by the

[199] The Irish anti-money laundering framework is largely set out in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended. On 26 November 2018, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 commenced and transposed the Fourth Money Laundering Directive (Directive (EU) 2015/849) into Irish law. The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 commenced on 23 April 2021 (except section 8 which commenced on 24 April 2021) and transposed most of the Fifth Money Laundering Directive (Directive (EU) 2018/843) into Irish law. In 2017, Ireland underwent the Financial Action Task Force's mutual evaluation process, which concluded that Ireland has a "sound and substantially effective regime to tackle money laundering": Financial Action Task Force, *Mutual Evaluation Report of anti-money laundering and counter-terrorist financing measures in Ireland* (September 2017) <https://www.fatf-gafi.org/en/publications/mutualevaluations/documents/mer-ireland-2017.html> accessed on 9 April 2024.

DSS provide a route to supported decision-making and protection that could, and should, be supplemented with stronger controls by banks, post offices and credit unions when financial abuse is suspected.

[14.127] Banks are obliged to safeguard their customers' best interests and must inquire into circumstances of "vulnerability" and the prudence of particular transactions in certain circumstances. Banks intervene to prevent suspicious transactions but the legal basis for such action is unclear, with some RFSPs with whom the Commission consulted being uncertain as to whether the basis originates in the contractual relationship between the RFSP and the customer, or in the CPC which imposes a duty on regulated entities to act in customers' best interests. One RFSP provided the Commission with excerpts from its terms and conditions, noting that it has found that its terms and conditions have afforded protection to customers. These terms and conditions have not been challenged and they are viewed as giving effect to a duty of care to customers.[200]

[200] The relevant extracts are as follows: Condition 2.10 : If we suspect or detect any fraud or unauthorised activity on your account we will advise you by phone call, SMS message or email as appropriate, unless doing so would break the law. If we deem it necessary, we may block your account and will advise you of the block and how it may be removed. … Condition 4.3 : We may take whatever action we consider appropriate … against fraud … for example stopping payments into and out of the Account. … Condition 9.4 : We may close your Account immediately or block any payments from it if … (v) we have reason to suspect there is unauthorised or fraudulent activity on your Account … . … Condition 40.6 : To protect you against fraud we sometimes issue a "referral" message to the Retailer requiring them to verify that it is you using the Card … . See Bank of Ireland, *Terms and Conditions – General Personal Account, Golden Years Current Account, Third Level Student Current Account, Graduate Current Account, Debit Card* (2021) at paras 2.10, 4.3, 9.4 and 40.6.

[14.128] The current account and general terms and conditions of AIB,[201] Permanent TSB,[202] EBS[203] and An Post[204] contain similar provisions to prevent suspicious transactions. However, some RFSPs cited the 'best interests' provision in the CPC as their basis for action. Sections 2.1 and 2.2 of the CPC provide that a regulated entity must ensure that in all its dealings with customers, it acts honestly, fairly and professionally, with due skill, care and diligence, in the best interests of its customers.

The Commission has considered whether primary or secondary legislation should give shape to the contours of precise legal obligations. Clear and unambiguous legislative provisions would assist RFSPs by providing clarity that is currently absent, since leaving the position unclear means RFSPs and customers do not know where they stand. The Commission has considered the possibility of introducing statutory obligations on RFSPs to ensure that necessary measures are taken to minimise the risk of financial abuse of at-risk adults. The Commission notes that some statutory obligations are already in place. For example, it is an offence under section 19 of the Criminal Justice Act 2011 for a person to fail to disclose to the Garda Síochána information which the person knows or believes might be of material assistance in:

(a) preventing the commission by a person of a "relevant offence" which, among other offences, includes offences related to financial abuse of at-risk adults such as theft, making gain by deception, unlawful use of a computer, use of a false instrument and conspiracy to defraud at common law; or

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[201] AIB, *Terms and Conditions for Current, Demand Deposit and Masterplan Accounts* (February 2022) at paras 5.1, 5.2, 6.5, 6.17, 6.51(b), 6.53, 11.2, 14.5 and 14.8 <https://aib.ie/content/dam/frontdoor/business/docs/products/current-accounts/terms-and-conditions-for-current-accounts-and-demand-deposit-accounts.pdf> accessed on 9 April 2024.

[202] Permanent TSB, *Terms & Conditions and Personal & Business Banking Charges* (8 December 2022). See General Terms and Conditions at paras 4(b), 13(g) and 15(h) <https://www.permanenttsb.ie/globalassets/pdf-documents/terms-and-conditions/bmk2548-12.22-tcs--personal--business.pdf> accessed on 9 April 2024.

[203] EBS, *Terms and Conditions Booklet for the EBS MoneyManager Account* (April 2022) at paras 32.1, 39, 40, 58 and 100 <https://www.ebs.ie/content/dam/ebs/pdfs/daily-banking/terms-and-conditions-for-ebs-moneymangager-account.pdf> accessed on 9 April 2024.

[204] An Post, *Current Account Terms & Conditions* at paras 5.0.3.1, 5.0.3.3, 5.0.8.1, 5.0.13.1, 5.0.13.3 and 9.0.4 <https://www.anpost.com/Money/Current-Account/Current-Account-Terms-Conditions> accessed on 9 April 2024.

(b) securing the apprehension, prosecution or conviction of a person for a "relevant offence".

[14.129] Although some statutory obligations are already in place in Ireland, they are neither specific to RFSPs nor to tackling financial abuse in the adult safeguarding context. The Commission believes that detailed guidance on obligations, expected standards and appropriate prevention and response measures should be provided to RFSPs in the form of secondary legislation (i.e. regulations) to be issued in the future by the CBI under the Central Bank Acts. Breach of regulations to be issued by the CBI under the Central Bank Acts are likely to have legal consequences which are not insignificant. For example, a breach of the CPC or regulations to be issued by the CBI under the Central Bank Acts may trigger the CBI's administrative sanctions procedure pursuant to Part IIIC of the 1942 Act and result in a direction by the CBI to a body corporate or unincorporated body to pay a monetary penalty the greater of €10 million or 10% of the turnover of the body for its last complete financial year, or a direction to a natural person to pay a monetary penalty not exceeding €1 million.[205] Indeed, the CBI has successfully concluded a number of enforcement actions for breaches of the CPC.[206] A breach of the CPC may also be subject to the Ombudsman's complaints procedure under Part 6 of the 2017 Act.

[14.130] As aforementioned, the CBI intends to reflect the revised CPC in two new regulations, namely the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations.[207] The Commission welcomes this proposal by the CBI and recommends that such regulations should provide for obligations on RFSPs to prevent and address actual or suspected financial abuse of at-risk customers.

[14.131] Having considered the growing prevalence of digital frauds and scams in accordance with the G20/OECD High-Level Principles on Financial Consumer Protection, the CBI proposes to introduce a statutory obligation, in the

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[205] Sections 33AQ and 33AV(2) of the 1942 Act.

[206] Central Bank of Ireland, Enforcement Actions (Administrative Sanctions Procedure) <https://www.centralbank.ie/news-media/legal-notices/enforcement-actions> accessed on 9 April 2024.

[207] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 19.

supporting standards for business in Part 3 of its proposed Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations, to ensure that RFSPs notify customers, through clear and timely communication, of any digital frauds or deception connected to the affairs of RFSPs, or specifically relevant to the sectors wherein RFSPs are operating, and of which RFSPs are aware. The Commission welcomes the introduction of such a statutory obligation and agrees with the CBI that informing customers of digital frauds can help support customers to remain alert to the existence and risk of digital frauds.[208]

[14.132] Moreover, the Commission notes that pursuant to draft regulation 4(1)(h) of the CBI's draft Central Bank Reform 2010 (Section 17A) (Standards for Business) Regulations, [209] the CBI intends to require RFSPs to control and manage their affairs and systems, at all times, to counter the risks to customers of "financial abuse".[210] The Commission welcomes the proposed introduction of such a statutory obligation.

[14.133] The Commission further notes that pursuant to draft regulation 12 of the CBI's draft Central Bank Reform 2010 (Section 17A) (Standards for Business) Regulations, the CBI intends to require RFSPs to control and manage their affairs and systems to counter the risks to customers of financial abuse, including by:

(a) putting reasonable systems and controls in place in the context of the provision of financial services, to mitigate the risk to customers of financial abuse;
(b) appropriately monitoring financial abuse trends relevant to customers or the sector more generally;
(c) carrying out ongoing monitoring in respect of potential vulnerabilities in services and distribution channels, and ensuring escalation processes where there is increased risk to customers of financial abuse;

[208] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 56.

[209] Draft Central Bank Reform 2010 (Section 17A) (Standards for Business) Regulations <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-code-review/draft-central-bank-reform-act-2010-section-17a-regulations.pdf?sfvrsn=dc5f631a_1> accessed on 9 April 2024.

[210] See section 1(a)(ii) of this Chapter to read the CBI's proposed definition of "financial abuse" in its two draft regulations intended to reflect the CBI's updated CPC.

(d) notifying customers through clear and timely communication of any digital frauds or deception connected to their affairs, or specifically relevant to the sectors in which RFSPs are operating, and of which RFSPs are aware; and

(e) communicating the supports available to customers, and the actions that customers can take in the event of financial abuse, directly connected to RFSPs' affairs.

[14.134] The Commission welcomes the proposed introduction of the above statutory obligations in the Central Bank Reform 2010 (Section 17A) (Standards for Business) Regulations, as part of the CBI's review of the CPC. The Commission believes that the introduction of such statutory obligations would improve upon the current situation in Ireland and would better protect at-risk customers from actual or suspected financial abuse. The Commission notes that the period for consultation on these regulations will expire on 7 June 2024[211] and the CBI intends to publish the revised CPC in 2025.[212] The Commission understands that the CBI proposes to provide an implementation period of 12-months from the date of publication of the revised CPC.[213]

[14.135] The Commission recommends that when finalising the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations to revise the CPC, regard should be had to the guidance for firms on the fair treatment of vulnerable customers published by the FCA in the UK, the Financial Abuse Code published by UK Finance, and the G20/OECD High-Level Principles on Financial Consumer Protection.

[14.136] The Commission also recommends that the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations should:

[211] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158).

[212] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at pages 25 and 86.

[213] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at pages 8 and 86.

(a) expressly provide that a RFSP must ensure that necessary measures are taken to minimise the risk of financial abuse of at-risk customers;

(b) clarify that for the purposes of taking necessary measures to minimise the risk of financial abuse of at-risk customers, it is immaterial whether a belief or suspicion of a RFSP is justified or not if it is honestly held at the time such measure is taken; and

(c) clarify that when considering whether a RFSP honestly held a belief or suspicion, the CBI should have regard to the presence or absence of grounds for the holding of such belief or suspicion.

[14.137] The Commission believes that potential measures taken by a RFSP which may be necessary include, but are not limited to, the following:

(a) the reporting of any knowledge, belief or suspicion that an at-risk customer is being, has been or is likely to be subject to financial abuse to the Garda Síochána, the Safeguarding Body214 or the HSE;

(b) requiring RFSPs to control and manage their affairs and systems to counter the risks to at-risk customers of financial abuse;

(c) putting reasonable systems and controls in place in the context of the provision of financial services to mitigate risk to at-risk customers of financial abuse;

(d) monitor financial abuse trends and, in particular, vulnerabilities in process and distribution channels, and ensure appropriate escalation processes are in place when there is increased risk of financial abuse of at-risk customers;

(e) clearly communicate the risk of financial abuse to at-risk customers, the supports available to at-risk customers, and the actions that at-risk customers can take in the event of actual or suspected financial abuse which is connected to a RFSP's financial product or service; and

(f) the temporary suspension of the completion of a financial transaction where there is knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse. The period of time within which a transaction is suspended may vary from a specified period of time up to an indefinite period of time, depending upon the time taken by an at-risk customer, upon request by a RFSP, to demonstrate to the

[214] See Chapter 5, which discusses the functions, duties and powers of the Safeguarding Body.

satisfaction of the RFSP that they intended to make, and consented to the making of, the financial transaction.

[14.138] With respect to the measure contained in paragraph 14.138(a) of this Chapter, the CBI stated in its Consultation Paper on the CPC that it wants to ensure that when there are issues of concern with customers, front-line staff can at least ensure that the concerns are brought to the attention of those within the firm who are sufficiently expert or senior, and authorised to take whatever actions can be taken by the firm to seek to prevent detriment or harm to the customer.[215] The CBI proposes to introduce an obligation on RFSPs to have clear procedures for their employees who report concerns that a customer is the victim of, or is at risk of being the victim of, financial abuse, fraud or scams.[216]

[14.139] With respect to the measure contained in paragraph 14.138(b) of this Chapter, the CBI stated in its Consultation Paper on the CPC that to ensure that RFSPs are taking the necessary steps to protect their customers from financial abuse, including frauds and scams, it proposes to introduce the Central Bank Reform Act 2010 (Section 17A) (Standards For Business) Regulations to create a new standard for business that will require RFSPs to control and manage their affairs and systems to counter the risks to customers of financial abuse.[217]

[14.140] With respect to the measures contained in paragraph 14.138(c) and (d) of this Chapter, the CBI stated in its Consultation Paper on the CPC that its proposed standards for business will be complemented by supporting standards for business which are contained in Part 3 of its proposed Central Bank Reform Act 2010 (Section 17A) (Standards For Business) Regulations. The measures contained in paragraph 14.138(c) and (d) of this Chapter are provisionally contained in these supporting standards.

[14.141] Some of the measures outlined above depend upon the knowledge, belief or suspicion of a RFSP. RFSPs may feel comfortable acting upon actual knowledge of financial abuse. But when it comes to acting upon a belief or suspicion of financial abuse, RFSPs may be slow to act, or may take no action, for fear that their belief or suspicion will turn out to be incorrect. The Commission is conscious

[215] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 61.

[216] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 61.

[217] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at page 55.

of the reticence that branch managers, directors, officers, employees, agents or other representatives of RFSPs may have to taking action where they have a belief or suspicion that an at-risk customer has been, is being or is likely to be subject to financial abuse.

[14.142] In this regard, the Commission believes that in order to effectively safeguard at-risk customers, it is more appropriate for a RFSP to act upon a belief or suspicion than to not act, for fear that their belief or suspicion will transpire to be incorrect. To encourage the taking of proactive measures to protect against the actual or suspected financial abuse of at-risk customers, the Commission believes that the CBI's proposed Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations or the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations should clarify that:

(a) for the purposes of taking necessary measures to minimise the risk of financial abuse of at-risk customers, it is immaterial whether a belief or suspicion of a RFSP is justified or not if it is honestly held at the time such measure is taken; and
(b) when considering whether a RFSP honestly held a belief or suspicion, the CBI shall have regard to the presence or absence of grounds for the holding of such belief or suspicion.

[14.143] Such clarification would empower branch managers, directors, officers, employees, agents or other representatives of RFSPs to take proactive measures to tackle actual or suspected financial abuse.

R. 14.1 **The Commission recommends that** the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations should provide for obligations on regulated financial service providers to prevent and address actual or suspected financial abuse of at-risk customers.

[14.144] Moreover, the Commission notes that the CBI stated in its recently published Consultation Paper on the CPC that if staff do not understand the broad nature of "vulnerability" and the types of "vulnerability", they will not be able to properly consider what obstacles may present for consumers in "vulnerable circumstances" when designing business processes, products and services, or when dealing with

customers. Recognising this, the CBI proposes to introduce an obligation for all firms to train staff on "vulnerability" issues".[218]

[14.145] Regulation 34(1) of the CBI's draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations states that a RFSP shall ensure that the persons specified in regulation 34(2) receive appropriate training in relation to "vulnerable circumstances", with the objective that such persons have:

(a) the knowledge and awareness to understand and recognise consumers in vulnerable circumstances, and how the RFSP and persons acting on behalf of the RFSP can respond to the needs of those consumers; and
(b) knowledge and awareness of the policies, procedures, systems and controls within the RFSP for responding to the needs of consumers in vulnerable circumstances.

[14.146] The persons specified in draft regulation 34(2) are those who perform the following functions on behalf of a RFSP:

(a) consumer-facing functions in respect of consumers that are natural persons;
(b) functions concerned in the design and development of financial services for consumers that are natural persons;
(c) functions concerned in the sale or marketing of financial services to consumers that are natural persons;
(d) functions involving the oversight of, and responsibility for, persons performing any of the functions referred to in subparagraphs (a), (b) and (c) above; and
(e) any other function in respect of which the person performing the function may have cause to deal with consumers in vulnerable circumstances at any time.

[14.147] Moreover and as aforementioned, Safeguarding Ireland has stated that post office and credit union personnel should receive safeguarding awareness training in order to combat financial abuse of at-risk adults.[219]

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[218] Central Bank of Ireland, *Consultation Paper on Consumer Protection Code* (7 March 2024) (CP158) at page 61.

[219] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 190.

[14.148] The Commission agrees with Safeguarding Ireland and welcomes the CBI's proposal to introduce a statutory obligation on RFSPs to ensure that persons specified in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations who perform certain functions on behalf of RFSPs receive appropriate training in relation to "vulnerable circumstances". Accordingly, the Commission recommends that RFSPs, credit unions and post offices should be under a statutory obligation to ensure that relevant personnel receive regular safeguarding awareness training.

R. 14.2 **The Commission recommends that** regulated financial service providers, credit unions and post offices should be under a statutory obligation to ensure that relevant personnel receive regular adult safeguarding awareness training.

(b) Ensuring the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations are consistent with the Assisted Decision-Making (Capacity) Act 2015 and existing codes of practice

[14.149] The Commission believes that the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations should be consistent with the 2015 Act and existing codes, such as the statutory codes of practice made under the 2015 Act, for example the Code of Practice for Financial Service Providers published by the Director of the DSS. Statutory codes of practice have been published under the 2015 Act to provide guidance to various people, including financial services providers, when interacting with relevant persons or those appointed to provide them with decision-making supports under the 2015 Act.[220] At the time of writing, 13 codes have been published by the DSS.[221] The Code of Practice for Financial Service Providers states that where a person's capacity is in question, financial service providers should take steps to maximise a relevant person's capacity to help uphold their decision-making rights, safeguard their autonomy, and give effect to their autonomy and preferences.[222]

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[220] Section 103 of the Assisted Decision-Making (Capacity) Act 2015.

[221] DSS, Resources, Codes of Practice <https://decisionsupportservice.ie/resources/codes-practice> accessed 9 April 2024.

[222] DSS, *Code of Practice for Financial Service Providers* (April 2023) at page 6.

[14.150] In its recently published Consultation Paper on the CPC, the CBI noted that its proposals to revise the CPC will complement the 2015 Act and that given the important role that financial services firms play in the lives of all customers, including those in "vulnerable circumstances", it is vital that firms are mindful of their statutory obligations under the 2015 Act.[223] The Commission welcomes these comments and proposals by the CBI, which suggest that the CBI intends to ensure that its finalised review of the CPC, including the enactment of the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations, will be consistent with the 2015 Act and existing codes.

R. 14.3 **The Commission recommends that** the Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations should be consistent with the Assisted Decision-Making (Capacity) Act 2015 and existing codes, such as the statutory codes of practice made under the Assisted Decision-Making (Capacity) Act 2015, for example the Code of Practice for Financial Service Providers published by the Director of the Decision Support Service.

(c) Amendment of, and clarification on, the proposed definition of "consumer in vulnerable circumstances" in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations

[14.151] Reflecting the movement towards a broader concept of "vulnerability" and in alignment with the updated recognition of "vulnerability" under the G20/OECD High-Level Principles on Financial Consumer Protection, the CBI intends to define a "consumer in vulnerable circumstances" in its proposed Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations as:

> a consumer that is a natural person and whose individual circumstances make that consumer especially susceptible to harm, particularly where a [RFSP] is not acting with the appropriate levels of care, and 'vulnerable circumstances' shall be construed accordingly.

[223] Central Bank of Ireland, *Consultation Paper on the Consumer Protection Code* (7 March 2024) (CP158) at pages 58 and 59.

[14.152] With regard to this proposed definition, it is unclear how "especially susceptible to harm" is to be interpreted and distinguished from mere susceptibility to harm. For example, a consumer whose individual circumstances make them "especially susceptible" to harm will constitute a "consumer in vulnerable circumstances" whereas a consumer whose individuals circumstances make them merely susceptible to harm will not come within the definition. Given the importance of the word "especially", the Commission recommends that the words "especially susceptible to harm" should be defined so as to distinguish special susceptibility to harm from mere susceptibility from harm, either within the definition of "consumer in vulnerable circumstances" or elsewhere in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. Alternatively, clarification of the meaning of "especially susceptible to harm" should be contained in the CBI's finalised Guidance on Protecting Consumers in Vulnerable Circumstances.

[14.153] The Commission also notes that the word "harm" is neither defined in the definition of "consumer in vulnerable circumstances" nor elsewhere in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. Given that "harm" forms a central element of the definition, the Commission recommends that "harm" should be defined, either in the definition of "consumer in vulnerable circumstances" or elsewhere in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. Alternatively, clarification of what constitutes "harm" should be provided in the CBI's finalised Guidance on Protecting Consumers in Vulnerable Circumstances.[224] In this regard, it may be useful to note that the Commission recommends, in Chapter 2 of this Report, that "harm" should be defined in civil adult safeguarding legislation as, among other things, loss of, or damage to, property by theft, fraud, deception or coercive exploitation, whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise.

[14.154] The Commission observes that the use of the word "particularly" in "particularly where a [RFSP] is not acting with the appropriate levels of care" in the definition of "consumer in vulnerable circumstances" suggests that the circumstances which place a consumer in vulnerable circumstances are not intended to be exhaustively defined therein. Whilst the drafting of the proposed definition in this manner affords flexibility when assessing whether a consumer is a "consumer in

[224] Central Bank of Ireland, *Guidance on Protecting Customers in Vulnerable Circumstances* (7 March 2024) at para 1.4.3.

vulnerable circumstances", and the CBI's draft Guidance on Protecting Consumers in Vulnerable Circumstances expressly states that "firms are not expected to be able to identify all consumers in vulnerable circumstances",[225] the Commission recommends that clarification of certain other circumstances wherein a consumer will constitute a "consumer in vulnerable circumstances" would be useful and should be provided, either in the definition of "consumer in vulnerable circumstances" or in the CBI's finalised Guidance on Protecting Consumers in Vulnerable Circumstances.

[14.155] The Commission also notes that the definition of "consumer in vulnerable circumstances" does not include a temporal reference to make clear that a consumer can be in vulnerable circumstances at one particular time but not at a different time. The Commission further observes that the definition of "consumer in vulnerable circumstances" does not clarify whether the individual circumstances of the consumer which make them especially susceptible to harm are permanent or temporary circumstances.

[14.156] In this regard, it is useful to note that in Chapter 2 of this Report, the Commission recommends that an "adult at risk of harm" should be defined in adult safeguarding legislation as "an adult who by reason of their physical or mental condition or other particular personal characteristics or family or life circumstance (whether permanent or otherwise) needs support to protect himself or herself from harm at a particular time." Having regard to the Commission's proposed definition of "adult at risk of harm", the Commission recommends that the definition of "consumer in vulnerable circumstances" should be amended, in part, to refer to a consumer that is a natural person and whose individual circumstances (whether permanent or otherwise) at a particular time make that consumer especially susceptible to harm.

R. 14.4 **The Commission recommends that** the following amendments and clarifications should be made and provided respectively in relation to the proposed definition of "consumer in vulnerable circumstances" in the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations:

(a) the words "especially susceptible to harm" and "harm" should be defined in the proposed definition or elsewhere in the Regulations;

[225] Central Bank of Ireland, *Guidance on Protecting Customers in Vulnerable Circumstances* (7 March 2024) at para 1.4.3.

(b) certain other circumstances wherein a consumer will constitute a "consumer in vulnerable circumstances" should be provided in the proposed definition or elsewhere in the Regulations;

(c) the proposed definition should be amended, in part, to refer to a consumer that is a natural person and whose individual circumstances (whether permanent or otherwise) at a particular time make that consumer especially susceptible to harm; and

(d) the proposed Guidance on Protecting Consumers in Vulnerable Circumstances should clarify:

(i) the meaning of "especially susceptible to harm" in the proposed definition;

(ii) what constitutes "harm" for the purposes of the proposed definition; and

(iii) the certain other circumstances wherein a consumer will constitute a "consumer in vulnerable circumstances".

(d) Enactment of a power in primary or secondary legislation to temporarily suspend transactions where there is knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse

[14.157] Branch managers, directors, officers, employees, agents or other representatives of RFSPs are in a good position, and sometimes the only position, to identify suspected financial abuse of at-risk customers. Banking software and procedures can flag unusual withdrawals, transfers or a material change in a person's financial position. However, concerns regarding breach of the GDPR and the Data Protection Act 2018, breach of confidentiality in relation to banking matters and the potential for actions in defamation loom large over banking personnel. Banking personnel have competing obligations in relation to the maintenance of confidentiality and the protection of personal data on the one hand and acting honestly, fairly and professionally with due skill, care and diligence in the best interests of customers on the other hand. The latter may necessitate the taking of action to protect at-risk customers from actual or suspected financial abuse.[226]

[226] Sections 2.1 and 2.2 of the CPC provide that a regulated entity must ensure that in all its dealings with customers it acts honestly, fairly and professionally, with due skill, care and diligence, in the best interests of its customers.

[14.158] In the Issues Paper, the Commission suggested a form of protected disclosure regime for RFSPs that respond to actual or suspected financial abuse of at-risk adults in good faith, whether by temporarily suspending activity on an account or by sharing information with relevant authorities.[227] The Commission notes that the general terms and conditions of Ireland's main retail banks contain provisions which allow for the blocking of customer accounts or the stopping of payments into and out of an account when fraud or unauthorised activity is detected or suspected.[228] Affected customers are advised of the block or the stop and how it may be removed.[229] Moreover and as noted in section 4(a)(iii)-(vi) of this Chapter, jurisdictions in Canada and the United States have introduced statutory powers to temporarily suspend or delay transactions to tackle the actual or suspected financial abuse of "elderly" or "vulnerable" adults.

[14.159] The Commission recommends that what is required in Ireland is a power in primary or secondary legislation to temporarily suspend the completion of a financial transaction where there is knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse. The period of time within which a transaction is suspended may vary from a specified period of time up to an indefinite period of time, depending upon the time taken by an at-risk customer, upon request by a RFSP, to demonstrate to the satisfaction of the RFSP that they intended to make, and consented to the making of, the financial transaction. If such a power is to be included in secondary legislation as opposed to primary legislation, the Commission believes that such power should be included in the CBI's proposed Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations or the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations. Furthermore, the Commission believes that when drafting such power in primary or secondary legislation, regard should be had to the statutory powers in jurisdictions in Canada and the United States to delay or temporarily suspend transactions, which are discussed in section 4(a)(iii)-(vi) of this Chapter.

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[227] Phelan, *Experience of Bank Staff of the Financial Abuse of Vulnerable Adults* (National Centre for the Protection of Older People 2018) at page 115.

[228] For example see Bank of Ireland, Terms and Conditions – General Personal Account, Golden Years Current Account, Third Level Student Current Account, Graduate Current Account, Debit Card (2021) at paras 2.10 and 4.3.

[229] For example, see Bank of Ireland, Terms and Conditions – General Personal Account, Golden Years Current Account, Third Level Student Current Account, Graduate Current Account, Debit Card (2021) at paras 2.10 and 4.3.

R. 14.5 **The Commission recommends that** regulated financial service providers should be provided with a power in primary or secondary legislation to temporarily suspend the completion of a financial transaction where there is knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse.

(e) Enactment of a statutory immunity for those who act in good faith to safeguard an at-risk customer from actual or suspected financial abuse

[14.160] The Commission believes that RFSPs and branch managers, directors, officers, employees, agents or other representatives of RFSPs should be permitted to disclose information to the Safeguarding Body,[230] the HSE and the DSS where the RFSP or a branch manager, director, officer, employee, agent or other representative of a RFSP has knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse. The Commission believes that the sharing of such information should be facilitated by:

(a) extending the proposed statutory protection that would apply to any natural person—who makes a report of actual harm, suspected harm or risk of harm in good faith—to legal persons who report in good faith, for example a RFSP; and
(b) providing for a statutory immunity in primary or secondary legislation that is applicable where a RFSP or a branch manager, director, officer, employee, agent or other representative of a RFSP shares information to prevent the actual or suspected financial abuse of at-risk customers in specified circumstances.

[14.161] Mandatory reporting is discussed in Chapter 9 and information sharing is discussed in Chapter 16. The mandatory reporting proposals in Chapter 9 do not include a proposed obligation on RFSPs or branch managers, directors, officers, employees, agents or other representatives of RFSPs to report actual or suspected harm or risk of harm to at-risk adults. However, in Chapter 9, the Commission recommends that adult safeguarding legislation should provide for the application of a statutory protection in circumstances where a report is made of actual or suspected harm to an at-risk adult, provided that the report is made

[230] In Chapter 5, the Commission discusses the functions, duties and powers of the Safeguarding Body.

in good faith. The proposed statutory protection would apply to natural persons such as branch managers, directors, officers, employees, agents or other representatives of a RFSP and legal persons such as RFSPs.

[14.162] In Chapter 16, the Commission proposes the introduction of a statutory obligation and a statutory power on relevant bodies to share information to safeguard the health, safety or welfare of an at-risk adult where specified criteria and conditions are met. RFSPs are not included in the proposed definition of "relevant body". However, the proposed legislative provisions allow the relevant Minister to prescribe by regulation any other person or public or private body, organisation or group as a "relevant body". This would allow the Minister to designate RFSPs and branch managers, directors, officers, employees, agents or other representatives of RFSPs as relevant bodies for the purposes of the proposed statutory obligation and power to share information to safeguard the health, safety or welfare of at-risk adults.

[14.163] In response to the Issues Paper, many respondents recommended the introduction of a legal immunity for RFSPs who report suspected financial abuse of at-risk customers in good faith. The Commission observes that jurisdictions in Australia, Canada, South Africa and the United States have introduced specific legal immunities in the financial services sector for financial service providers and relevant personnel who report suspected financial abuse of "the elderly" or "vulnerable adults" in good faith.[231]

[14.164] For these reasons, the Commission considers that a legal immunity should be introduced in primary or secondary legislation to apply specifically in the financial services sector, to ensure that RFSPs and branch managers, directors, officers, employees, agents or other representatives of RFSPs can report suspected financial abuse of at-risk customers in good faith, safe in the knowledge that they can do so without fear of legal repercussion.

[14.165] If such a statutory immunity is not introduced in Ireland, there is a risk that some incidents of actual or suspected financial abuse of at-risk customers may go unreported. As one commentator has noted:

> even the most diligent [branch manager, director, officer, employee, agent or other representative] might look the other way in questionable situations if the law does not protect [them] from civil and criminal liability arising out of the referral. People do not

[231] See section 4(b) of this Chapter.

> want to be exposed to a lawsuit or criminal prosecution as a result of trying to help someone else [while performing their legally imposed duty].[232]

[14.166] The provision of a statutory immunity for action taken in good faith by RFSPs and branch managers, directors, officers, employees, agents or other representatives of RFSPs would add a further layer of necessary protection in the Irish adult safeguarding context. Such immunity has a number of statutory precedents in jurisdictions in Australia, Canada, South Africa and the United States, which are discussed in section 4(b) of this Chapter. Notably, Irish law contains a number of statutory precedents for such an immunity. For example, section 112 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 provides:

> 112.—(1) This section applies to the disclosure in good faith, to a member of the Garda Síochána or to any person who is concerned in the investigation or prosecution of an offence of money laundering or terrorist financing, of—
>
> (a) a suspicion that any property has been obtained in connection with any such offence, or derives from property so obtained, or
>
> (b) any matter on which such a suspicion is based.
>
> (2) A disclosure to which this section applies shall not be treated, for any purpose, as a breach of any restriction on the disclosure of information imposed by any other enactment or rule of law.

[14.167] Section 112 provides legal comfort to a person making a disclosure of information by protecting the person from liability that might otherwise arise as a result of making such disclosure. Without such a statutory immunity, people may be discouraged from disclosing information in good faith, for fear that they might be in breach of the law or a restriction on disclosure contained in a law.

[14.168] A broader immunity provision is contained in section 14 of the Proceeds of Crime Act 1996 which protects banks, building societies, financial institutions and other

[232] Pomerance, "Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse" (2015) 16 Marquette Benefits & Social Welfare Law Review 439 at page 467.

persons from legal proceedings if they act to comply with orders under the Proceeds of Crime Act 1996:

> 14.—No action or proceedings of any kind shall lie against a bank, building society or other financial institution or any other person in any court in respect of any act or omission done or made in compliance with an order under [the Proceeds of Crime Act 1996].

[14.169] It is worth noting, however, that section 112 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and section 14 of the Proceeds of Crime Act 1996 were enacted before the GDPR came into effect on 25 May 2018. The GDPR and the Law Enforcement Directive[233] are given effect in Irish law by the Data Protection Act 2018 ("DPA 2018"). Most of the provisions of the DPA 2018 came into effect on 25 May 2018. Section 41(b) of the DPA 2018 allows for the processing of data for a purpose other than the original intended purpose if it is for the prevention, detection, investigation or prosecution of criminal offences. Section 19 of the Criminal Justice Act 2011 criminalises failure, without reasonable excuse, to share information with the Garda Síochána which a person knows or believes might be of material assistance in preventing, among other relevant offences, the commission of most of the offences contained in the Criminal Justice (Theft and Fraud Offences) Act 2001.

[14.170] It is important for there to be legal provision under which relevant personnel can be protected in taking measures, including information sharing, and that relevant personnel are empowered to share information with agencies other than the Garda Síochána in appropriate cases, for example with the HSE, the DSS or the Safeguarding Body.[234] The Commission believes that protection in taking steps, for example information sharing, could be included in the CBI's proposed Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations or the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations.

[14.171] The Commission notes that section 95A of the 2015 Act provides for regulations to be made by the Minister in consultation with the Data Protection Commission to provide for disclosure of information by the Director of the DSS to various persons and bodies (which are not limited to law enforcement authorities) where:

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[233] Directive (EU) 2016/680.

[234] In Chapter 5, the Commission discusses the functions, duties and powers of the Safeguarding Body.

(a) such disclosure is necessary to: (i) protect the vital interests of the relevant person or another person; (ii) protect and safeguard the interests of a relevant person or another person in relation to their treatment or care; or (iii) protect and safeguard the assets of a relevant person; and

(b) the Director comes into possession of information that discloses the actual or possible commission of a criminal offence.

[14.172] Section 95A(3) of the 2015 Act proposes that the regulations may provide for the sharing of "data relating to the prevention, detection, investigation or prosecution of criminal offences in relation to a relevant person where this is necessary for reasons of substantial public interest." The Commission believes that such regulations could usefully assist in safeguarding at-risk adults by allowing the Director of the DSS to share information with various persons and bodies.

R. 14.6 **The Commission recommends that** a statutory immunity should be introduced in primary or secondary legislation to clarify that no action shall lie against a regulated financial service provider or a branch manager, director, officer, employee, agent or other representative of a regulated financial service provider in respect of an action taken in good faith to safeguard an at-risk customer from actual or suspected financial abuse when there is knowledge or a reasonable belief that an at-risk customer is being, has been or is likely to be subject to financial abuse.

(f) Amendment of social welfare legislation to ensure consistency with the Assisted Decision-Making (Capacity) Act 2015, the United Nations' Convention on the Rights of Persons with Disabilities, and Council of Europe Recommendation (CM/Rec(2014)2) of the Committee of Ministers to Member States on the promotion of human rights of older persons

[14.173] Social welfare recipients are particularly at risk of financial abuse if they do not have the physical or decision-making capacity to collect social welfare payments themselves. The potential for agency arrangements to be used to commit financial abuse against at-risk adults is discussed in section 1(b)(i) of this Chapter. Such arrangements allow for the collection of social welfare payments on behalf of at-risk adults.

[14.174] In an Irish study published in 2010, rates of financial abuse were found to be highest among those whose only source of income was the minimum state

pension.[235] At-risk social welfare recipients are at further risk of financial abuse if they lack capacity to manage their own financial affairs. In such situations, a social welfare agent can be appointed to collect, or collect and manage, a person's social welfare payments. However, it must be acknowledged that the ability of one person to have control or management of another person's finances under an agency arrangement presents a risk for financial abuse to occur.

[14.175] There are two types of social welfare agents that can be appointed to assist in the collection of payments: type 1 and type 2 agents.[236] A type 1 arrangement allows an agent, with the consent of the social welfare recipient, for the recipient's payments to be collected and delivered to them by the agent in cases where the recipient is temporarily ill or has mobility issues.[237] A type 2 arrangement involves a certification by a medical practitioner that a social welfare recipient is unable to manage their own financial affairs and, depending on the circumstances, the agent may be directly responsible for managing the recipient's social welfare payments.[238]

[14.176] This section of this Chapter is concerned with type 2 agent arrangements. Agents are appointed pursuant to section 244 of the Social Welfare Consolidation Act 2005 ("2005 Act"), which provides for payments to persons other than the claimant or beneficiary. The Social Welfare (Consolidated Claims, Payments and Control Provisions) Regulations 2007 ("2007 Regulations") also apply.[239]

[14.177] The functional test for capacity under the 2015 Act assesses a person's ability to understand, at the time a decision is to be made, the nature and consequences of making that decision in the context of the available choices at that time. At the time of writing, type 2 agency arrangements are under review by a working group established by the Department of Social Protection to ensure that the full supports of the 2015 Act are available to a relevant person in nominating a social welfare agent and managing social welfare payments for the benefit of the

[235] Law Reform Commission, *A Regulatory Framework for Adult* Safeguarding (LRC IP 18–2019) at para 4.13.

[236] Law Reform Commission, *A Regulatory Framework for Adult* Safeguarding (LRC IP 18–2019) at paras 4.14 to 4.21.

[237] Department of Social Protection, *Safeguarding Vulnerable Adults 2017* (June 2017) at page 3.

[238] Department of Social Protection, *Safeguarding Vulnerable Adults 2017* (June 2017) at page 4.

[239] SI No 142 of 2007.

relevant person. At the time of writing, no recommendations have been published by the Department of Social Protection.

[14.178] The General Scheme of the Assisted Decision-Making (Capacity) Act (Amendment) Bill was published in November 2021,[240] and included a range of proposed amendments to the 2015 Act. While the General Scheme of the Bill included proposals to amend section 244(1) of the 2005 Act to provide that a person can nominate a social welfare agent with the assistance of a decision-making assistant or a co-decision-maker appointed in accordance with the 2015 Act, it did not contain any provisions for the nomination of a social welfare agent by a decision-making representative where decision-making supports would be insufficient to assist a person with making a decision. The Assisted Decision-Making (Capacity) (Amendment) Act 2022, as enacted, does not contain any provisions to make amendments to the 2015 Act which are relevant to social welfare agent arrangements.

[14.179] Regulation 201(1) of the 2007 Regulations provides that a person who has decision making ability may nominate a person over the age of 18 years to receive payment of benefit on their behalf with the consent of the Minister. Article 202(1)(b) provides that for an adult who is unable to manage their financial affairs and is certified by a registered medical practitioner, the Minister may appoint a person over the age of 18 years or a representative of an institution to receive the benefit, provided that the person is not a ward of court or has not appointed an attorney under an enduring power of attorney. The appointed person acts as an agent of the beneficiary of the payment. The Commission notes that consultees have highlighted the potential for financial abuse to occur when a person or a representative of an institution is appointed as an agent of an at-risk adult to receive a benefit on behalf of the at-risk adult.

[14.180] Regulation 202(1) of the 2007 Regulations provides that the Minister for Social Protection may appoint an agent to act on behalf of the claimant or beneficiary where the claimant or beneficiary is certified by a registered medical practitioner in the prescribed form to be a person who is unable for the time being to manage their own financial affairs.[241] The Commission believes that the functional

[240] Department of Children, Equality, Disability, Integration and Youth, Cabinet approves General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill (22 November 2021)<https://www.gov.ie/en/press-release/b952e-cabinet-approves-general-scheme-of-the-assisted-decision-making-capacity-amendment-bill/> accessed 9 April 2024.

[241] Social Welfare (Consolidated Claims, Payments and Control Provisions) Regulations 2007 (SI No 142 of 2007).

approach to decision-making capacity should be adopted in respect of determining whether a person may be deemed to require supports to manage their financial affairs. The Commission further believes that any relevant statutory instruments made under social welfare legislation should reflect the move from a medical approach to capacity to a functional approach to capacity.

[14.181] The Department of Social Protection can investigate any case of non-compliance with the legislative obligations by an agent and may cancel an agent arrangement. This may be difficult where the person lacks full decision-making capacity and may be unaware that there are issues with their finances due to the actions of an agent. Safeguarding Ireland note that of 208 cases brought to the Department of Social Protection's attention in 2020, 154 involved alleged financial abuse. In the majority of cases, the concerns related to alleged financial abuse by a family member of the social welfare recipient.[242] Financial abuse by social welfare agents may therefore go undetected or unreported within familial relationships. Unless a concern is raised with the Department of Social Protection, there are no investigations or proactive oversight because there is no monitoring or review of agency arrangements. There are no obligations in respect of investigating concerns related to at-risk adults in social welfare legislation. Some consultees noted the need for oversight of agency arrangements to ensure that financial abuse is not occurring and that recipients are receiving the entirety of the amount due to them.

[14.182] At the time of writing, it is unclear how agency arrangements should operate where a person requires decision-making supports, or whether existing arrangements should be revised in light of the 2015 Act. Where there are concerns about a person's decision-making capacity in relation to the management of their financial affairs, including social welfare payments, and there are no decision-making support arrangements in place under the 2015 Act, there is a lack of clarity with regard to whether an attorney, a decision-making assistant, co-decision-maker or decision-making representative should be appointed under the 2015 Act to provide decision-making supports, including the making of decisions in relation to social welfare payments as a social welfare agent.

[14.183] If appropriate, the incorporation of agent arrangements into the 2015 Act would give greater oversight of social welfare decisions and agent arrangements

[242] Safeguarding Ireland, *Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 65.

because decision-making assistants, co-decision-makers and decision-making representatives have clear obligations under the 2015 Act and relevant offences apply. Further oversight could be provided by means of the investigative powers of the Director of the DSS pursuant to section 96 of the 2015 Act. Section 15 of the 2015 Act provides for a duty on the Director to investigate a complaint regarding a decision-making assistant and sections 30, 47, 76 and 88 of the 2015 Act provide for a similar duty in respect of complaints in relation to co-decision makers, decision-making representative, attorneys and designated healthcare representatives respectively. If the Director decides not to investigate, the Director must provide written reasons for their decision, which can be appealed to the Circuit Court within 3 months of receipt of written reasons by the complainant.[243]

[14.184] Moreover, the Commission observes that both the 2005 Act and the 2007 Regulations predate the UNCRPD and the Council of Europe Recommendation (CM/Rec(2014)2) of the Committee of Ministers to Member States on the promotion of human rights of older persons ("Council of Europe Recommendation"), in particular the provisions on autonomy and participation in the Council of Europe Recommendation, which point to the need to update and reform the 2005 Act and the 2007 Regulations in line with the UNCRPD and the Council of Europe Recommendation. [244]

[14.185] In response to the Issues Paper, consultees made the following comments:

(a) the selection of persons, as provided for in the 2005 Act and the 2007 Regulations, do not comply with the requirements of the UNCRPD or the Council of Europe Recommendation to respect the autonomy of the person, to determine who they may wish to appoint, and to take account of their will and preferences;

(b) there is no obligation on the Minister under the 2005 Act to ensure that, in the appointment of agents, there are suitable persons to act and no conflict with the interests of the claimant or beneficiary. This contrasts with the provisions of the 2015 Act where the Circuit Court and the DSS must be satisfied on these matters in respect of any decision making supporter who is appointed under any of the arrangements provided in the 2015 Act;

[243] Sections 15(7), 30(7), 47(7) and 76(6B) of the Assisted Decision-Making (Capacity) Act 2015.

[244] UNCRPD; Council of Europe, *Recommendation (CM/Rec(2014)2) on the Promotion of Human Rights of Older Persons*<https://rm.coe.int/1680695bce> accessed on 9 April 2024.

(c) there is minimal, if any, safeguarding provisions or oversight of agents appointed under the provisions of the 2005 Act, which creates circumstances wherein financial abuse can occur. Although regulation 202A of the 2007 Regulations obliges an appointed agent "to act in the best interests of the claimant or beneficiary" to use the benefit or pension for the benefit of the claimant or beneficiary and to keep a record of transactions, there is, in practice, little or no oversight or review of such agents, and no procedures in place to ensure appointed agents comply with their obligations. According to consultees, the absence of such oversight leads to an unacceptable risk of financial abuse; and

(d) according to consultees, there is evidence of a high level of financial abuse in relation to State benefits and payments to at-risk adults. In some cases, the form of financial abuse can be described as an omission or failure to use the State payment to pay for the care of the person. In other cases, if the 80% portion of the payment is made for the purposes of the Fair Deal Scheme, there is an omission or failure to use the balance for the benefit of the person. Without any oversight, financial abuse is hidden because the perpetrator has control over the person's finances and is not obliged to make any returns.

[14.186] Having carefully considered consultees' submissions, the Commission recommends that the 2005 Act and the 2007 Regulations should be amended to ensure consistency with the 2015 Act and to enable the State to comply with its obligations under the UNCRPD and the Council of Europe Recommendation.

R. 14.7 **The Commission recommends that** the relevant provisions of the Social Welfare Consolidation Act 2005 and the Social Welfare (Consolidated Claims, Payments and Control Provisions) Regulations 2007 (SI No 142 of 2007) should be amended to ensure consistency with the Assisted Decision-Making (Capacity) Act 2015, the United Nations' Convention on the Rights of Persons with Disabilities, and Council of Europe Recommendation (CM/Rec(2014)2) of the Committee of Ministers to Member States on the promotion of human rights of older persons.

(g) The remit of the Safeguarding Body to receive and respond to reports of actual or suspected abuse or neglect of at-risk adults should apply to reports of actual or suspected financial abuse of at-risk adults

[14.187] Financial abuse can involve transactions using multiple accounts and RFSPs. It can therefore be difficult or impossible for an investigation by any one RFSP to uncover the full extent of the financial abuse. In some cases, social workers from

the HSE's Safeguarding and Protection Teams assist with, or coordinate, assessments of safeguarding concerns that include financial abuse. Representatives of the vulnerable customer teams of RFSPs with whom the Commission consulted spoke about having engaged with, and been supported by, the HSE's Safeguarding and Protection Teams. However, the Commission has received anecdotal evidence from some consultees that the practice of the HSE's Safeguarding and Protection Teams to assisting with, or addressing reports or allegations of, financial abuse can vary regionally due to a lack of formal powers, training specific to financial abuse, and resourcing.

[14.188] The Commission is aware that complex investigations of financial abuse have previously been undertaken by the Office of Wards of Court in cases where a person has been made a ward of court. The Commission also notes that the Director of the DSS can investigate reports or allegations of financial abuse using the investigative powers provided to the Director under section 96 of the 2015 Act. Section 15 of the 2015 Act provides for a duty on the Director to investigate a complaint regarding a decision-making assistant and sections 30, 47, 76 and 88 provide for a similar duty in respect of complaints in relation to co-decision-makers, decision-making representatives, attorneys and designated healthcare representatives respectively.

[14.189] The Commission observes that no organisation in Ireland has formal functions, obligations or powers to receive and undertake preliminary investigations of safeguarding concerns involving financial abuse more broadly, regardless of the identity of the alleged perpetrators or whether an at-risk adult needs decision-making support or has decision-making supports in place under the 2015 Act. The need for the Safeguarding Body[245] to have the remit to receive and respond to reports of actual or suspected abuse or neglect of at-risk adults is particularly significant, because the Office of Wards of Court has indicated that the Garda Síochána will take on cases of financial abuse only where there is already significant evidence of the commission of a criminal offence. The gathering of such evidence may require the exercise of powers of enquiry, relevant expertise and the investment of time and resources before a referral can be made to the Garda Síochána. If the Safeguarding Body had relevant functions and powers, it could receive reports and make enquiries in all cases.[246] The Safeguarding Body

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[245] In Chapter 5, the Commission discusses the functions, duties and powers of the Safeguarding Body.

[246] In Chapter 5, the Commission discusses the functions, duties and powers of the Safeguarding Body.

could also make referrals to the Garda Síochána where the necessary threshold for the commission of a criminal offence has been met, or to the DSS where preliminary enquiries indicate that the alleged victim needs decision-making supports.

[14.190] In its submission on the Issues Paper, the Department of Health stated that public service providers, such as the HSE, should have sufficient powers to undertake such preliminary investigations as would be required to refer a concern of financial abuse to the Garda Síochána.[247] It is essential that the Safeguarding Body has the remit and powers to receive and respond to reports of actual or suspected financial abuse. In Chapter 5, the Commission recommends that the Safeguarding Body should be conferred with statutory functions to, among others, promote the health, safety and welfare of at-risk adults who need support to protect themselves from harm at a particular time. Accordingly, the Commission recommends that the remit of the Safeguarding Body to receive and respond to reports of actual or suspected abuse or neglect of at-risk adults should apply to reports of all types of abuse, including actual or suspected financial abuse of at-risk adults.

R. 14.8 **The Commission recommends that** the remit of the Safeguarding Body to receive and respond to reports of actual or suspected abuse or neglect of at-risk adults should apply to reports of all types of abuse, including actual or suspected financial abuse of at-risk adults.

(h) Enactment of secondary legislation to clarify the financial procedures for the confirmation of fee arrangements in contracts for care between home support providers and service users

[14.191] Where a person is in receipt of home care services and dependent on others for their care, they may be particularly susceptible to financial abuse. Mechanisms should be implemented to prevent financial abuse. In its 2011 Report on Legal Aspects of Professional Home Care, the Commission recommended that a professional home care service provider should have policies and procedures in place for home care support workers on the safe handling of clients' money and property to prevent financial abuse.[248] The Commission endorsed provisions on

[247] Department of Health, *Law Reform Commission Issues Paper: A Regulatory Framework for Adult Safeguarding – A Response from the Department of Health* (2020) at page 15.

[248] Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at paras 2.62 and 2.63.

the prevention of financial abuse contained in the HSE's 2008 Draft National Quality Guidelines for Home Care Support Services and recommended that the policy and procedures of service providers should be based on those guidelines.[249] The Commission further recommended that the policies and procedures should be included in contracts for care provided by service providers to clients.[250]

[14.192] Where a person is in receipt of home care services, there should be transparency in relation to the fee arrangements for such services. In relation to the fee arrangements for the provision of home care services, the Commission recommended in its Report on Legal Aspects of Professional Home Care that the proposed national standards should set out that a contract for the provision of home care services should include specific provisions that outline, in plain and simple language, the fee arrangements between the contracting parties for the agreed services.[251]

[14.193] HIQA has referred to the approach towards the development and implementation of standards for formal home care as "fragmentary and devolved".[252] For example, HIQA identified that in 2008, the HSE agreed to develop national quality standards for formal home care services. Rather than being adopted, these standards were drafted into two other sets of standards relating to the tendering out of homecare packages and home help services delivered directly by the HSE.[253]

[14.194] In the HSE's Service 39 Service Arrangement Part 1 for providers funded by the HSE under section 39 of the Health Act 2004 and for Irish for-profit and commercial providers providing services and in receipt of funding from the HSE ("Part 1"), the HSE refers to HIQA's National Standards for Safer Better Healthcare and provides that service providers must comply with the standards and have in place appropriate mechanisms to assess quality and standards of the delivery of

[249] Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at para 2.63.

[250] Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at para 2.63.

[251] Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at para 2.102.

[252] HIQA, *Regulation of Homecare: Research Report* (2021) at page 25.

[253] HIQA, *Regulation of Homecare: Research Report* (2021) at page 25.

services in line with HIQA's National Standards. [254] Part 1 states that providers must comply with national guidelines in respect of the protection of "vulnerable adults" and comply with reporting procedures in respect of actual or suspected abuse.[255] Part 2 of the HSE's Service 39 Service Arrangements for providers funded by the HSE under section 39 of the Health Act 2004 and for Irish for-profit and commercial providers providing services and in receipt of funding from the HSE ("Part 2") states that providers must cooperate with the HSE in the implementation of the National Policy for Safeguarding Vulnerable Persons at Risk of Abuse. Part 2 notes that the HSE has undertaken a revision of the Safeguarding Vulnerable Persons at Risk of Abuse National Policy and Procedures (2014), that a revised policy, when implemented, will have an operational remit for all HSE and HSE-funded services, and that providers will be expected to be fully compliant with the revised policy.[256]

[14.195] Home and Community Care Ireland ("HCCI") is the national membership organisation for companies that provide a managed home care service in Ireland.[257] HCCI has published the HCCI Home Care Standards: National Standards for the Provision of Home Care Support Services ("Home Care Standards"), which set out requirements for the protection of persons from abuse or exploitation.[258] The Home Care Standards include a standard relating to financial transactions, which provides that essential, appropriate procedures are followed in all financial transactions undertaken on behalf of a client and a full

[254] HSE, Service 39 Service Arrangement Part 1 for providers funded by the HSE under section 39 of The Health Act 2004 (revised October 2022) at sections 24.2 and 24.3 <https://www.hse.ie/eng/services/publications/non-statutory-sector/section-39-service-arrangement-part-1-revised-october-2022.pdf> accessed on 9 April 2024; HSE, Service 39 Service Arrangement Part 1 for Irish for-profit and commercial providers providing services and in receipt of funding from the HSE (revised October 2022) at sections 20.2 and 20.3.

[255] HSE, Service 39 Service Arrangement Part 1 for providers funded by the HSE under section 39 of The Health Act 2004 (revised October 2022) at section 17.7(c); HSE, Service 39 Service Arrangement Part 1 for Irish for-profit and commercial providers providing services and in receipt of funding from the HSE (revised October 2022) at section 15.7(c).

[256] HSE, Home Support Authorisation Scheme 2023 Schedules (August 2023) at page 11 <https://www.hse.ie/eng/services/publications/non-statutory-sector/sa-home-support-authorisation-scheme-2023-schedules-tender-2023-.doc> accessed on 9 April 2024.

[257] Home and Community Care Ireland (HCCI), About HCCI (2022) <https://hcci.ie/about/> accessed on 9 April 2024.

[258] HCCI, *HCCI Home Care Standards: National Standards for the Provision of Home Care Support Services* (2018) at standard 4.0.

written record kept to safeguard a client and the client's care worker.[259] To become a member of HCCI, an organisation must undergo an independent audit to ensure they satisfy the Home Care Standards, which incorporate HSE standards and international best practice.[260]

[14.196] In its 2021 Regulation of Homecare: Research Report, HIQA identified that the abuse of service recipients was frequently cited as a significant risk.[261] HIQA stated that this generally related to physical, psychological and financial abuse.[262] HIQA found that respondents cited people who used homecare services as being vulnerable and identified the lack of standardisation and regulation as being a significant risk for such persons.[263]

[14.197] HIQA launched a scoping consultation for Draft National Standards for Homecare and Home Support Services in September 2021. HIQA is currently developing these draft national standards for organisations that provide home support services to complement primary and secondary legislation that is currently being developed by the government in furtherance of its commitment in the Programme for Government 2020.[264] National standards for home support services aim to promote progressive quality improvements in home support services and give a shared voice to the expectations of the public, service users, service providers and staff.[265] A further evidence review was published in May 2022 to inform the National Standards for Homecare and Home Support Services.[266]

[14.198] In line with the Programme for Government 2020, the heads of primary legislation on home care regulation are currently being prepared. The Commission's recommendations in its Report on Legal Aspects of Professional

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[259] HCCI, *HCCI Home Care Standards: National Standards for the Provision of Home Care Support Services* (2018) at standard 4.3.

[260] HCCI, HCCI Standards<http://hcci.ie/hcci-standards/> accessed on 9 April 2024.

[261] HIQA, *Regulation of Homecare: Research Report* (2021) at page 52.

[262] HIQA, *Regulation of Homecare: Research Report* (2021) at page 52.

[263] HIQA, *Regulation of Homecare: Research Report* (2021) at page 52.

[264] HIQA, *Regulation of Homecare: Research Report* (2021) at page 52.

[265] HIQA, HIQA launches scoping consultation for Draft National Standards for Home Support Services (2021) <https://www.hiqa.ie/hiqa-news-updates/hiqa-launches-scoping-consultation-draft-national-standards-home-support-services> accessed on 9 April 2024.

[266] HIQA, *Evidence review to inform the National Standards for Homecare and Home Support Services* (2022).

Home Care in December 2011 are currently being considered in the drafting of the heads of the Health (Amendment) (Licensing of Professional Home Support Providers) Bill. In June 2022, the Department of Health launched a public consultation on related draft regulations for providers of home support services.[267]

[14.199] The Commission recommended in its Report on Legal Aspects of Professional Home Care in December 2011 that a contract for the provision of home care should include specific provisions, in plain and simple language, which explain the fee arrangements between contracting parties for agreed services.[268] The Commission endorses the inclusion of a regulation on financial procedures in the draft regulations for home support service providers, including proposed requirements for service providers to provide itemised invoices, receipts and maintain payment records.[269] The Commission notes the feedback of consultees on the draft regulations, which emphasised the need for clarity on the applicability of the draft regulation on financial procedures to HSE-funded homecare packages and privately funded services.[270] The Commission endorses the proposals on limitations on fee increases and advance written notices of fee increases.

[14.200] In line with its previous recommendation in its Report on Legal Aspects of Professional Home Care in December 2011, the Commission recommends that provision should be made in secondary legislation to clarify the financial procedures for the confirmation of fee arrangements in contracts for care between home support providers and service users in order to allow for advance consideration of home support providers by potential service users and to provide financial certainty to potential service users.

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[267] Department of Health, *Public Consultation on Draft Regulations for Providers of Home Support Services* (16 June 2022), draft regulation 16 (financial procedures).

[268] Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011) at para 2.102.

[269] Department of Health, *Public Consultation on Draft Regulations for Providers of Home Support Services* (16 June 2022).

[270] Sheehan and O'Sullivan, *Draft Regulations for Providers of Home Support Services: An Overview of the Findings of the Department of Health's Public Consultation* (Institute of Public Health 2023) at pages 14 and 57.

R. 14.9 **The Commission recommends that** provision should be made in secondary legislation to clarify the financial procedures for the confirmation of fee arrangements in contracts for care between home support providers and service users in order to allow for advance consideration of home support providers by potential service users and to provide financial certainty to potential service users.

(i) Introduction and inclusion of a standard on the prevention of financial abuse by service providers in the National Standards for Homecare and Home Support Services

[14.201] While the Commission recognises that the HSE tender documentation for home care services include provisions related to the prevention of financial abuse and that HCCI has home care standards in place, the Commission is of the view that national standards applicable to all home care service providers—regardless of whether they are contracted by the HSE or not—are required in Ireland. The Commission welcomes the development by HIQA of the Draft National Standards for Homecare and Home Support Services. The Commission recommends the introduction of a standard on the prevention of financial abuse by service providers, and the inclusion of such standard in the National Standards for Homecare and Home Support Services.

R. 14.10 **The Commission recommends that** a standard in relation to the prevention of financial abuse by service providers should be introduced and included in the National Standards for Homecare and Home Support Services.

CHAPTER 15 COOPERATION

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1. Introduction

[15.1] Cooperation involves one body or provider of a relevant service to at-risk adults working together with other bodies or providers which, in the adult safeguarding context, can practically assist in safeguarding at-risk adults from harm. While cooperation encompasses information sharing, which is discussed in Chapter 16, it also includes shared decision-making and responsibility, the pooling of resources, and the sharing of expertise and best practice between bodies and providers of relevant services to at-risk adults. Effective multidisciplinary working and cooperation is at the core of ethical adult safeguarding.[1] Due to the multidisciplinary nature of adult safeguarding, cooperation in addressing and preventing adult safeguarding concerns is important to ensure effective and concerted action.

[15.2] This Chapter:

(a) discusses existing mechanisms and proposals for cooperation in Ireland;

(b) examines cooperation in transitional care arrangements in Ireland;

(c) explores cooperation in Scotland, England, Wales and Northern Ireland; and

(d) makes proposals for law reform, in particular the enactment of statutory duties to cooperate on the Safeguarding Body, certain public service bodies, and providers of relevant services to at-risk adults.[2]

2. Cooperation in Ireland

(a) Existing mechanisms for cooperation

[15.3] Existing cooperation arrangements in Ireland are either informal or underpinned by policy rather than legislation. Consultees who responded to the Issues Paper described existing arrangements as inadequately resourced and inconsistently implemented. As is often the case, the strength of collaboration can depend on individual relationships and local partnerships. Current cooperation arrangements in Ireland include memoranda of understanding and joint protocols, for example

[1] Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of How Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3690.

[2] See the relevant Part of the Commission's Adult Safeguarding Bill 2024 which contains provisions in relation to cooperation.

the memorandum of understanding between the Garda Síochána and the Health Service Executive ("HSE") on the removal of a person to, or the return of a person to, an approved centre in accordance with sections 13 and 27 of the Mental Health Act 2001 ("2001 Act"), and the removal of a person to an approved centre in accordance with section 12 of the 2001 Act.[3] Another example is the joint protocol for inter-agency collaboration between the HSE and the Child and Family Agency ("CFA") to promote the best interests of children and families.[4]

[15.4] While memoranda and joint protocols can be underpinned by policy, they can also be facilitated by the statutory functions of relevant bodies that permit or require bodies to cooperate with other bodies to achieve a statutory objective or perform a statutory function. For example, in the performance of its statutory functions, the HSE must have regard to the need to cooperate and coordinate its activities with other public bodies if the performance of its functions affects or could affect public health.[5] The statutory objective of HIQA is to promote safety and quality in the provision of health and personal social services for the benefit of the health and welfare of the public.[6] In undertaking its statutory functions, HIQA must have regard to the need to cooperate and coordinate its activities with public bodies which perform statutory functions that may affect or relate to its functions.[7] This provision for cooperation excludes cooperation by HIQA in the exercise of its functions which relate to the monitoring compliance with standards, conducting investigations, and advising relevant Government Ministers, the HSE and the CFA.[8] The Garda Síochána must cooperate, as appropriate, with Departments of State, agencies and bodies that have legal responsibility for any matter relating to any aspect of the statutory objective of the Garda Síochána.[9] The CFA is required to facilitate and promote enhanced cooperation to ensure that services for children are coordinated and provide an

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[3] An Garda Síochána and the HSE, *Memorandum of Understanding between An Garda Síochána and the HSE on Removal to or Return of a person to an Approved Centre in accordance with Section 13 & Section 27, and the Removal of a person to an Approved Centre in accordance with Section 12, of the Mental Health Act 2001* (September 2010) <https://www.hse.ie/eng/services/publications/mentalhealth/memo-of-understanding-between-hse-and-garda-.pdf> accessed on 7 April 2024.

[4] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) <https://www.hse.ie/eng/services/list/4/disability/progressing-disability/pds-programme/documents/hse-tusla-2020-joint-protocol-for-interagency-collaboration-between-the-hse-and-tusla.pdf> accessed on 7 April 2024.

[5] Section 7(5)(b) of the Health Act 2004.

[6] Section 7 of the Health Act 2007.

[7] Section 8(2)(b) of the Health Act 2007.

[8] Section 8(2)(b) of the Health Act 2007.

[9] Section 7(2) of the Garda Síochána Act 2005.

integrated response to the needs of children and their families.[10] At this juncture, it is worth noting, as discussed in Chapter 5, that no body has an existing statutory function to promote the health, safety and welfare of at-risk adults in Ireland.

[15.5] In submissions received in response to the Issues Paper, consultees stated that existing cooperation arrangements in Ireland are insufficient. In addition, consultees made the following submissions:

(a) current non-statutory policies and protocols for cooperation are unenforceable, which can lead to inconsistencies in adult safeguarding;
(b) there are limitations and uncertainty regarding the scope of data that can be shared between public bodies;
(c) a statutory duty to cooperate between bodies and agencies involved in adult safeguarding is necessary; and
(d) there is a lack of a statutory basis for transitional care arrangements from children's social care services to adult safeguarding services for young persons whom it is believed will or may fall under the definition of an "adult at risk of harm".11

(b) Proposed statutory duties and powers to cooperate

[15.6] The Policing, Security and Community Safety Bill 2023 was signed by the President of Ireland on 7 February 2024 and has accordingly become the Policing, Security and Community Safety Act 2024 ("2024 Act").[12] However, the 2024 Act has not yet commenced. A commencement order is required under section 1(2) of the 2024 Act. The 2024 Act imposes duties to cooperate on specified public service bodies and was drafted to implement recommendations in the 2018 Report of the Commission on the Future of Policing in Ireland.[13] Once

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[10] Section 8(8) of the Child and Family Agency Act 2013.

[11] "Adult at risk of harm" is defined in the Commission's Adult Safeguarding Bill 2024 as: "(a) a person who is not a child, and (b) by reason of their physical or mental condition or other particular personal characteristics or family or life circumstance (whether permanent or otherwise) needs support to protect himself or herself from harm at a particular time." "Child" is defined in the Adult Safeguarding Bill 2024 as "a person who has not attained the age of 18 years".

[12] President of Ireland, *President Higgins signs the Policing, Security and Community Safety Bill* 2023 (7 February 2024) <https://president.ie/en/media-library/news-releases/president-higgins-signs-the-policing-security-and-community-safety-bill-2023> accessed on 7 April 2024.

[13] Houses of the Oireachtas, *Explanatory Memorandum*: *Policing, Security and Community Safety Bill 2023* (19 January 2023) at page 1 <https://data.oireachtas.ie/ie/oireachtas/bill/2023/3/eng/memo/b0323d-memo.pdf> accessed on 7 April 2024; Commission on the Future of Policing in Ireland, *The Future of*

commenced, the 2024 Act will repeal the Garda Síochána Act 2005 in its entirety.[14]

[15.7] Section 9(1)(f) of the 2024 Act states that the function of the Garda Síochána is to provide policing services and security services, including vetting, for the State with the objective of preventing harm to individuals, "in particular individuals who are vulnerable or at risk".[15] Section 9(2) of the 2024 Act states that for the purpose of achieving the objective referred to in section 9(1), the Garda Síochána shall cooperate, as appropriate, with other Departments of State, agencies and bodies having, by law, responsibility for any matter relating to any aspect of that objective.

[15.8] There is an obligation on a "public service body" in section 118(3) of the 2024 Act which provides that public service bodies shall cooperate with each other, as appropriate, in the performance of their functions for the purposes of improving community safety, including through the prevention of crime and through the prevention of harm to individuals, in particular those who are vulnerable or at risk.

[15.9] Section 103 of the 2024 Act defines a "public service body" as the CFA, the Commissioners of Public Works in Ireland, a Department of State, an education and training board,[16] the Garda Síochána, the HSE, the Irish Prison Service, a local authority,[17] the Probation Service, or a body that has been designated under section 104 of the 2024 Act as a "public service body".

[15.10] Section 118(1) of the 2024 Act provides that public service bodies shall, in performing their functions, take all reasonable steps to improve community safety, including through the prevention of crime and through the prevention of harm to individuals, in particular those who are vulnerable or at risk. Section

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Policing in Ireland (September 2018) <https://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf> accessed on 7 April 2024.

[14] Schedule 1 to the Policing, Security and Community Safety Act 2024.

[15] Section 2(1) of the Policing, Security and Community Safety Act 2024 defines "at risk" as "an individual (including an individual aged under the age of 18 years) who is at risk, at a particular point in time, of harm and who requires, whether due to his or her personal characteristics or personal circumstances, assistance in protecting himself or herself from such harm at that time". Section 2(1) defines "vulnerable" as "an individual— (a) who is under the age of 18 years, or (b) whose capacity to guard himself or herself against harm by another individual is significantly impaired through— (i) a physical disability, illness or injury, (ii) a disorder of the mind, whether as a result of mental illness or dementia, or (iii) an intellectual disability".

[16] Established under section 9 of the Education and Training Boards Act 2013.

[17] Within the meaning of the Local Government Act 2001.

118(4) provides that the reference in section 118(3) to public service bodies being required to "cooperate" includes cooperating through the sharing of documents and information (including personal data within the meaning of the General Data Protection Regulation) in accordance with law and to the extent that it is necessary and proportionate for the purpose of the performance of the functions referred to in section 118(3) of the 2024 Act.

[15.11] Head 10 of the Child Care (Amendment) Bill 2023 proposes the enactment of powers to cooperate on relevant bodies.[18] In a Dáil Éireann debate on 28 February 2024, the Minister of State at the Department of the Taoiseach and at the Department of Health stated, in response to a question regarding the Government's Legislation Programme for Spring 2024, that the Child Care (Amendment) Bill 2023 is "a priority for publication".[19] The Bill is intended to revise and update current legislation on the welfare of children, in particular the Child Care Act 1991. The proposals in the Bill are aimed at enabling the cooperation of relevant bodies.[20] Head 10(1) of the Bill defines a "relevant body" as the CFA, a Department of State, the HSE, the Garda Síochána, a recognised school,[21] the National School for Special Education, a children detention school,[22] an early years services,[23] a Children and Young People's Services Committee,[24] a local authority,[25] a Local Community Development Committee[26] and a Local Community Safety Partnership.[27]

[15.12] Head 10(3) of the Bill states that a relevant body that has a statutory obligation to provide services to children or an eligible adult within the meaning of section 45 of the Child Care Act 1991, or is in receipt of public funding to provide services relating to the development, welfare and protection of children, may cooperate with another relevant body for the purpose of promoting the development,

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[18] Head 10 of the Heads and General Scheme of the Child Care (Amendment) Bill 2023 at page 21 <https://assets.gov.ie/254561/1b92fe3a-97b6-46e2-8db2-87f21b813db7.pdf> accessed on 7 April 2024.

[19] Dáil Éireann Debates 28 February 2024 vol 1050 no 4 <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2024-02-28/debate/mul@/main.pdf> accessed on 7 April 2024.

[20] Head 10(3) of the Heads and General Scheme of the Child Care (Amendment) Bill 2023 at page 22. The relevant bodies are set out in Head 10(1) of the Heads and General Scheme of the Child Care (Amendment) Bill 2023 at page 21.

[21] Within the meaning of the Education Act 1998.

[22] Within the meaning of the Children Act 2001.

[23] Within the meaning of section 58A of the Child Care Act 1991.

[24] To be established under Head 9 of the Child Care (Amendment) Bill 2023.

[25] Within the meaning of the Local Government Act 2001.

[26] Established pursuant to section 49A of the Local Government Act 2001.

[27] Established pursuant to the Policing, Security and Community Safety Act 2024.

welfare and protection of children or eligible adults, and such cooperation may include the sharing of relevant information. Head 10(4) clarifies that any cooperation by a relevant body with the CFA or another relevant body shall not remove or derogate from the responsibility of that relevant body to exercise or perform its statutory powers and duties. Head 10(5) states that relevant bodies may request information from each other. A relevant body that receives a lawful request for information must comply with such request and provide the other relevant body with such information and assistance as it may reasonably require.[28]

[15.13] In the Report on Pre-Legislative Scrutiny of the Child Care (Amendment) Bill 2023, the Joint Oireachtas Committee on Children, Equality, Disability, Integration and Youth recommended that Head 10 should be amended to make cooperation mandatory, not optional.[29] The Committee stated that the option to cooperate already exists, and without relevant bodies being bound by a duty to cooperate, Head 10 "does nothing new".[30] The Committee also favoured the extension of the duty to cooperate beyond information sharing to a broader obligation on agencies "to work together for children, including children with disabilities".[31] This is a noteworthy proposal, which is arguably transferable to the adult safeguarding context.

(c) Transitional care arrangements

[15.14] Transitional care arrangements provide an example of cooperation working well. Transitional care arrangements can refer to arrangements for young people as they move from the care of the State to aftercare, independent living, supported living or residential care. Transitional care arrangements can also be implemented when young people move from children's social care services to adult social care services, and are aimed at supporting young people through psychological, social

[28] Head 10(6) of the Child Care (Amendment) Bill 2023.

[29] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth, *Report on Pre-Legislative Scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023* (33/CDEI/15 June 2023) at pages 13 and 64 <https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_children_equality_disability_integration_and_youth/reports/2023/2023-06-28_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-a-child-care-amendment-bill-2023_en.pdf> accessed on 7 April 2024.

[30] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth, *Report on Pre-Legislative Scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023* (33/CDEI/15 June 2023) at page 57.

[31] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth, *Report on Pre-Legislative Scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023* (33/CDEI/15 June 2023) at page 65.

and educational adaptation from childhood to adulthood.[32] Such arrangements can also refer to supports for older people as they move from an acute hospital to independent living or nursing home care. These arrangements are an important form of preventative intervention because they can play a role in empowering adults and preventing safeguarding issues from arising.

[15.15] This Report considers transitional care arrangements for young people who have been in the care of the State as children or who received social care services, such as disability services, as a child and who will require supports from disability services, for example, when they reach adulthood. Consultees who responded to the Issues Paper highlighted the need for statutory provisions in relation to transitional care in Ireland.

[15.16] A failure to undertake adequate transitional care planning may result in at-risk adults falling through the cracks when they age out of children's services. In a number of cases in Ireland and the UK, failures in transitional care planning have resulted in significant safeguarding issues. In Ireland, such failures include the case of 'Mary', whose case was the subject of a review jointly commissioned by the HSE and the CFA.[33] The review examined the circumstances of 'Mary', a young adult with an intellectual disability, who was in receipt of services from both agencies and who continued to reside with her former foster family despite the coming to light of an allegation that her foster father had sexually abused two young girls within his extended family, one of whom was 'Mary'.[34] The allegation was found to be credible.[35] A decision was made to remove 'Mary'

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[32] Hall, *Transitions of Young People with Service and Care Needs Between Child and Adult Services in Scotland* (The Scottish Parliament 29 March 2019) at page 5 <https://bprcdn.parliament.scot/published/2019/3/29/Transitions-of-young-people-with-service-and-care-needs-between-child-and-adult-services-in-Scotland/SB%2019-15.pdf> accessed on 7 April 2024.

[33] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) <https://www.lenus.ie/bitstream/handle/10147/621253/CaseReviewMary.pdf?sequence=1&isAllowed=y> accessed on 7 April 2024.

[34] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) at page 6.

[35] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) at page 15.

from the home. But because she had already turned 18 years of age by this time, she was no longer under statutory care and no longer under the remit of the CFA. Therefore the powers used to remove foster children from homes were not available in her case.[36] Had there been a well-functioning process of cooperation between the HSE and the CFA for transitional care planning in relation to 'Mary', the two-year delay by the HSE in moving her to a residential care placement may have been prevented. The findings of the review stated that a clear and formal written referral from the CFA to the HSE could have contributed to the progression of her case and may have clarified the roles of both agencies.[37] The review also found that there was no shared understanding by the agencies on the referral pathways between the CFA, the HSE's Disability Services and voluntary service providers.[38]

[15.17] Regarding children who have been in the care of the CFA for specified periods, section 45(1) of the Child Care Act 1991 imposes a statutory duty on the CFA to prepare an aftercare plan for an "eligible child" [39] or "eligible adult"[40] which sets out the assistance that may be provided by the CFA to the eligible child (on or after they attain the age of 18 years) or the eligible adult. However, there are no statutory provisions requiring the cooperation of the CFA, the HSE and other relevant agencies when a child is transitioning from children's services more broadly to adult services that involve multiple agencies.

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[36] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) at page 15.

[37] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) at pages 7 and 54.

[38] HSE and the CFA, *Case Review Mary: A review jointly commissioned by the HSE and Tusla into the circumstances whereby a vulnerable young adult ("Mary") with an intellectual disability, in receipt of services from both agencies, continued to reside with a former foster family following a report being received of a retrospective allegation of abuse, which did not relate to residents in the foster home* (2017) at pages 7 and 54.

[39] Section 2(1) of the Child Care Act 1991 defines an "eligible child", subject to section 2(1C) and (1D), as "a child aged 16 years or over who—(a) is in the care of the [CFA] and has been in the care of the [CFA] for a period of not less than 12 months since attaining the age of 13 years, or (b) was in the care of the [CFA] for a period of not less than 12 months since attaining the age of 13 years but is no longer in the care of the [CFA]".

[40] Section 2(1) of the Child Care Act 1991 defines an "eligible adult", subject to section 2(1A) and (1B), as "a person aged 18, 19 or 20 years who was in the care of the [CFA] for a period of not less than 12 months in the 5 year period immediately prior to the person attaining the age of 18 years".

[15.18] There is a Joint Protocol between the HSE and the CFA which describes how both agencies work together to provide a person-centred pathway to meet the needs of children with complex disabilities and their families.[41] One of the principles underpinning the Joint Protocol is "managed transitions".[42] The transition from State care to aftercare or independent living for children and young people with complex disabilities is jointly managed to address their identified needs and provide continuity of care, with the commencement of planning on or before the child's sixteenth birthday.[43] The Joint Protocol between the HSE and the CFA also outlines how children in the care of the State can access disability services when they become 18.[44] The CFA's Local Aftercare Steering Committees manage aftercare planning.[45] The CFA, health service professionals and other service providers collaborate to plan for long-term and short-term supports for young people in care that may need access to adult safeguarding services.[46] The CFA recognises that cooperation is necessary to ensure the delivery of transitional care arrangements because some of the specialist services and expertise required are not available in the CFA.[47]

[41] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 1.

[42] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 3.

[43] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 3.

[44] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 3.

[45] CFA, *National Aftercare Policy for Alternative Care* (2017) at page 19. The CFA defines an "aftercare plan" as "a written plan that is prepared by the aftercare worker and the young person/young adult in conjunction with their social worker and other key people in their lives". Moreover, the CFA states that the aftercare plan "is based on the assessment of need and aims to outline clearly the supports required for the young person in their transition into adulthood". <https://www.tusla.ie/uploads/content/4248-TUSLA_National_Policy_for_Aftercare_v2.pdf> accessed on 7 April 2024.

[46] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 14.

[47] HSE and the CFA, *Joint Protocol for Interagency Collaboration Between the HSE and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (December 2020) at page 30.

3. Cooperation in Scotland, England, Wales and Northern Ireland

(a) Cooperation to safeguard "adults at risk" and "adults at risk and in need of protection"

[15.19] In Scotland, England and Wales, agencies and bodies work together on the basis of a statutory duty to cooperate to safeguard adults at risk and adults at risk and in need of protection. In Scotland, the duty requires specified bodies to cooperate with councils in adult safeguarding inquiries and investigations. In England and Wales, the duty to cooperate is part of social care legislation and involves the promotion of the wellbeing of adults at risk and the improvement of the quality of care and support provided to adults at risk.

(i) Scotland

[15.20] In Scotland, the collaborative efforts of social work services, health services, the Police Service of Scotland and other agencies have improved outcomes for at-risk adults.[48] As a result of cooperation, adults are safer and their lives have been improved.[49] The Adult Support and Protection (Scotland) Act 2007 ("2007 Act") provides that a council must make inquiries about a person's wellbeing, property or financial affairs if it knows or believes that the person is an "adult at risk"[50] and that it might need to intervene (by performing functions under Part 1 of the 2007 Act or otherwise) to protect the person's wellbeing, property or financial affairs.[51] The following public bodies and office-holders must, insofar as is consistent with the proper exercise of their functions, cooperate with a council making inquiries under section 4 of the 2007 Act and with each other, where such cooperation is likely to enable or assist the council making such inquiries:

(a) the Mental Welfare Commission for Scotland;
(b) the Care Inspectorate;

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[48] Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary in Scotland, *The Joint Inspection of Adult Support and Protection Interim Overview Report – Emerging Key Messages* (2022) at page 6 <https://www.careinspectorate.com/images/documents/6666/Joint%20inspections%20of%20adult%20support%20and%20protection%20overview%20report%202022.pdf> accessed on 7 April 2024.

[49] Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary in Scotland, *The Joint Inspection of Adult Support and Protection Interim Overview Report – Emerging Key Messages* (2022) at page 6.

[50] Section 3(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) defines "adults at risk" as "adults 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".

[51] Section 4 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

(c) Healthcare Improvement Scotland (“HIS”);
(d) the Public Guardian;52
(e) all councils in Scotland;
(f) the Chief Constable of the Police Service of Scotland;
(g) the relevant health board; and
(h) any other public body or office-holder as the Scottish Ministers may by order specify.53

[15.21] The proper exercise of their functions may include being bound by a duty of confidentiality.[54] These public bodies and office-holders are also obliged to make referrals to a council where they know or believe that a person is an adult at risk and that action needs to be taken (under Part 1 of the 2007 Act or otherwise) to protect that adult from harm.[55]

[15.22] Adult Protection Committees (“APC”) provide leadership, oversight and governance of adult support and protection.[56] APCs are comprised of representatives of HIS, the relevant health board, the chief constable of the Police Service of Scotland and any other public body or office-holder as the Scottish Ministers may by order specify.[57] The Care Inspectorate may nominate a representative to be a member of an APC.[58] The functions of APCs are: (a) to keep under review the procedures and practices of the public bodies and office-holders specified in section 42(3) of the 2007 Act;[59] (b) to give information or

[52] The Office of the Public Guardian in Scotland was created by the Adults with Incapacity (Scotland) Act 2000 (asp 4). It has a similar function to the Decision Support Service in Ireland. The Office of the Public Guardian maintains a public register of powers of attorney that have been registered and registers these powers. It also supervises people who have been appointed to manage the financial and property affairs of adults lacking capacity and investigate cases where the property or finances of an adult lacking capacity appear to be at risk.

[53] Sections 5(1) and (2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[54] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 27 <https://www.gov.scot/publications/adult-support-protection-scotland-act-2007-code-practice-3/> accessed on 7 April 2024.

[55] Section 5(3) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[56] Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary Scotland, *Definition of adult protection partnership* <https://www.careinspectorate.com/images/Adult_Support_and_Protection/1._Definition_of_adult_protection_partnership.pdf> accessed on 7 April 2024.

[57] Section 43(2) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[58] Section 43(3) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[59] Section 42(3) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) states that the public bodies and office-holders to which section 42 applies are the council, the Care Inspectorate, Healthcare Improvement Scotland, the relevant health board, the chief constable of the Police Service of Scotland and any other public body or office-holder as the Scottish Ministers may by order specify.

advice, or make proposals, to any public body and office-holder specified in section 42(3) on the exercise of functions which relate to the safeguarding of adults at risk present in the council's area; (c) 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 specified in section 42(3) who have responsibilities relating to the safeguarding of adults at risk present in the council's area; and (d) any other function relating to the safeguarding of adults at risk as the Scottish Ministers may by order specify.[60]

[15.23] APCs regulate their own procedures.[61] However, these procedures must allow a representative of the Mental Welfare Commission for Scotland, the Public Guardian, the Care Inspectorate (where it has not nominated a representative to be a member of the APC) and any other public body or office-holder as the Scottish Ministers may by order specify to attend APC meetings.[62]

[15.24] In Scotland, bodies work in partnerships to: (a) receive suspicions of adult protection concerns; (b) decide if such concerns require investigation; (c) investigate such concerns; (d) decide what actions are required to protect, support, involve and consult adults at risk; and (e) be responsible and accountable for the implementation of these actions.[63] These partnerships are known as adult support and protection partnerships ("ASPPs"). Typical partners in an ASPP are the local authority, the Police Service of Scotland, the relevant health board, APCs, voluntary organisations, the Fire and Rescue Service and local Trading Standards offices.[64]

[15.25] ASPPs are subject to joint inspection to ensure that adults at risk are supported and protected by existing adult support and protection arrangements.[65] Inspections are carried out by the Care Inspectorate, working jointly with His Majesty's Inspectorate of Constabulary in Scotland ("HMICS") and HIS.[66] The Care Inspectorate is a scrutiny body that can inspect any social service, the organisation or coordination of any social service, or the planning, organisation

[60] Section 42(1)(a)-(d) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[61] Section 44(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[62] Section 44(2)(a)-(d) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[63] Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary Scotland, *Definition of adult protection partnership*.

[64] Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary Scotland, *Definition of adult protection partnership*.

[65] Care Inspectorate, *Adult Support and Protection* <https://www.careinspectorate.com/index.php/joint-inspections/adult-support-and-protection> accessed on 7 April 2024.

[66] These bodies are undertaking this duty under section 115 of the Public Services Reform (Scotland) Act 2010 (asp 8). See also, Care Inspectorate, *Adult Support and Protection.*

or coordination of any social service.[67] The Care Inspectorate is the lead agency, but HMICS and HIS have lead responsibility for police and health issues respectively within the joint inspection framework.[68] HIS is under a duty to improve the quality of health care in Scotland, and can inspect any service provided under the health service.[69] HMICS is an independent scrutiny body that makes inquiries about matters relating to the Police Service of Scotland.[70]

[15.26] When examining an ASPP in Scotland, the Care Inspectorate, HIS and HMICS: (a) review the policies, procedures and practices of the ASPP; (b) examine referral handling, screening, investigation and management of adult protection concerns; (c) examine how effective and collaborative the ASPP's actions have been in securing sustained safety, protection and support for adults at risk; and (d) decide how good the leadership and governance of the ASPP is in the partnership area.[71]

[15.27] Beyond adult safeguarding, Scottish law imposes statutory duties to cooperate in social care. Local authorities shall cooperate with health boards, National Health Service trusts or other voluntary organisations that appear to the local authority to: (a) have an interest, power or duty in the provision of care and support services; (b) provide services designed to promote wellbeing and social development; and (c) provide assistance with travel.[72]

[15.28] There is a duty to cooperate in promoting the improvement of the physical and mental health of the people of Scotland, which is binding on the Scottish Ministers, health boards, the National Health Service of Scotland and HIS.[73] Moreover, there is a duty to cooperate in the planning and development of services for people with disabilities and persons aged 65 years or older.[74] Health Boards, HIS, National Health Service trusts, local authorities, integration joint boards and education authorities must consult with voluntary organisations that

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67 Section 53(1) of the Public Services Reform (Scotland) Act 2010 (asp 8).

68 Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary in Scotland, *Joint Inspection of Adult Support and Protection Phase 1: Frequently Asked Questions* (ASP-0220-002 2020) at page 2 <https://www.careinspectorate.com/images/documents/5549/Joint%20inspection%20of%20adult%20support%20and%20protection%20FAQs.pdf> accessed on 7 April 2024.

69 Sections 10A(1)(b) and 10I of the National Health Service (Scotland) Act 1978.

70 Section 74(1) of the Police and Fire Reform (Scotland) Act 2012 (asp 8).

71 Care Inspectorate, Healthcare Improvement Scotland and HM Inspectorate of Constabulary in Scotland, *Joint Inspection of Adult Support and Protection Phase 1: Frequently Asked Questions* (ASP-0220-002 2020) at page 2.

72 Section 30 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13).

73 Sections 1A(2) and 2A(2) of the National Health Service (Scotland) Act 1978. The Common Services Agency is the formal name for NHS National Services Scotland.

74 Section 13A(1)(a) of the National Health Service (Scotland) Act 1978.

may contribute substantially to these services, and must publish any joint plans made about these services.[75]

(ii) England

[15.29] The Care Act 2014 outlines how adult social care should be provided in England.[76] The Care Act 2014 places the duty to cooperate on a statutory footing, which applies to the provision of broad social care services and related duties and the protection of adults with needs for care and support. [77] The duty binds local authorities[78] and relevant partners.[79]

> Local authorities must also cooperate, in the exercise of their functions, with such other persons as they consider appropriate and who exercise functions or are engaged in activities in the authority's area which relate to adults with needs for care and support.[80] The local authority and its relevant partners must cooperate to:
>
> (a) promote the wellbeing of adults with needs for care and support;
> (b) improve the quality of care and support for adults;
> (c) smooth the transition for children to adult care and support;
> (d) protect adults with needs for care and support who are experiencing, or at risk of, abuse or neglect; and

[75] Sections 13A(1)(b) and 13A(1)(c) of the National Health Service (Scotland) Act 1978.

[76] Care Quality Commission, *The Care Act and the 'Easements' to It* (12 May 2022) <https://www.cqc.org.uk/guidance-providers/adult-social-care/care-act-easements-it> accessed on 7 April 2024.

[77] Sections 6 and 7 of the Care Act 2014 (England).

[78] Section 1(4) of the Care Act 2014 (England) states that "local authority" means "(a) a county council in England, (b) a district council for an area in England for which there is no county council, (c) a London borough council, or (d) the Common Council of the City of London".

[79] Section 6(7) of the Care Act 2014 (England) defines a "relevant partner" of a local authority as "(a) where the authority is a county council for an area for which there are district councils, each district council; (b) any local authority, or district council for an area in England for which there is a county council, with which the authority agrees it would be appropriate to co-operate under [section 6]; (c) each NHS body in the authority's area; (d) the Minister of the Crown exercising functions in relation to social security, employment and training, so far as those functions are exercisable in relation to England; (e) the chief officer of police for a police area the whole or part of which is in the authority's area; (f) the Minister of the Crown exercising functions in relation to prisons, so far as those functions are exercisable in relation to England; (g) a relevant provider of probation services in the authority's area; and (h) such person, or a person of such description, as regulations may specify".

[80] Section 6(2) of the Care Act 2014 (England).

(e) identify lessons to be learned from cases where adults with needs for care and support experienced serious abuse or neglect and apply those lessons to future cases.[81]

[15.30] Where cooperation is requested by a local authority or any of its relevant partners in a specific case of an adult with needs for care and support, the authority or relevant partner must comply with the request unless doing so would be incompatible with its duties or would have an adverse effect on the exercise of its functions.[82]

(iii) Wales

[15.31] The duty to cooperate in Wales has a similar scope to that which applies in England, in that it applies more generally to social care provision. The Social Services and Well-being (Wales) Act 2014 provides that a local authority in Wales must make arrangements to promote cooperation between itself, its relevant partners (when exercising its functions in relation to adults with needs for care and support) and such other persons or bodies as it considers appropriate, provided they exercise functions or are engaged in activities in relation to adults with needs for care and support.[83] The "relevant partners" of a local authority include:

(a) the local policing body and the chief officer of police for a police area, any part of which falls within the area of the local authority;
(b) any other local authority with which the authority agrees that it would be appropriate to cooperate;
(c) the Secretary of State to the extent that the Secretary is discharging functions under sections 2 and 3 of the Offender Management Act 2007 in relation to Wales;
(d) any provider of probation services that is required by arrangements under section 3(2) of the Offender Management Act 2007 to act as a relevant partner;
(e) local health boards;
(f) National Health Service Trusts;
(g) Welsh Ministers to the extent that they are discharging functions under Part 2 of the Learning and Skills Act 2000; and
(h) such person, or a person of such description, as regulations may specify.[84]

[81] Section 6(6)(a)-(e) of the Care Act 2014 (England).

[82] Section 7 of the Care Act 2014 (England).

[83] Section 162(1) of the Social Services and Well-being (Wales) Act 2014.

[84] Section 162(4)(a)-(h) of the Social Services and Well-being (Wales) Act 2014.

[15.32] Cooperation arrangements are made to: (a) provide staff, goods, services, accommodation or other resources; (b) establish and maintain a pooled fund; or (c) share information.[85] The aim of cooperative arrangements is to improve the wellbeing of adults with needs for care and support, to improve the quality of care and support for such adults, and to protect adults with needs for care and support who are experiencing, or at risk of, abuse or neglect.[86] If a local authority requests the cooperation of a relevant partner, another local authority, a local health board, a National Health Service Trust or a youth offending team in the exercise of its social services functions, they must comply with the request unless doing so would be incompatible with their duties or would have an adverse effect on the exercise of their functions.[87]

(iv) Northern Ireland

[15.33] There is currently no statutory duty to cooperate in adult safeguarding in Northern Ireland.[88] However, there is a duty on health and social care bodies, district councils, the Education Authority, the Northern Ireland Library Authority and the Northern Ireland Housing Executive to cooperate with one another to secure and advance the health and social welfare of the people of Northern Ireland.[89] Cooperation based on policies and protocols exists between the Police Service of Northern Ireland ("PSNI"), Health and Social Care Trusts and the Regulation and Quality Improvement Authority ("RQIA").[90]

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[85] Section 162(7)(a)-(c) of the Social Services and Well-being (Wales) Act 2014. Section 162(8) of the Act defines a "pooled fund" as "a fund — (a) which is made up of contributions by the authority and the relevant partner or partners concerned, and (b) out of which payments may be made towards expenditure incurred in the discharge of functions of the authority and its relevant partner or partners".

[86] Section 162(3)(a)-(c) of the Social Services and Well-being (Wales) Act 2014.

[87] Section 164(1) and (4) of the Social Services and Well-being (Wales) Act 2014.

[88] Commissioner for Older People for Northern Ireland, *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland Consultation – Response from the Commissioner for Older People for Northern Ireland* (2021) at page 11 <https://niopa.qub.ac.uk/bitstream/NIOPA/14290/1/copni-adult-protection-consultation-final-draft-formatted-1.pdf> accessed on 7 April 2024.

[89] Article 67 of the Health and Personal Social Services (Northern Ireland) Order 1972.

[90] Montgomery and McKee, "Adult Safeguarding in Northern Ireland: Prevention, Protection, Partnership" (2017) 19(4) The Journal of Adult Protection 199 at page 202. The relevant policies and protocols are the Adult Safeguarding Prevention and Protection in Partnership Policy and the Protocol for Joint Investigation of Adult Safeguarding Cases. Health and Social Care Trusts are the main providers of health and social care services to the public. The RQIA keeps the Department of Health, Social Services and Public Safety in Northern Ireland informed about the provision of health and personal social services, in particular about their availability and quality, and encourages improvement in the quality of services. The RQIA registers and inspects a wide range of health and social care services, and has a role in assuring the quality of services provided by Health and Social Care Trusts.

[15.34] In 2020, the Department of Health in Northern Ireland launched a consultation process about proposals to introduce an Adult Protection Bill in Northern Ireland. The Department agreed that it would be important to define the scope of the Bill so that key agencies across health and social care would know how and when they could work together, and the roles they could play to protect adults.[91] In the consultation document, the Department recognised that adult protection is not the responsibility of one agency alone and cannot be seen solely as a health and social care responsibility.[92]

[15.35] Following the consultation, the Department published its draft policy proposals for consideration by the relevant Minister and for inclusion in the proposed Adult Protection Bill. These proposals included a proposed duty to cooperate.[93] The proposed duty to cooperate binds Health and Social Care Trusts and their relevant partners, including the PSNI, Probation Board for Northern Ireland, RQIA, the Public Health Agency and independent providers commissioned or contracted to provide health and social care services.[94] Under the proposed Adult Protection Bill, they would be required to cooperate when the Health and Social Care Trust makes inquiries into a case where there is reasonable cause to suspect that an adult is an "adult at risk and in need of protection".[95] This is similar to the duty to cooperate in Scotland. This proposed statutory duty would also clarify what information can be shared between the relevant bodies and partners.[96] The

[91] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland: Consultation Document* (2020) at para 2.6 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/consultation-document-adult-protection-bill.pdf> accessed on 7 April 2024.

[92] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland: Consultation Document* (2020) at para 2.72.

[93] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at page 6 https://www.health-<ni.gov.uk/sites/default/files/consultations/health/adult%20protection%20bill-final%20policy%20proposals.pdf> accessed on 7 April 2024.

[94] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at page 6.

[95] Department of Health (Northern Ireland), *Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration* (2021) at page 6. This document defines an "adult at risk and in need of protection" as "(a) a person aged 18 or over; (b) whose exposure to harm through abuse, neglect or exploitation may be increased by their personal characteristics and/or life circumstances; (c) who is unable to protect their own well-being, property, assets, rights or other interests; and (d) where the action or inaction of another person or persons is causing, or is likely to cause, them to be harmed".

[96] Department of Health (Northern Ireland), *Legislative Options to Inform the Development of an Adult Protection Bill for Northern Ireland: Consultation Document* (2020) at para 2.81.

majority of consultees in Northern Ireland favoured the introduction of this proposed statutory duty to cooperate.[97]

(b) Transitional care arrangements in Scotland, England and Wales

(i) Scotland

[15.36] The Adult Support and Protection (Scotland) Act 2007 ("2007 Act") does not include a provision requiring relevant bodies to make transitional care arrangements. However, the Statutory Code of Practice accompanying the 2007 Act emphasises the importance of ensuring the implementation of transitional arrangements between child and adult protection services.[98] The Code of Practice emphasises the need for a case-by-case assessment when young people transition out of children's services.[99] APCs, in conjunction with Child Protection Committees and similar partnerships or authorities, should ensure that young people who are considered at risk of harm are identified at the earliest possible time and that appropriate support and protection is implemented during and after their transition to adult services.[100] Robust systems are required for the sharing of information and any necessary transfer of responsibilities between agencies and services.[101]

[15.37] When implementing post-school transition plans, education authorities are bound by a duty to seek and take account of relevant advice and information from other agencies.[102] At least 12 months before a child or young person with needs for additional support ceases receiving school education, education authorities must request from agencies any information concerning any provision which the agencies are likely to make for the child or young person on ceasing to receive school education.[103]

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[97] Department of Health (Northern Ireland), *Adult Protection Bill: Consultation Analysis Report* (2021) at page 9 <https://www.health-ni.gov.uk/sites/default/files/consultations/health/consultation%20documant-adult%20protection%20bill.pdf> accessed on 7 April 2024.

[98] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[99] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[100] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[101] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[102] Section 12(2) of the Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4).

[103] Sections 12(5) and 12(6) of the Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4).

(ii) England

[15.38] In England, section 58(1) 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 whether the child: (a) has needs for care and support after becoming 18 and, if so, what those needs are; and (b) is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be.[104]

(iii) Wales

[15.39] The Social Services and Well-being (Wales) Act 2014 does not specifically provide for assessment of a person's needs for care and support in the context of transitioning from children's services to adult social care and support services. The Social Services and Well-being (Wales) Act 2014 provides for needs assessments for children and adults, but does not contain a statutory provision similar to the provision contained in the Care Act 2014 in England.[105] A Code of Practice issued under the Social Services and Well-being (Wales) Act 2014 states that an individual's transition from a child to an adult constitutes a significant change in their circumstances and creates a right to a reassessment of their needs.[106]

[15.40] Guidance issued on a policy basis by the Welsh Government advises local health boards and National Health Service Trusts to engage with agencies and health services to ensure proactive planning for smooth transitions from children's services to adult services.[107] The guidance recommends a period of joint working up to and after the period of transition and handover to ensure continuity of care and accountability.[108] The guidance acknowledges that a child or young person may have multiple needs or complex conditions which require the assistance or

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[104] Section 58(3) of the Care Act 2014 (England) provides that "the consent condition is met if— (a) the child has capacity or is competent to consent to a child's needs assessment being carried out and the child does so consent, or (b) the child lacks capacity or is not competent so to consent but the authority is satisfied that carrying out a child's needs assessment would be in the child's best interests."

[105] Sections 19 and 21 of the Social Services and Well-being (Wales) Act 2014.

[106] Welsh Government, *Social Services and Well-being (Wales) Act 2014 – Part 3 Code of Practice (assessing the needs of individuals)* (2015) at para 95 <https://www.gov.wales/sites/default/files/publications/2019-05/part-3-code-of-practice-assessing-the-needs-of-individuals.pdf> accessed on 7 April 2024.

[107] Welsh Government, *The Transition and Handover Guidance* (February 2022) at page 18 <https://www.gov.wales/sites/default/files/publications/2022-02/transition-handover-guidance-children-adult-services_2.pdf> accessed on 7 April 2024.

[108] Welsh Government, *The Transition and Handover Guidance* (February 2022) at page 18.

support of multiple professionals, specialisms or agencies.[109] The guidance states that a coordinated approach to service provision achieves effective care for children or young persons, fosters good communication, engagement and continuity of care, and helps staff clearly understand their roles and responsibilities.[110]

4. Statutory proposals for cooperation in Ireland

(a) Enactment and imposition of statutory duties to cooperate on the Safeguarding Body, certain public service bodies and providers of relevant services in Ireland

(i) The need for statutory duties to cooperate in Ireland

[15.41] To ensure effective cooperation in preventing and addressing adult safeguarding concerns in Ireland, the Safeguarding Body, certain public service bodies and providers of relevant services must work together to share information, to share decision-making responsibilities, to pool resources and to share expertise and best practice. For example, shared decision-making and responsibility for service users' outcomes can bring about greater coordination, accountability and encourage more effective working.[111] In partnerships based on the Adult Support and Protection (Scotland) Act 2007, shared responsibility was found to have more positive overall outcomes[112] and to increase interprofessional cooperation and work efficiency, which made safeguarding more effective and made practitioners feel less isolated.[113] These positive overall outcomes were experienced by practitioners and service users.

[15.42] Cooperation undoubtedly has the potential to improve the outcomes of at-risk adults in Ireland. It stands to reason that planned collaborative interventions should operate more effectively and efficiently than disjointed and uncoordinated individual interventions. The introduction of a statutory duty to cooperate in adult safeguarding legislation in Ireland was favoured by consultees who responded to our Issues Paper. Consultees noted that such a duty would increase

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[109] Welsh Government, *The Transition and Handover Guidance* (February 2022) at page 18.

[110] Welsh Government, *The Transition and Handover Guidance* (February 2022) at page 18.

[111] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, "Voices From the Frontline: Social Work Practitioners' Perceptions of Multi-Agency Working in Adult Protection in England and Wales" (2008) 10(4) The Journal of Adult Protection 12 at page 15.

[112] Mackay, Notman, McNicholl, Fraser, McLaughlan and Rossi, "What Difference Does the Adult Support and Protection (Scotland) Act 2007 Make to Social Work Service Practitioners' Safeguarding Practice?" (2012) 14(4) The Journal of Adult Protection 197 at page 203.

[113] Mackay, Notman, McNicholl, Fraser, McLaughlan and Rossi, "What Difference Does the Adult Support and Protection (Scotland) Act 2007 Make to Social Work Service Practitioners' Safeguarding Practice?" (2012) 14(4) The Journal of Adult Protection 197 at page 204.

accountability and improve the efficiency, effectiveness and consistency of working arrangements between relevant bodies. Shared expertise has been identified as a benefit of cooperation.[114] In respect of adult safeguarding, a statutory duty to cooperate ensures that bodies adopt a shared approach to the resolution of adult safeguarding concerns. Such a duty also ensures that valuable lessons are shared by bodies. While a statutory duty to cooperate could arguably place an excessive time and resource burden on certain bodies, research conducted on Scotland's experience of cooperation in adult safeguarding found that partnerships between bodies are likely to remain at a partial level until there is a requirement for bodies to work together.[115]

[15.43] In England and Wales, there is a general duty to cooperate in adult social care legislation.[116] There is also a statutory duty in England to cooperate to facilitate the smooth transition of an individual from children's services to adult services.[117] In England, local authorities must carry out adult safeguarding inquiries when they reasonably suspect an adult with needs for care and support is, or is at risk of, being abused or neglected and is unable to protect themselves against the abuse or neglect, or risk of it, because of their needs.[118] Local authorities and their relevant partners must cooperate to protect adults with needs for care and support who are experiencing, or are at risk of, abuse or neglect.[119]

[15.44] Similarly in Wales, when local authorities have reasonable cause to suspect that an individual is an adult at risk, they must carry out inquiries to enable them to decide whether any action should be taken, and if so, what action and by whom.[120] In Wales, local authorities and their relevant partners are required to cooperate when protecting adults with needs for care and support who are experiencing, or are at risk of, abuse or neglect.[121]

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[114] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, *Partnership and Regulation in Adult Protection: The Effectiveness of Multi-Agency Working and the Regulatory Framework in Adult Protection* (Department of Health 2007) at page 37.

[115] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, *Partnership and Regulation in Adult Protection: The Effectiveness of Multi-Agency Working and the Regulatory Framework in Adult Protection* (Department of Health 2007) at pages 41 and 161.

[116] In England, the relevant provision is section 6 of the Care Act 2014. In Wales, the relevant provision is section 162 of the Social Services and Well-being (Wales) Act 2014.

[117] Section 6(6)(c) of the Care Act 2014 (England).

[118] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 14.76 <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance> accessed on 7 April 2024.

[119] Section 6(6)(d) of the Care Act 2014 (England).

[120] Section 126(2) of the Social Services and Well-being (Wales) Act 2014.

[121] Section 162(3)(c) of the Social Services and Well-being (Wales) Act 2014.

[15.45] In Scotland, the Adult Support and Protection (Scotland) Act 2007 introduced provisions to support adults at risk to safeguard their interests.[122] Scottish councils and relevant partners must cooperate to make inquiries about a person's wellbeing, property or financial affairs if they know or believe that the person is an adult at risk and they have reason to believe that intervention is necessary to protect their wellbeing, property or financial affairs.[123]

[15.46] The Commission believes that Ireland should mirror the approach taken in neighbouring jurisdictions and statutorily oblige the Safeguarding Body, certain public service bodies and providers of relevant services to cooperate with one another. The Commission considers that a general duty to cooperate in the provision of social care services would not be appropriately housed in adult safeguarding legislation in Ireland, because those in receipt of social care services may not necessarily require adult safeguarding services. Accordingly, the Commission believes that more specific duties to cooperate would be appropriate for adult safeguarding legislation. The Safeguarding Body, certain public service bodies and providers of relevant services can work collaboratively to address adult safeguarding concerns and share expertise, information and resources to fulfil their statutory duties to cooperate.

[15.47] Once commenced, section 9(2) of the Policing, Security and Community Safety Act 2024 ("2024 Act") will impose a duty on the Garda Síochána to cooperate, as appropriate, with other Departments of State, agencies and bodies having, by law, responsibility for any matter relating to any aspect of the objective of the Garda Síochána which includes the prevention of harm to individuals, in particular individuals who are "vulnerable or at risk".

[15.48] Section 118(3) of the 2024 Act imposes a duty on "public service bodies", as defined in section 103, to cooperate with each other, as appropriate, in the performance of their functions for the purposes of improving community safety, including through the prevention of crime and the prevention of harm to individuals, in particular those who are "vulnerable or at risk". While the 2024 Act neither defines "community safety" nor "harm", and the duty to cooperate is broad and lacks prescriptive detail, the introduction of such a statutory provision in Irish law is to be welcomed.[124]

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[122] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 10.

[123] Section 4 of the Adult Support and Protection (Scotland) Act 2007 (asp 10).

[124] Section 118(4) of the Policing, Security and Community Safety Act 2024 provides that "cooperation", as referred to in section 118(3), "includes" cooperating through the sharing of documents and information (including personal data within the meaning of the General Data Protection Regulation (GDPR)) in accordance with law and to the extent that is necessary and proportionate for the purpose of the performance of the functions referred to in section 118(3).

[15.49] Notwithstanding the duty to cooperate in the 2024 Act, the Commission believes that more specific duties to cooperate on the Safeguarding Body, certain public service bodies and providers of relevant services are required in Ireland because the duty in the 2024 Act does not apply to a number of bodies whose functions relate to adult safeguarding, for example HIQA and the Mental Health Commission ("MHC"). It is acknowledged that part (j) of the definition of "public service body" in section 103 of the 2024 Act provides for the future possibility that HIQA and the MHC could each be designated as a "public service body" under section 104 of the 2024 Act. However, the 2024 Act has not yet commenced. In the relevant Part of the Commission's Adult Safeguarding Bill 2024 which contains provisions in relation to cooperation, both HIQA and the MHC are expressly included in the definition of a "public service body".

(ii) Statutory function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions

[15.50] As outlined in paragraph 15.4 of this Chapter, HIQA, the Garda Síochána and the CFA cooperate with other agencies, as appropriate, in the exercise of their statutory functions or in furtherance of their statutory objectives. The Commission believes that adult safeguarding legislation should provide that it shall be a function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions. Regarding with whom the Safeguarding Body should cooperate and in relation to what matters, the Commission believes that the Safeguarding Body should have a statutory function to cooperate with "any person or body that it considers appropriate in relation to any matter connected to its functions".[125] Regarding the functions of the Safeguarding Body, the Commission believes that the functions of the Safeguarding Body should be:

(a) to promote the health, safety and welfare of at-risk adults who need support to protect themselves from harm;

(b) in relation to the function specified in paragraph (a)—

(i) to maintain and develop services, including regional services;

(ii) to carry on such activities, or publish such information, as it considers appropriate;

(iii) to undertake or commission research into such matters, or into such other matters as the relevant Minister may request;

[125] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which outlines the functions of the Safeguarding Body.

(iv) to collect, maintain and publish data on such matters;

(v) to provide training on such matters, or on such other matters as the relevant Minister may request; and

(vi) to provide information to the public on such matters, or on such other matters as the relevant Minister may request; and

(c) to provide information or advice, or make proposals, to the relevant Minister on matters relating to the functions of the Safeguarding Body.[126]

[15.51] The Commission is of the view that cooperation by the Safeguarding Body with any person or body that it considers appropriate in relation to any matter connected to its functions, in particular its function to promote the health, safety and welfare of adults at risk of harm who need support to protect themselves from harm at a particular time, has the potential to improve cooperation in the Irish adult safeguarding context. Accordingly, the Commission recommends that adult safeguarding legislation should provide that it shall be a function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions.

R. 15.1 **The Commission recommends that** adult safeguarding legislation should provide that it shall be a function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions.

(iii) Statutory duty on a public service body to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body

[15.52] To complement the proposed statutory function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions, the Commission recommends that adult safeguarding legislation should impose a statutory duty on a "public service body", when requested by the Safeguarding Body, to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body.[127]

[15.53] In response to the Issues Paper, some consultees favoured the enactment of a general statutory provision to require every public body to cooperate, as far as

[126] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which outlines the functions of the Safeguarding Body.

[127] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

practicable, with every other public body, where necessary for the purposes of safeguarding at-risk adults.[128] Having carefully considered consultees' views, the Commission believes that statutory duties to cooperate in adult safeguarding legislation should only apply to certain public service bodies that are most likely to be involved in adult safeguarding in Ireland. The creation of a duty to cooperate on certain public service bodies would ensure legal certainty because such bodies would be under a duty to cooperate and provide mutual assistance. The statutory provision should expressly state that the duty can be extended to any other body or office-holder as the relevant Minister may specify in regulations. For the purposes of this statutory duty in adult safeguarding legislation, the Commission believes that each of the following bodies should be a "public service body":

(a) the CFA;
(b) a Department of State;
(c) the Director of the Decision Support Service;
(d) the Garda Síochána;
(e) the Domestic, Sexual and Gender-Based Violence Agency, commonly referred to as Cuan;129
(f) the HSE;
(g) HIQA;
(h) the International Protection Accommodation Services, under the authority of the Minister for Children, Equality, Disability, Integration and Youth;
(i) the MHC;
(j) the Policing and Community Safety Authority; and
(k) a body designated as a "public service body" under the relevant Part of the Commission's Adult Safeguarding Bill 2024 which contains provisions in relation to cooperation.

[15.54] The imposition of this statutory duty could ensure that the CFA, as a "public service body", when requested by the Safeguarding Body, must cooperate with the Safeguarding Body in the performance of a function of the Safeguarding Body, for example the promotion of the health, safety and welfare of at-risk adults who need support to protect themselves from harm at particular times,

[128] Department of Health, *Law Reform Commission Issues Paper: A Regulatory Framework for Adult Safeguarding – A Response from the Department of Health* (August 2020) at page 35 <https://assets.gov.ie/83566/8594f084-fe09-4e55-80a9-ccbeac1075cd.pdf> accessed on 7 April 2024.

[129] The legal name of the body is "An Ghníomhaireacht um Fhoréigean Baile, Gnéasach agus Inscnebhunaithe". See section 5(1) of the Domestic, Sexual and Gender-Based Violence Agency Act 2023. The whole Act commenced on 31 December 2023 pursuant to article 2 of the Domestic, Sexual and Gender-Based Violence Agency Act 2023 (Commencement) Order 2023 (SI No 667 of 2023).

and the maintenance and development of services, for example services provided to young people who are transitioning from children's services to adult services.[130] If the Safeguarding Body made a request to the CFA pursuant to this duty, the CFA would be obliged to cooperate with the Safeguarding Body in the performance of the functions mentioned above, which would entail notification to the Safeguarding Body, in advance of a child attaining 18 years of age, where the CFA has reasonable grounds to believe that the child, who is at risk of harm, will become an at-risk adult and require a safeguarding plan as part of any care planning.

[15.55] This statutory duty could be complemented by the statutory authority proposed in section 4(b) of this Chapter, where the Commission recommends that adult safeguarding legislation should provide that in circumstances where, on the basis of information reported or available to the Safeguarding Body, an authorised officer of the Safeguarding Body believes, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult, the Safeguarding Body should be able to take whatever action it deems necessary to safeguard the at-risk adult, which should include, but should not be limited to, cooperating with other agencies to develop a safeguarding plan to safeguard the at-risk adult.

[15.56] The Commission believes that the statutory authority to take such action and cooperate with other agencies, such as the CFA, to develop safeguarding plans could facilitate the cooperation and development of transitional care arrangements for young people who have been in the care of the State as children, or who have received social care services as a child, and who will or may become at-risk adults and receive adult services when they turn 18.

R. 15.2 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a public service body, when requested by the Safeguarding Body, to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body.

(iv) Statutory duty on a public service body to cooperate with another public service body for the purpose of the performance of a function of the public service body

[15.57] The Commission also recommends adult safeguarding legislation should impose a statutory duty on a public service body, when requested by another public service body, to cooperate with such body for the purpose of the performance of a function of that public service body which relates to safeguarding the health,

[130] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which outlines the functions of the Safeguarding Body.

safety or welfare of an at-risk adult.[131] This would complement the proposed statutory duty on a public service body to cooperate with the Safeguarding Body, when requested by the Safeguarding Body, for the purpose of the performance of a function of the Safeguarding Body,

[15.58] The application of this statutory duty in respect of a "public service body" could ensure that relevant information is shared between public service bodies where a safeguarding issue arises in respect of an adult who was in receipt of children's services where there are no transitional care arrangements in place. The broadness of this duty, relating as it does to "a function" of a public service body which "relates to safeguarding the health, safety or welfare of an adult at risk of harm", affords the possibility that such a duty may, depending on the particular adult safeguarding situation, extend to the prevention of care and support needs or the prevention of safeguarding issues. Such a duty may require the HSE or the CFA, as public service bodies, to take proactive measures to ensure that adequate arrangements are in place when a child with complex disabilities is transitioning from children's services to adult services and will or may, upon such transition, become an at-risk adult. The proposed statutory duty on public service bodies to cooperate with other public service bodies would assist in filling the gap caused by the lack of statutory provisions for transitional care arrangements in Ireland.

R. 15.3 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a public service body, when requested by another public service body, to cooperate with that body for the purpose of the performance of a function of that body which relates to safeguarding the health, safety or welfare of an at-risk adult.

(v) Statutory duty on a public service body to cooperate with a provider of a relevant service where there is a risk to the health, safety or welfare of an at-risk adult

[15.59] Finally, the Commission recommends that adult safeguarding legislation should impose a statutory duty on a public service body, when requested by a "provider of a relevant service", to cooperate with that provider where such provider is of the opinion, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult that is caused by abuse, neglect or ill-treatment.[132] This would complement the proposed statutory duties on a public service body to cooperate with the Safeguarding Body and other public service bodies.

[131] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

[132] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

[15.60] For the purposes of this proposed statutory duty, the Commission believes that the terms "relevant service" and a "provider of a relevant service" should be defined in adult safeguarding legislation in the same manner as such terms are defined in the Commission's Adult Safeguarding Bill 2024.

R. 15.4 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a public service body, when requested by a provider of a relevant service, to cooperate with that provider where such provider is of the opinion, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult that is caused by abuse, neglect or ill-treatment.

(vi) Statutory duty on a provider of a relevant service to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body

[15.61] To complement the proposed statutory function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions, the Commission recommends that adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by the Safeguarding Body, to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body.[133] Similar to the imposition of the other statutory duties recommended in this Chapter, the Commission believes that the imposition of this duty has the potential to improve cooperation in the Irish adult safeguarding context.

R. 15.5 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by the Safeguarding Body, to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body.

(vii) Statutory duty on a provider of a relevant service to cooperate with a public service body for the purpose of the performance of a function of the public service body

[15.62] The Commission recommends that adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by a public service body, to cooperate with that body for the purpose of the performance of a function of that body which relates to safeguarding the health, safety or welfare

[133] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

of an at-risk adult.[134] This would complement the proposed statutory duty on a provider of a relevant service to cooperate with the Safeguarding Body for the purpose of the performance of a function of the Safeguarding Body. Similar to the imposition of the other statutory duties recommended in this Chapter, the Commission believes that the imposition of this duty has the potential to improve cooperation in the Irish adult safeguarding context.

R. 15.6 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by a public service body, to cooperate with that body for the purpose of the performance of a function of that body which relates to safeguarding the health, safety or welfare of an at-risk adult.

(viii) Statutory duty on a provider of a relevant service to cooperate with another provider of a relevant service where there is a risk to the health, safety or welfare of an at-risk adult

[15.63] To complement the proposed statutory duties on a provider of a relevant service to cooperate with the Safeguarding Body and a public service body, the Commission believes that adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by another provider of a relevant service, to cooperate with that provider where such provider is of the opinion, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult that is caused by abuse, neglect or ill-treatment.[135] Similar to the imposition of the other statutory duties recommended in this Chapter, the Commission believes that the imposition of this duty has the potential to improve cooperation in the Irish adult safeguarding context.

[134] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

[135] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which relates to cooperation for the performance of functions.

R. 15.7 **The Commission recommends that** adult safeguarding legislation should impose a statutory duty on a provider of a relevant service, when requested by another provider of a relevant service, to cooperate with that provider where such provider is of the opinion, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult that is caused by abuse, neglect or ill-treatment.

(ix) Requirements for effective implementation of duties to cooperate

[15.64] The sharing of skills, expertise and best practice is a key benefit of cooperation.[136] A lack of resources and clarity about the roles and responsibilities of bodies can negatively impact on cooperative partnerships,[137] which can contribute to delayed decision-making and perpetuate the view of some bodies that adult safeguarding is time-consuming and difficult to coordinate.[138] HIQA has criticised the non-statutory policies, joint working protocols and memoranda of understanding, and highlighted the challenge of enforcement in the absence of statutory underpinning and adequate resourcing:

> there are limitations to the scope within which information can be shared and public bodies do not have a clear and transparent framework that facilitates such sharing and enhances cooperation. Compliance with informal arrangements can also be compounded by inadequate resource allocation, insufficient training and awareness of adult safeguarding issues and poor or ineffective leadership, accountability and oversight. Cooperation can sometimes be dependent on the development of good working relationships at a local level. These issues have resulted in the adoption of inconsistent practices from region to region and have led to a lack of clarity on who has responsibility for the development, implementation and oversight of appropriate safeguarding plans. HIQA believes that current non-statutory

[136] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, *Partnership and Regulation in Adult Protection: The Effectiveness of Multi-Agency Working and the Regulatory Framework in Adult Protection* (Department of Health 2007) at page 37.

[137] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, "Voices From the Frontline: Social Work Practitioners' Perceptions of Multi-Agency Working in Adult Protection in England and Wales" (2008) 10(4) The Journal of Adult Protection 12 at page 16. See also, Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, *Partnership and Regulation in Adult Protection: The Effectiveness of Multi-Agency Working and the Regulatory Framework in Adult Protection* (Department of Health 2007) at page 41.

[138] Pinkney, Penhale, Manthorpe, Perkins, Reid and Hussein, *Partnership and Regulation in Adult Protection: The Effectiveness of Multi-Agency Working and the Regulatory Framework in Adult Protection* (Department of Health 2007) at page 42.

interagency protocols do not ensure a transparent and accountable multi-agency cooperation to adult safeguarding and fail to effectively promote a preventative approach to adult safeguarding.[139]

[15.65] It is important that the Safeguarding Body, a "public service body" and a "provider of a relevant service" who are subject to duties to cooperate in adult safeguarding legislation in Ireland are adequately resourced to effectively share their skills and expertise with other public service bodies and providers of relevant services. The Commission believes that the publication of a statutory code of practice, as an accompaniment to adult safeguarding legislation, could provide practical guidance to the Safeguarding Body, public service bodies and providers of relevant services on how to comply with their duties to cooperate.

(b) Statutory authority of the Safeguarding Body to cooperate with other agencies to develop a safeguarding plan to safeguard at-risk adults

[15.66] In addition to the recommendation in section 4(a)(ii) of this Chapter that adult safeguarding legislation should provide that it shall be a function of the Safeguarding Body to cooperate with any person or body that it considers appropriate in relation to any matter connected to its functions, the Commission recommends that in circumstances where, on the basis of information reported or available to the Safeguarding Body, an authorised officer of the Safeguarding Body believes, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult, the Safeguarding Body should be able to take whatever action it deems necessary to safeguard the at-risk adult. This should include, but should not be limited to, cooperating with other agencies to develop a safeguarding plan to safeguard the at-risk adult.[140]

[15.67] The Commission believes that the statutory authority to take such action and cooperate with other agencies, such as the CFA, to develop safeguarding plans could facilitate the cooperation and development of transitional care arrangements for young people who have been in the care of the State as children, or who have received social care services as a child, and who will or may become at-risk adults and receive adult services when they turn 18.

[139] HIQA, *Law Reform Commission Issues Paper 'A Regulatory Framework for Adult Safeguarding' – Response by the Health Information and Quality Authority (HIQA)* (29 May 2020) at page 52 <https://www.hiqa.ie/sites/default/files/2020-06/HIQA-Response-LRC-Issues-Paper.pdf> accessed on 7 April 2024.

[140] See the relevant section of the Commission's Adult Safeguarding Bill 2024 which outlines the authority of the Safeguarding Body to carry out safeguarding functions.

R. 15.8 **The Commission recommends that** adult safeguarding legislation should provide that in circumstances where, on the basis of information reported or available to the Safeguarding Body, an authorised officer of the Safeguarding Body believes, based on reasonable grounds, that there is a risk to the health, safety or welfare of an at-risk adult, the Safeguarding Body should be able to take whatever action it deems necessary to safeguard the at-risk adult which should include, but should not be limited to, cooperating with other agencies to develop a safeguarding plan to safeguard the at-risk adult.

(c) Oversight of cooperation

[15.68] Consultees who responded to the Issues Paper agreed that oversight of cooperation is necessary in the Irish adult safeguarding context. Furthermore, consultees favoured an independent, overarching oversight body to, among other statutory functions, promote the health, safety and welfare of at-risk adults who need support to protect themselves from harm at particular times.

[15.69] Issues surrounding a dual oversight mechanism were raised by the Garda Síochána in its submission on the General Scheme of the Policing, Security and Community Safety Bill which was appended to the Report of the Joint Committee on Justice on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill.[141] One of the main purposes of the Policing, Security and Community Safety Act 2024 ("2024 Act") is to make community safety a whole-of-government responsibility.[142] In the context of cooperation to improve community safety, section 103 of the 2024 Act defines a "public service body" as the CFA, the Commissioners of Public Works in Ireland, a Department of State, an education and training board,[143] An Garda Síochána, the HSE, the Irish Prison Service, a local authority,[144] the Probation Service or a body that has been designated under section 104 of the 2024 Act as a "public service body".

[141] See para 2.4.25.4 of the submission of the Garda Síochána on the General Scheme of the Policing, Security and Community Safety Bill (Version No: 0.03 August 2021) at Appendix 2, page 335 of the Houses of the Oireachtas, Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill* (33/JC/20 June 2022) <https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2022/2022-06-01_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-policing-security-and-community-safety-bill_en.pdf> accessed on 7 April 2024.

[142] Houses of the Oireachtas, *Explanatory Memorandum*: *Policing, Security and Community Safety Bill 2023* (19 January 2023) at page 1. Chapter 20 of this Report addresses the need for a whole-of-government approach to adult safeguarding.

[143] Established under section 9 of the Education and Training Boards Act 2013.

[144] Within the meaning of the Local Government Act 2001.

[15.70] The Garda Síochána has stated that all cooperation issues should be addressed in one forum.[145] Prior to the enactment of the 2024 Act, the Garda Síochána noted the impracticalities of a dual oversight mechanism and suggested that all matters relating to cooperation in the delivery of community safety should come within the remit of a steering group.[146] However the 2024 Act, as enacted, does not appear to place all matters relating to cooperation in the delivery of community safety within the remit of a steering group.

[15.71] Section 107(1) of the 2024 Act provides that as soon as may be after coming into operation of that section, the Minister for Justice shall establish a National Community Safety Steering Group ("Steering Group") to, among other things, promote and monitor compliance by public service bodies with their duties under the 2024 Act, which include the taking of all reasonable steps to improve community safety and cooperation with each other in the performance of their functions to improve community safety, including through the prevention of crime and harm to individuals, in particular those who are "vulnerable or at risk".[147]

[15.72] Section 121(1) of the 2024 Act provides that the Policing and Community Safety Authority ("Authority") shall stand established on the establishment day under the 2024 Act to perform the functions conferred on it by or under the 2024 Act or any other enactment. Notably, section 122(2)(m) and (n)(ii) of the 2024 Act provide that the Authority shall have the functions to promote, and to promote improvements in, inter-agency collaboration and community engagement to improve community safety.

[15.73] Based on the foregoing, it appears that under the 2024 Act, as enacted, certain matters relating to community safety come within the remit of the Steering Group and certain other matters relating to community safety come within the remit of the Authority.

[145] See para 2.4.25.3 of the submission of the Garda Síochána on the General Scheme of the Policing, Security and Community Safety Bill (Version No: 0.03 August 2021) at Appendix 2, page 335 of the Houses of the Oireachtas, Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill* (33/JC/20 June 2022) Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill* (33/JC/20 2022).

[146] See para 2.4.25.4 of the submission of the Garda Síochána on the General Scheme of the Policing, Security and Community Safety Bill (Version No: 0.03 August 2021) at Appendix 2, page 335 of the Houses of the Oireachtas, Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill* (33/JC/20 June 2022) Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill* (33/JC/20 2022).

[147] Section 118(1) and (3) of the Policing, Security and Community Safety Act 2024.

[15.74] Chapter 20 addresses the need for a whole-of-government approach to adult safeguarding. The establishment of an interdepartmental steering group to give effect to a whole-of-government approach to adult safeguarding is discussed therein. The Commission recommends that such a group, with members from the Department of Health,[148] the Department of Justice,[149] the Department of Children, Equality, Disability, Integration and Youth,[150] the Department of Social Protection[151] and the Department of Housing, Local Government and Heritage, should be established under adult safeguarding legislation and should function to give effect to a whole-of-government approach to adult safeguarding. These Departments have responsibility for a number of key agencies which, as proposed in this Chapter, should be subject to duties to cooperate in the Irish adult safeguarding context. The proposed interdepartmental steering group should provide oversight of cooperation in this context.

[148] The Department of Health has policy responsibility for health and social care services, including services for older people, people with a disability, palliative care, dementia care and mental health services. See Department of Health, *Statement of Strategy 2023-2025* (20 December 2023) at pages 3 to 7 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/279506/54546e50-c027-49ec-9992-bf8b17645774.pdf#page=null> accessed on 7 April 2024.

[149] The Department of Justice has lead responsibility for public policy in respect of the security of the State and public safety, including the prevention and detection of crime. This includes policy responsibility for the Garda Síochána. See Department of Justice, *Organisation Information: Crime and Security Division* (3 February 2022) <https://www.gov.ie/en/organisation-information/0c388-crime-and-security-division/#:~:text=The%20role%20of%20the%20Crime,and%20develop%20more%20secure%20communities> accessed on 7 April 2024. As aforementioned, section 9(1)(f) of the Policing, Security and Community Safety Act 2024 provides that one of the objectives of the Garda Síochána is to prevent harm to individuals, in particular individuals who are "vulnerable" or "at risk".

[150] The Department of Children, Equality, Disability, Integration and Youth has responsibility for oversight and development of the CFA. See the definition of "Minister" in section 2 of the Child and Family Agency Act 2013; Department of Children, Equality, Disability, Integration and Youth, *Organisation Information: Child Policy and Tusla Governance Division* (31 July 2019) <https://www.gov.ie/en/organisation-information/ff74cd-child-policy-and-tusla-governance-division/> accessed on 7 April 2024.

[151] The Department of Social Protection has responsibility for promoting active participation and inclusion in society through the provision of income supports, employment services and other services. It acts on any reports it receives of alleged abuse of its pension/benefit recipients, consulting or involving as appropriate other relevant agencies such as the HSE or the Garda Síochána. Investigations of alleged abuse are coordinated by the Safeguarding Unit in the Department of Social Protection. See Department of Social Protection, *Organisation Information: About the Department of Social Protection (DSP)* (16 May 2023) <https://www.gov.ie/en/organisation-information/c08a36-about-the-department-of-employment-affairs-and-social-protection/> accessed on 7 April 2024.

R. 15.9 **The Commission recommends that** an interdepartmental steering group should be established on a statutory basis to provide oversight of cooperation in the adult safeguarding context.

(d) Transitional care arrangements

(i) The need for statutory provision for transitional care arrangements in Ireland

[15.75] In Ireland, the management of transitions from State care to aftercare or independent living between the CFA and the HSE is currently underpinned by a Joint Protocol rather than by legislation. The Joint Protocol focuses on children and young people with "complex disability" which is defined as moderate-to-severe or enduring physical, sensory, mental health or intellectual impairment. These transitional care arrangements are managed by the CFA's Local Aftercare Steering Committees.

[15.76] In submissions received in response to the Issues Paper, consultees stated that there should be statutory provision for transitional care arrangements for persons transitioning between children's services and adult services. It was suggested that a statutory duty would encourage greater consistency in care which would manifest on the national level because all agencies specified in the legislation would have to follow the same approach to transitional care arrangements. It would also manifest on the individual level by minimising the impact on a person transitioning from children's services to adult services. Consultees also considered statutory provisions for cooperation in transitional care planning to be particularly important when more than two agencies are involved, for example the HSE, the CFA and agencies contracted under sections 38 or 39 of the Health Act 2004. If statutory provisions for transitional care arrangements were to be included in any future social care legislation that may be considered by the Government, the Commission believes that an existing gap in protection for children who are likely to become adults at risk of harm could be filled.

[15.77] Scottish safeguarding legislation does not make statutory provision for transitional care arrangements. The focus in the statutory Code of Practice is on identifying young people at risk of harm and ensuring that appropriate support and protection is in place for them as they transition from children's services to adult services. However in England, statutory provision for transitional care arrangements is contained in social care legislation.[152] Most young people who receive a transition assessment are known to the local authority as children in

[152] Section 58 of the Care Act 2014 (England).

need.[153] However, it must be acknowledged that children who have not been in contact with children's services can present to a local authority as a young adult and oftentimes with a high level of need for care and support.[154]

[15.78] The Commission recommends that statutory provisions for transitional care arrangements should be included in any future social care legislation that may be considered by the Government.

R. 15.10 **The Commission recommends that** statutory provisions for transitional care arrangements should be included in any future social care legislation that may be considered by the Government.

(ii) Model statutory provisions for transitional care arrangements in Ireland

[15.80] In England, section 58(1) 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 whether the child: (a) has needs for care and support and, if so, what those needs are; and (b) is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be.

[15.81] When considering whether the young person is "likely to have needs", this wording is intended to reflect any likely appearance of any need for care and support as an adult and not just those needs that will be deemed eligible under the legislation.[155] The consideration of "significant benefit" is not related to a young person's needs but rather is related to the timing of the transition assessment.[156] When considering whether it is of significant benefit to assess a young person, a local authority should consider factors which may contribute to determining the right time to assess. Such factors include but are not limited to:

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[153] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.18. Section 17(10) of the Children Act 1989 (England) states that "a child shall be taken to be in need if— (a) [they] are unlikely to achieve or maintain, or to have the opportunity of achieving of maintaining, a reasonable standard of health or development without the provision for [them] of services by a local authority ... ; (b) [their] health or development is likely to be significantly impaired, or further impaired, without the provision for [them] of such services; or (c) [they] are disabled".

[154] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.20.

[155] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.9.

[156] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.10.

(a) the stage the young person has reached at school and any upcoming exams;
(b) whether the young person wishes to enter further/higher education or training;
(c) whether the young person wishes to get a job when they become a young adult;
(d) whether the young person is planning to move out of their parental home into their own accommodation;
(e) whether the young person will have care leaver status when they become 18;
(f) whether the carer of a young person wishes to remain in employment when the young person leaves full time education;
(g) the time it may take to carry out an assessment;
(h) the time it may take to plan and implement the adult care and support;
(i) any relevant family circumstances; and
(j) any planned medical treatment.[157]

[15.82] Given that the purpose of a transition assessment is to allow a young person to plan for their future, such assessment must include an assessment of:

(a) current needs for care and support and how these impact on wellbeing;
(b) whether the young person is likely to have needs for care and support when they become 18;
(c) if so, what those needs are likely to be, and which are likely to be eligible needs; and
(d) the outcomes the young person wishes to achieve in day-to-day life and how care and support can help them achieve these outcomes.158

[15.83] Transition arrangements should be carried out in a reasonable timeframe and should be proportionate to the person's needs.[159] In England, children and adult

[157] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.10.

[158] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.25.

[159] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at paras 16.32 and 16.33.

services must cooperate for the purposes of transitions to adult care and support.[160]

[15.84] The Statutory Code of Practice accompanying the Adult Support and Protection (Scotland) Act 2007 emphasises the importance of ensuring the implementation of transitional care arrangements between child and adult protection services.[161] The Code of Practice emphasises the need for a case-by-case assessment when young people transition out of children's services.[162] The receipt of children's services as a young person does not necessarily mean that such person will become an at-risk adult when they reach adulthood.[163] APCs, in conjunction with Child Protection Committees and similar partnerships or authorities, should ensure that young people who are considered at risk of harm are identified at the earliest possible stage and appropriate support and protection is implemented during and after their transition to adult services.[164] Robust systems need to be in place for the sharing of information and any necessary transfer of responsibilities between bodies and services.[165] The Code of Practice highlights that the responsibilities of councils and other bodies for young people extend beyond adult protection legislation.[166]

[15.85] Under the existing Joint Protocol between the HSE and the CFA, aftercare planning is currently managed by the CFA's Local Aftercare Steering Committees. Cooperation would be essential during this transition phase because one agency does not have all the necessary services and expertise, and it is essential that information is shared to ensure there is no gap in the provision of care or service to a person who is or may become an at-risk adult.

[15.86] The Commission recommends that if statutory provisions for transitional care arrangements are provided for in any future social care legislation, the Government should consider:

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[160] Department of Health and Social Care (England), *Care and Support Statutory Guidance* (28 March 2024) at para 16.39.

[161] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[162] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[163] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[164] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[165] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

[166] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 – Code of Practice* (28 July 2022) at page 24.

(a) the appointment of a lead organisation, or two or more organisations as lead organisations, to manage transitional care arrangements in cooperation with certain public service bodies and certain providers of relevant services to at-risk adults; and

(b) the introduction of a duty on the lead organisation(s) to: (i) assess whether a child who is considered to be at risk or has complex needs is likely to be an at-risk adult upon transition from children's services to adult services; and (ii) undertake timely transitional care planning and safeguarding planning for that child.

R. 15.11 The Commission recommends that, if statutory provisions for transitional care arrangements are provided for in any future social care legislation, the Government should consider:

(a) the appointment of a lead organisation, or two or more organisations as lead organisations, to manage transitional care arrangements in cooperation with certain public service bodies and certain providers of relevant services to at-risk adults; and

(b) the introduction of a duty on the lead organisation(s) to:

(i) assess whether a child who is considered to be at risk or has complex needs is likely to be an at-risk adult upon transition from children's services to adult services; and

(ii) undertake timely transitional care planning and safeguarding planning for that child.

CHAPTER 16 INFORMATION SHARING

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1. The need for information sharing in the adult safeguarding context in Ireland

[16.1] Information sharing is a key part of the multiagency and multidisciplinary approach required to safeguard at-risk adults because it is essential to allow the sharing of information necessary to mitigate safeguarding concerns. This may arise in a number of situations, for example in community care, residential care, day services,[1] healthcare and community service settings, and when financial services are provided by, for example, banks, post offices and credit unions.

[16.2] The challenge is that in the absence of a clear legislative basis in Irish law, there is a risk that disclosure of information may amount to a breach of the General Data Protection Regulation ("GDPR") and/or the Data Protection Act 2018 ("DPA 2018").[2] Information sharing between individuals and public and private organisations has the potential to ensure, in a very practical way, that at-risk adults are supported and protected. The need for information sharing has been consistently expressed by stakeholders, and uncertainty as to when data can be shared for the purposes of adult safeguarding has been flagged as a serious issue by respondents to the Commission's Issues Paper on A Regulatory Framework for Adult Safeguarding published on 29 January 2020 ("Issues Paper").

[16.3] In its Discussion Paper titled Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland notes:

> [s]takeholders have consistently highlighted that effective information sharing is an integral aspect of the multiagency and multidisciplinary approach required to adequately safeguard adults at risk of abuse.[3]

[1] See sections 38 (arrangements with service providers) and 39 (assistance for certain bodies) of the Health Act 2004.

[2] Disclosure of personal information may also infringe an individual's right to privacy guaranteed by Article 40.3 of the Constitution of Ireland.

[3] Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 137 <https://safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf> accessed on 6 April 2024.

Stakeholders' need for information sharing has also been highlighted in various guidelines relevant to adult safeguarding in Ireland.[4]

[16.4] While privacy rights under the Constitution, the GDPR and the DPA 2018 are qualified in nature, the question of how social care and social work practitioners may distinguish information that may be shared from information that must be maintained in strict confidence is challenging.[5]

[16.5] Commenting on existing Irish law, Donnelly and O'Brien note that a person may be a user of mental health services, but information about their medical diagnosis held by the Child and Family Agency ("CFA") is not normally shared with social workers.[6] This makes it difficult for the National Safeguarding Office of the Health Service Executive ("HSE") and the Irish Association of Social Workers to carry out adult risk assessments. The need for information sharing is also important when people at risk of harm or neglect become adults and move from child services to adult services.[7] Donnelly and O'Brien have pointed to the example of a situation where an at-risk adult returned to live at home with their parents, and information was sought from the CFA because the at-risk adult had previously been involved with the CFA. Ultimately, it took 10 months for information to be shared.[8]

[16.6] Although certain Irish statutory provisions allow information sharing in some situations, there is uncertainty around the nature and format of the information

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4 HIQA and the MHC, *National Standards for Adult Safeguarding* (2019) at pages 49-50 <https://www.hiqa.ie/sites/default/files/2019-12/National-Standards-for-Adult-Safeguarding.pdf> accessed on 6 April 2024; HSE, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at pages 25-30 <https://assets.hse.ie/media/documents/ncr/personsatriskofabuse.pdf> accessed on 6 April 2024; HIQA, *National Standards for Residential Care Settings for Older People in Ireland* (2016) at para 4.1.10<https://www.hiqa.ie/sites/default/files/2017-01/National-Standards-for-Older-People.pdf> accessed on 6 April 2024; HIQA and Safeguarding Ireland, *Guidance on a Human Rights–based Approach in Health and Social Care Services* (2019) at pages 18 and 28 <https://www.hiqa.ie/sites/default/files/2019-11/Human-Rights-Based-Approach-Guide.PDF> accessed on 6 April 2024.

5 *Cogley v Radio Telefís Éireann* [2005] IEHC 180, [2005] 4 IR 79; *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316.

6 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3686.

7 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3686.

8 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3687.

that can be shared.[9] It has been observed that the apparent or perceived limitations on the nature and format of the information that can be shared under existing Irish law poses significant barriers to adult safeguarding and prevents patterns being identified of ongoing concerns or multiple incidents relating to an individual.[10] Patterns help social workers decide whether to undertake preliminary screenings to establish if an abusive act occurred and if there are reasonable grounds for concern.[11]

2. The current law in Ireland

(a) The legal framework for information sharing in Ireland

[16.7] In Ireland, information sharing is governed by the GDPR, the DPA 2018 and the Data Sharing and Governance Act 2019 ("2019 Act"). The GDPR, as an EU Regulation, is directly effective in Ireland and is supplemented by the DPA 2018, which also gives effect to the Law Enforcement Directive (EU) 2016/680 ("LED"). The 2019 Act provides for the sharing of data between public bodies and for data governance within the public service.

[16.8] In considering the current legal framework, the Commission is primarily focused on the question of whether the current law permits or requires the sharing of data pertaining to at-risk adults.

(b) General Data Protection Regulation

[16.9] The GDPR recognises that the right to data protection is a fundamental right[12] but must be balanced against other fundamental rights. Recital 4 of the GDPR provides:

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9 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3687; section 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012; section 3 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012.

10 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3687.

11 Donnelly and O'Brien, "Adult Safeguarding Legislation – The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation" (2022) 52(6) The British Journal of Social Work 3677 at page 3687; HSE, *Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures* (2014) at page 31.

12 As also recognised by Article 8 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights.

> [t]he right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

[16.10] Article 5 of the GDPR outlines the core principles for the protection of personal data, namely lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability.[13] Data controllers must respect these principles by considering the nature, scope, context and purposes of the processing of personal data.[14] The GDPR requires data controllers to implement measures to ensure and demonstrate GDPR compliance. This is known as the accountability principle. To comply with the accountability principle, decisions made on the basis of risk assessment must be documented each time personal data relating to data subjects is processed.

(i) Types of data processed in the adult safeguarding context

[16.11] Where information comes within the definition of "personal data" under Article 4(1) of the GDPR, it may only be processed where there is a legal basis for that processing pursuant to Article 6(1) of the GDPR. Sharing data is a form of processing. As such, the Commission is primarily concerned in this section with the question of whether a legal basis exists for the sharing of data in the adult safeguarding context.

[16.12] Article 9 of the GDPR specifies additional protection for "special categories of personal data" which are defined as:

> data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.[15]

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[13] Article 5(1)-(2) of the GDPR; DPC, *Data Protection: The Basics, Principles of Data Protection* <https://www.dataprotection.ie/en/individuals/data-protection-basics/principles-data-protection> accessed on 6 April 2024.

[14] A data "controller" is defined in Article 4(7) of the GDPR as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of collecting, recording, organising, structuring, storing, adapting, altering, retrieving, consulting, using, disclosing, disseminating, making available, aligning, combining, restricting, erasing or destroying personal data. In an adult safeguarding context, a data controller could be a person or body who works in adult safeguarding, provides services to an at-risk adult, cares for an at-risk adult, determines the purposes for which the information of an at-risk adult is shared, or determines how such information is shared.

[15] Article 9(1) of the GDPR.

[16.13] It should be made clear at the outset that most of the information that is relevant in the adult safeguarding context is the personal data and special categories of personal data of at-risk adults, in particular their "data concerning health" which is "personal data related to the physical or mental health of [an at-risk adult], including the provision of health care services, which reveal information about [their] health status".[16] Recital 35 of the GDPR provides:

> personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.

[16.14] It has been noted that the conclusion that may be drawn from the definition of "data concerning health" in Article 4(15) of the GDPR and the additional information in Recital 35 of the GDPR means that "data concerning health" includes all the collected personal data of an individual as soon as this personal data is used to gain information on the health status of an individual.[17]

[16.15] Information sharing in the adult safeguarding context is usually subject to significant regulation because the processing of the special categories of personal data of an at-risk adult is only permitted where there is both a legal basis under Article 6(1)(a)-(f) of the GDPR and where one of the conditions for processing special categories of personal data in Article 9(2) of the GDPR applies.

[16] Article 4(15) of the GDPR.

[17] Mulder, "The Protection of Data Concerning Health in Europe" (2019) 5 European Data Protection Law Review 209 at page 216.

(ii) Legal bases for processing personal data under Article 6 of the GDPR

[16.16] In response to the Issues Paper, many stakeholders noted that there is considerable uncertainty about what legal bases may be relied upon to share data for adult safeguarding purposes. It is therefore likely that inconsistent policies and practices are applied by different bodies in the Irish adult safeguarding sector.

[16.17] Article 6(1)(a)-(f) of the GDPR provides the following legal bases for information sharing:

(a) consent;

(b) contractual necessity;

(c) legal obligation;

(d) vital interests;

(e) public task; and

(f) legitimate interests.

Some, if not all, of these legal bases present challenges to the sharing of information in the adult safeguarding context.

a. Consent

[16.18] The legal basis of consent for the processing of personal data is provided for in Article 6(1)(a) of the GDPR. Article 7 of the GDPR sets out the conditions for consent, and is interpreted rigorously.[18] Reliance on consent as a legal basis for information sharing in an adult safeguarding context is difficult because an at-risk adult might have reduced capacity to consent to the sharing of their information because of mental illness, disability or cognitive impairment.[19] It may be unclear whether they can give consent or have given consent when they are unable to clearly express themselves or communicate their consent. A care provider of an at-risk adult may not be in a position to communicate their request for consent to the at-risk adult in a manner that helps them understand

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[18] See, generally, EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679* (Version 1.1, adopted on 4 May 2020) <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed on 6 April 2024.

[19] Malgieri, Niklas, "Vulnerable data subjects" (July 2020) 37 Computer Law & Security Review 105415 <https://www.sciencedirect.com/science/article/pii/S0267364920300200?via%3Dihub> accessed on 6 April 2024.

the request. Given these challenges in the consent process, waiting to obtain the consent of an at-risk adult could hinder the swift exchange of information and impede adult safeguarding. Accordingly, reliance on the legal basis of consent to share the personal data of an at-risk adult in an adult safeguarding context is not always an effective approach.

b. Contractual necessity

[16.19] The legal basis of contractual necessity may be relied on for information sharing purposes where necessary for the performance of a contract to which an at-risk adult is a party or to take steps at their request before entering a contract.[20] The Data Protection Commission ("DPC") advises that there must be a contractual relationship between the data subject and the data controller to rely on the legal basis of contractual necessity for information sharing purposes.[21] In an adult safeguarding context, a contractual relationship may exist between an at-risk adult (as data subject) and a care provider (as data controller of the at-risk adult's personal data) in some instances.

[16.20] However, the ability to rely on the legal basis of contractual necessity for information sharing purposes in an adult safeguarding context is limited by the terms of the contract between the data controller and the data subject and limited to sharing data that is necessary for the performance of the contract. Accordingly, the legal basis of contractual necessity may be inappropriate for information sharing in an adult safeguarding context because it may not be strictly necessary for the performance of a contract to share some or all of the information that is sought to be shared.

[16.21] For example, there may be a contract between a care provider and an at-risk adult or a relative of the at-risk adult to provide residential care services in a nursing home to the at-risk adult, but the information sharing that might safeguard the at-risk adult or another resident in the nursing home may not be strictly necessary for the residential care provider to satisfy the contractual obligation to provide care services to the at-risk adult. For this reason, reliance on the legal basis of contractual necessity for the purposes of information sharing to safeguard at-risk adults is not particularly effective in an adult safeguarding context.

c. Compliance with a legal obligation

[16.22] Article 6(1)(c) of the GDPR provides a legal basis for processing where the processing is necessary for compliance with a legal obligation to which the data

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[20] Article 6(1)(b) and Recital 44 of the GDPR.

[21] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 11 <https://www.dataprotection.ie/sites/default/files/uploads/2020-04/Guidance%20on%20Legal%20Bases.pdf> accessed on 6 April 2024.

controller is subject. Article 6(3) of the GDPR imposes certain constraints on this legal basis, and requires that processing for this purpose must be contained in Irish or EU law.[22] If contained in Irish law, the DPC advises that the legal obligation may be contained in an act of the Oireachtas, a statutory instrument or a common law rule.[23] Furthermore, the purpose of the information sharing must meet an objective of public interest and be proportionate to the legitimate aim pursued by sharing the information.[24]

[16.23] The relevant recitals to the GDPR further constrain this legal basis. The legal obligation should be clear and precise, and its application should be foreseeable by those subject to it.[25] The law containing the legal obligation must be sufficiently clear and precise to provide a legal basis for information sharing but does not need to specify a legal obligation for each processing activity, for example, recording, organising and sharing information.[26]

[16.24] As such, Article 6(1)(c) of the GDPR may provide a legal basis for information sharing in the adult safeguarding context where such sharing is done pursuant to a legal obligation; but only where the above criteria are satisfied by the source of that legal obligation. There are certain statutory provisions in Ireland that provide a legal basis for information sharing. However, their relevance and effectiveness is limited because they are not specifically tailored to information sharing in an adult safeguarding context.

[16.25] For example, section 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 imposes a legal obligation on, among others, HIQA, the Mental Health Commission ("MHC"), the Health and Social Care Professionals Council ("CORU") and the HSE to notify specified information to the National Vetting Bureau of the Garda Síochána ("National Vetting Bureau") regarding persons engaged in work or activities relating to "vulnerable persons". But the relevance and effectiveness of section 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 in an adult safeguarding context is limited because it only applies to a limited number of bodies and the information that can be shared is limited.

[16.26] Moreover, 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 they know or believe that an offence listed in Schedule 2 of the Criminal Justice (Withholding Information on Offences

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[22] Article 6(3) of the GDPR.

[23] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 14.

[24] Article 6(3) of the GDPR.

[25] Recital 41 of the GDPR.

[26] Recitals 41 and 45 of the GDPR.

Against Children and Vulnerable Persons) Act 2012 has been committed by a person against a "vulnerable person" and they have information which they know or believe might be of material assistance in securing the apprehension, prosecution or conviction of the offender and fail without reasonable excuse to disclose that information as soon as practicable to the Garda Síochána. The effectiveness of section 3(1) of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012 in an adult safeguarding context is limited because it only provides a legal basis for information sharing with the Garda Síochána where an offence listed in Schedule 2 of the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 has been committed or is believed to have been committed. It does not provide a legal basis for information sharing with other bodies or for information sharing in circumstances other than those listed in Schedule 2.[27]

[16.27] In addition, recent research examining attitudes and awareness of adult safeguarding practice in the Irish acute hospital context has found that some hospital staff (including nurses, doctors and health and social care professionals) are not aware of their information sharing requirements under the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012. In a recent participatory action research study which surveyed 100 hospital staff including nurses, doctors and health and social care professionals, only 66 members of staff were aware of their information sharing requirements under the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012.[28] Awareness of the law is a core aspect in adult safeguarding. For law to shape behaviour and lead to the safeguarding of at-risk adults, people whose conduct the law tries to influence should be aware of the law, for example their information sharing obligations in respect of information on offences against "vulnerable persons".

[16.28] Section 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and section 3 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012 are helpful legal provisions that provide some assistance when safeguarding at-risk adults in Ireland. But their relevance and effectiveness in an adult safeguarding context is limited because they provide limited bases for information sharing. The duty to disclose information only allows for information sharing with the National Vetting

[27] For example, false imprisonment, assault causing harm or a range of sexual offences.

[28] Donnelly, Casey, Lynch, Deaveney, Scanlon, McKenzie, "Using Participatory Action Research to Examine Attitudes and Awareness of Adult Safeguarding Practices in the Acute Hospital Context" (September 2023) Vol 52 Issue Supplement 3 Age and Ageing at page 70 <https://academic.oup.com/ageing/issue-pdf/52/Supplement_3/51548837>accessed on 6 April 2024.

Bureau relating to "vulnerable persons" and with the Garda Síochána where specific offences have been committed or are believed to have been committed. Neither of the legal provisions provide a legal obligation to share information with other organisations who could, for example, intervene in situations where an adult is at risk of harm or neglect but which do not involve the commission of an offence listed in Schedule 2 of the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 or which do not arise as a result of an investigation, inquiry or regulatory process in respect of a "vulnerable person" requiring notification to the National Vetting Bureau under section 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

d. Vital interests

[16.29] The legal basis of vital interests under Article 6(1)(d) of the GDPR for information sharing purposes may be capable of being relied on by those involved in adult safeguarding as a legal basis for information sharing. Recital 46 GDPR describes this type of processing as that which is "necessary to protect an interest which is essential for the life of the data subject or that of another natural person".[29] This includes life-threatening situations and situations which very seriously threaten the health or fundamental rights of an individual.[30] The DPC's Guidance Note on Legal Bases for Processing Personal Data notes that the legal basis of vital interests is used less frequently than other legal bases in Article 6(1) of the GDPR and is used when other legal bases are inappropriate.[31] Importantly, Recital 46 of the GDPR provides that vital interests should, in principle, only be relied upon where the processing "cannot be manifestly based on another legal basis".

[16.30] The DPC has noted that the legal basis of vital interests is unlikely to apply "outside of an emergency situation". Its applicability as a means of sharing information in an adult safeguarding context will likely only arise where it can be objectively demonstrated that there is a serious risk to the health, safety or welfare of an at-risk adult and there is a need to urgently share information to protect their vital interests.[32]

[16.31] In its Guidance Note on Legal Bases for Processing Personal Data, the DPC notes that an example where the legal basis of vital interests could be relied on to share information is where paramedics are called to a residential care facility to

[29] Recital 46 of the GDPR.

[30] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 17.

[31] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 16.

[32] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 16.

assist a seriously ill resident who is unconscious.[33] The medical history and other relevant health data of the resident may be shared with the paramedics because it is necessary to do so to protect their vital interests.[34] The DPC states that this is the case even where the resident has not previously consented to the sharing of this data for such purposes.[35]

[16.32] In summary, while the legal basis of vital interests has some application to the adult safeguarding context, its application will be limited to situations of extreme risk.

e. Task carried out in the public interest

[16.33] Article 6(1)(e) of the GDPR provides a legal basis for sharing personal data where it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller. This information sharing must be grounded in an EU or Irish law that meets an objective of public interest and is proportionate to the legitimate aim pursued.[36]

[16.34] Article 6(1)(e) of the GDPR may therefore enable information sharing in the adult safeguarding context because it may, for example, be in the public interest for HIQA or the HSE to share information for adult safeguarding purposes insofar as it relates to functions carried out by those bodies under legislation. However, the Commission observes that there seems to be a considerable degree of uncertainty among stakeholders as to whether this legal basis is applicable in an adult safeguarding context.

[16.35] Section 38(1) of the DPA 2018 provides that sharing personal data shall be lawful to the extent that it is necessary and proportionate for the performance of a function of a data controller conferred by or under a law, the Constitution or the administration of a non-statutory scheme, programme or fund. Section 38(4) of the DPA 2018 provides for a ministerial power to make regulations specifying the processing of personal data which is necessary for the performance of a task carried out in the public interest by a controller or which is necessary in the exercise of official authority vested in a data controller. At the time of writing, no such regulations have been made.

[16.36] The effect of section 38 of the DPA 2018 appears to be limited by section 6(2) of the 2019 Act which provides that "[s]ection 38 of the [DPA 2018] shall not apply

[33] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 16.

[34] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 16.

[35] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 16.

[36] Article 6(3) and Recital 45 of the GDPR; see guidance in Case C-268/21 *Norra Stockholm Bygg AB v Per Nycander AB* (Judgment of the Court (Third Chamber) on 2 March 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CJ0268> accessed on 6 April 2024.

to the disclosure of information by one public body to another public body". Accordingly, it seems that the regulation-making power under section 38(4) of the DPA 2018 cannot safely be used by a public body to share personal data with another public body.

[16.37] Section 6(3) of the 2019 Act provides that regulations made under section 38(4) of the DPA 2018 shall not constitute an enactment under which specific provision is made permitting or requiring data sharing for the purpose of sections 13(1), 15(1) or 34(1) of the 2019 Act.[37] Public bodies may share information under the 2019 Act and rely on the 2019 Act as their legal basis for information sharing from one public body to another public body. The 2019 Act is discussed in further detail in section 2(d) of this Chapter.

f. Legitimate interest

[16.38] The legal basis of legitimate interest under Article 6(1)(f) of the GDPR may be capable of being relied upon for information sharing purposes to safeguard at-risk adults where processing is necessary for a legitimate interest pursued by a data controller or third party, unless that legitimate interest is "overridden by the interests or fundamental rights and freedoms of the [at-risk adult] which require protection of personal data".[38]

[16.39] The DPC acknowledges that the legal basis of legitimate interest is versatile and flexible and advises that legitimate interests may include commercial interests, individual interests and broader societal interests.[39] Having regard to the DPC's guidance, the legal basis of legitimate interest under Article 6(1)(f) of the GDPR may be an appropriate legal basis for information sharing in some adult safeguarding situations which are necessary for the purposes of the individual interests of at-risk adults and the broader societal interests of safeguarding at-risk adults in Ireland.

[16.40] The DPC notes that a relevant legitimate interest could, for example, exist in various situations where there is a relevant and appropriate relationship between the data subject and the data controller, as noted in Recital 47 of the

[37] Sections 13(1) and 15(1) of the 2019 Act relate to the disclosure of personal data and business information by a public body to another public body where there is no other enactment or law of the European Union in operation under which specific provision is made permitting or requiring data sharing. Section 34(1) of the 2019 Act is similar to sections 13(1) and 15(1) except that it relates to the disclosure of business information which is defined in section 33(1).

[38] Article 6(1)(f) of the GDPR.

[39] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at pages 21-22.

GDPR.[40] The DPC states that this may apply where the data subject is a client or in the service of the data controller. With regard to this guidance, it is possible that a relevant and appropriate relationship may exist in an adult safeguarding context between an at-risk adult (as a data subject) and a care provider (as a data controller) where the at-risk adult is a client or in the service of the care provider.

[16.41] Recital 47 of the GDPR states that processing personal data for the purposes of fraud prevention constitutes a legitimate interest of the data controller. In adult safeguarding, fraud prevention is relevant when an adult is exposed to a risk of financial abuse.[41] Recital 47 of the GDPR provides that a legitimate interest could exist where there is a relevant and appropriate relationship between the data subject and the data controller, for example where the data subject is a client of the data controller or in the care or service of the data controller. This situation could arise where the data subject is an at-risk adult in the care or service of a care provider acting as the data controller of the at-risk adult's personal data. The relationship between an at-risk adult and a care provider could give rise to a legitimate interest on the part of the care provider, or a third party such as the HSE, to safeguard the at-risk adult. It may be appropriate for the care provider to rely on the legal basis of legitimate interest to share relevant personal data of an at-risk adult with another organisation involved in safeguarding the at-risk adult.

[16.42] The relationship between an at-risk adult and a financial institution could also give rise to a legitimate interest to safeguard the at-risk adult by sharing their information with another organisation. For example, the legal basis of legitimate interest could potentially provide a legal basis for a financial institution to share information with the Department of Social Protection, the National Shared Services Office or the HSE about the risk of an at-risk adult being subject to financial abuse.

[16.43] However, reliance on the legal basis of legitimate interest under Article 6(1)(f) of the GDPR for information sharing in an adult safeguarding context has two important limitations:

(a) it cannot be relied on by public authorities that process personal data in the performance of their tasks;[42] and

[40] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at pages 21-22.

[41] Financial abuse is discussed in Chapter 14.

[42] Article 6(1) and Recital 47 of the GDPR. Article 6(1) of the GDPR provides that Article 6(1)(f) of the GDPR (i.e., the legal basis of legitimate interest) "shall not apply to processing carried out by public authorities in the performance of their tasks"; DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 21.

(b) it places obligations on data controllers to balance the legitimate interests they are seeking to pursue by sharing information with the rights and interests of data subjects. This balancing of rights is a necessary protection to ensure the rights of data subjects are considered before their personal data is shared for a legitimate interest.[43] This balancing exercise must be carried out in respect of each act of processing, for example when recording, organising and sharing information.

[16.44] The Commission notes that the extent of the exclusion for public authorities is debatable. There is an argument that public bodies may not rely on legitimate interests to share data in the course of the performance of their official functions or tasks, but could rely on the legal basis of legitimate interests to share personal data outside of the context of those official functions or tasks. Whether or not this is correct as a matter of Irish law, the Commission observes that reliance on this basis would be very unattractive for any public body due to the considerable legal uncertainty involved.

[16.45] In practice, therefore, many organisations and persons working in adult safeguarding are either excluded from relying on the legal basis of legitimate interest under Article 6(1)(f) of the GDPR or are reluctant to rely on this legal basis in an adult safeguarding context. Safeguarding Ireland notes that the complexity of the balancing exercise between the legitimate interests of data controllers and the rights of data subjects may result in inconsistent approaches by organisations and persons in the adult safeguarding sector and may make organisations and persons reluctant to rely on this legal basis as a lawful way to share information to safeguard the health, safety or welfare of at-risk adults.[44]

(iii) The processing of special categories of personal data under Article 9 of the GDPR

[16.46] Article 9(1) of the GDPR provides for the processing of special categories of personal data, which are afforded heightened protection under the GDPR.[45] The sharing of special categories of personal data is prohibited unless one of the exceptions in Article 9(2) of the GDPR applies. Data concerning health is a special category of personal data. As stated at the beginning of this Chapter, the vast majority of the information that is relevant in the adult safeguarding

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[43] DPC, *Guidance Note: Legal Bases for Processing Personal Data* (December 2019) at page 21.

[44] Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 151.

[45] Colgan, "Debiasing and Data Protection: the GDPR and Proposed Artificial Intelligence Act in Contest" (2023) 30(3) Commercial Law Practitioner 53 at page 54.

context is the personal data and special categories of personal data of at-risk adults, in particular their "data concerning health".

[16.47] Personal data revealing the religious or philosophical beliefs of a data subject is also a special category of personal data. Sharing this category of data may also be important because in considering what forms of medical treatment or types of health care are capable of being used to safeguard the health, safety or welfare of an at-risk adult, their religious or philosophical beliefs may be an important consideration.[46]

[16.48] Special categories of personal data shall only be processed where there is a relevant legal basis under Article 6(1)(a)-(f) of the GDPR and a relevant exception under Article 9(2)(a)-(j) of the GDPR. The following exceptions under Article 9(2)(a)-(j) of the GDPR are those with the greatest potential relevance to the sharing of the special categories of personal data of an at-risk adult in the adult safeguarding context:

(a) processing on the basis of the explicit consent of the at-risk adult;[47]

(b) processing is necessary to protect the vital interests of the at-risk adult or another person where the at-risk adult is physically or legally incapable of giving consent;[48]

(c) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law, which must be proportionate to the aim pursued, respect the essence of the right to data protection, and provide for suitable and specific measures to safeguard the fundamental rights and interests of the at-risk adult;[49] and

(d) 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 and safeguards referred to in Article 9(3) of the GDPR.[50]

46 Article 9(1) of the GDPR and section 2(1) of the DPA 2018.

47 Article 9(2)(a) of the GDPR.

48 Article 9(2)(c) of the GDPR.

49 Article 9(2)(g) of the GDPR.

50 Article 9(2)(h) of the GDPR. Article 9(3) of the GDPR provides: "Personal data referred to in [Article 9(1) of the GDPR] may be processed for the purposes referred to in [Article 9(2)(h) of

[16.49] Reliance on explicit consent under Article 9(2)(a) of the GDPR presents the same challenges in an adult safeguarding context as relying on the consent of the at-risk adult under Article 6(1)(a) of the GDPR for the sharing of the personal data of the at-risk adult.[51]

[16.50] While the exceptions contained in Article 9(2)(g) and (h) of the GDPR are relevant in an adult safeguarding context, their application is strictly confined. For Article 9(2)(g) or (h) to apply, there must be a basis in European Union or Member State law and suitable and specific safeguards must be in place. Therefore even if a legal basis in Member State law is identified, some uncertainty may remain as to whether there are adequate safeguards in place and, in the context of Article 9(2)(g) of the GDPR, whether the essence of the right to data protection is respected.

[16.51] Article 9(2)(g) of the GDPR refers to the processing of special categories of personal data for reasons of substantial public interest. The concept of a "substantial" public interest has no independent meaning in EU law and no definition is provided in the GDPR. As a result, it has been noted that Article 9(2)(g) may be too vague and extensive because the concept of substantial public interest is delegated to Member States.[52] There is, however, guidance from the Article 29 Working Party in relation to the comparable concept of an "important" public interest which suggests that the concept of an important public interest should be given a restrictive interpretation and refer to processing which is necessary and identified as an important public interest by national legislation.[53]

[16.52] Section 51(3) of the DPA 2018 allows for regulations to be made authorising the sharing, where necessary for reasons of substantial public interest, of special

the GDPR] when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies."

[51] See para 16.20.

[52] Foglia, "Patients and Privacy: GDPR Compliance For Healthcare Organizations" (2020) European Journal of Privacy Law & Technologies 43 at page 46.

[53] Hallinan, "Broad consent under the GDPR: an optimistic perspective on a bright future" (2020) 16(1) Life, Sciences, Society and Policy 1 at page 6 fn 8; Article 29 Working Party, *Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995* (Adopted on 25 November 2005) at page 15 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2005/wp114_en.pdf> accessed on 6 April 2024. The Article 29 Working Party was the body tasked with the EU level interpretation of data protection law under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Directive 95/46/EU was the law in the EU before the GDPR came into force. The GDPR repealed Directive 95/46/EC.

categories of personal data. Such regulations must specify the substantial public interest concerned and the suitable and specific measures to be taken to safeguard the fundamental rights and freedoms of data subjects. At the time of writing, no regulations have been made under section 51(3) of the DPA 2018.

[16.53] It is likely that to rely on Article 9(2)(g) of the GDPR, the relevant public interest must be expressly identified in legislation. This is supported by guidance from the European Data Protection Board ("EDPB") which notes that Member State or Union law is needed in order to "stipulate" a reason of substantial public interest.[54] Irish legislation does not currently identify in express terms the sharing of the special categories of personal data of at-risk adults to safeguard the health, safety or welfare of at-risk adults as a substantial public interest.

[16.54] Article 9(2)(h) is directed at the sharing of health data and is further implemented by section 52 of the DPA 2018. This basis may apply in some adult-safeguarding situations, such as where the processing of data is necessary for "medical care, treatment or social care". Importantly, processing on this basis may only be conducted by a medical practitioner or someone with an equivalent duty of confidentiality.

[16.55] As further outlined in paragraphs 16.110-16.113 of this Chapter, the Commission is of the view that the most appropriate legal basis and the most appropriate exception for sharing special categories of personal data of an at-risk adult between relevant bodies, insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of the at-risk adult, are Article 6(1)(e) and Article 9(2)(g) of the GDPR.

[16.56] In this context, the express identification of the public interest in the sharing of special categories of personal data of at-risk adults to safeguard the health, safety or welfare of at-risk adults will be important to ensure that Article 6(1)(e) and Article 9(2)(g) of the GDPR may be relied upon.

[16.57] In section 4(b)(ii) of this Chapter, the Commission has drafted a proposal for both a statutory obligation and a statutory permission to share the special categories of personal data of at-risk adults insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of at-risk adults. The Commission has drafted both the statutory obligation and the statutory permission in such a manner so as to ensure that the sharing of such data to safeguard the health, safety or welfare of at-risk adults is expressly identified as a substantial public interest.

[54] EDPB, *EDPB Document on response to the request from the European Commission for clarifications on the consistent application of the GDPR, focusing on health research* (Adopted on 2 February 2021) at page 5 para 13 <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_replyec_questionnaireresearch_final.pdf> accessed on 6 April 2024.

[16.58] Some useful guidance on the sharing of health data between public bodies can be found in the recent DPC Decision IN-21-3-2, issued on 16 June 2023. This own volition inquiry arose from public allegations made against the Department of Health concerning the manner in which it collected and processed personal data of members of the public who had historically taken litigation against the Department.

[16.59] The DPC found that the Department of Health, as a body requesting information from the HSE, infringed data protection law by asking the HSE overly broad questions that resulted in the provision of sensitive information by the HSE to the Department about the lives of plaintiffs and their families. The DPC held that the processing of information obtained in response to broad scoping questions sent by the Department to the HSE for the purpose of seeking to settle cases was excessive and disproportionate to the aims pursued by the Department and that the processing (i.e. the information sharing) for this reason was not necessary for the purposes of litigation.[55]

[16.60] At paragraph 6.63 of its decision, the DPC found that the Department did not have clearly defined parameters for the information that it sought to collect pursuant to a request for information to the HSE. The Department requested from the HSE, among other information, "any further information [that the HSE thought was] worth mentioning". The DPC found that the responses to this request were broadly at the discretion of the recipient (i.e. the HSE) and the information provided by the HSE included details that went beyond the services that the Department actually provided, and included details of the private lives of the plaintiffs and their families.[56]

[16.61] The analogous provisions under UK data protection law are discussed in section 3(a)(i) of this Chapter. It is useful to observe that the Data Protection Act 2018 of England and Wales ("UK DPA") makes it easier for a government department or public authority to rely on Article 9(2)(g) of the UK General Data Protection Regulation ("UK GDPR") to share information with other government departments or public authorities, provided that there are one or more of the substantial public interest conditions set out in Schedule 1, Part 2 to the UK DPA.

[16.62] The following two substantial public interest conditions in Schedule 1, Part 2 to the UK DPA are potentially relevant in an adult safeguarding context:

[55] See in particular paragraphs 6.58-6.98.

[56] *In the matter of the Department of Health* (DPC Case Ref IN-21-3-2) (16 June 2023) at paras 6.63 and 6.94 <https://www.dataprotection.ie/sites/default/files/uploads/2023-07/20230710_Full%20decision%20IN-21-3-2%20Dept%20of%20Health.pdf>accessed on 6 April 2024.

(a) the sharing of information is necessary for the purposes of the prevention or detection of an unlawful act, is carried out without the consent of the data subject, and is necessary for reasons of substantial public interest;[57] and

(b) the sharing of information is necessary for the exercise of a protective function, is carried out without the consent of the data subject, and is necessary for reasons of substantial public interest.[58]

[16.63] In summary, at present as a matter of Irish law identifying a condition under Article 9(2)(a)-(j) of the GDPR for the sharing of special categories of personal data of an at-risk adult, in particular data concerning health, presents similar challenges to identifying a legal basis under Article 6(1)(a)-(f) of the GDPR for the sharing of the personal data of an at-risk adult. There are a number of potentially applicable legal bases under Article 6(1) of the GDPR and exceptions under Article 9(2) of the GDPR for the sharing of special categories of personal data of an at-risk adult in the form of data concerning health in an adult safeguarding context. However, a degree of uncertainty exists as to their operation, such that entities involved in adult safeguarding remain uncertain as to the legal position in Ireland.

(iv) The processing of personal data relating to criminal convictions

[16.64] The sharing of personal data relating to criminal convictions may be important to safeguard at-risk adults because in providing for their health, safety or welfare, it may be important to know whether those who care for, or come into contact with, at-risk adults have criminal convictions.[59] By being able to share this information under the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, those working with at-risk adults can ensure that at-risk adults will not be cared for by, or be at risk of harm from, persons who have, for example, criminal convictions for sexual assault or rape.

[16.65] The processing of personal data relating to criminal convictions is governed by Article 10 of the GDPR which provides:

> processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) [of the GDPR] shall be carried out only under the control of official

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[57] Schedule 1 Part 2 para 10(1)(a)-(c) of the UK DPA.

[58] Schedule 1 Part 2 para 11(1) and (2) of the UK DPA. "Protective function" means a function which is intended to protect members of the public against dishonesty, malpractice or other seriously improper conduct, unfitness or incompetence, mismanagement in the administration of a body or association, or failures in services provided by a body or association.

[59] Article 10 of the GDPR and section 55 of the DPA 2018.

authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

[16.66] Section 55 of the DPA 2018 gives further effect to Article 10 of the GDPR in Irish law and provides certain circumstances in which the sharing of Article 10 data will be lawful, subject to compliance with Article 6(1) of the GDPR and the implementation of suitable and specific measures to safeguard the fundamental rights and freedoms of data subjects.

[16.67] Considering this ground in a public blog post,[60] the DPC has noted that there are specific situations where it may be necessary for information about a person's criminal convictions to be shared between organisations. The DPC noted that one such situation is where it is necessary to protect other people and to deal with a specific identified risk. This is facilitated in Irish data protection law by section 55(1)(b)(iv) of the DPA 2018 which makes lawful the processing of criminal conviction data where "necessary to prevent injury or other damage to the data subject or another person or loss in respect of, or damage to, property or otherwise to protect the vital interests of the data subject or another person". The DPC advised that where it has been determined that it is strictly necessary to share criminal conviction data to protect other people, the consent of the person concerned is not required to share information about their criminal convictions. However the DPC advised that in such a situation it will be necessary for organisations to ensure that only the information that they specifically need to address the risk to other people is shared, and that the information is handled in a sensitive and confidential manner.

(c) Law Enforcement Directive

[16.68] The LED was incorporated into Irish law by Part 5 of the DPA 2018. The LED provides for information sharing where necessary for the performance of a function of a "competent authority" for the purposes of "the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against, and the prevention of, threats to public security" or "the execution of criminal penalties".[61] Importantly, the LED regime only applies where the data controller is a competent authority and is processing data for

[60] DPC, *Failure to share information with a nursing home about a resident's criminal convictions* (28 June 2023) <https://dataprotection.ie/en/dpc-guidance/blogs/Failure-to-share-information-with-a-nursing-home-about-a-residents-criminal-convictions>accessed on 6 April 2024.

[61] Article 1(1) of Directive (EU) 2016/680.

specified purposes. Where the data controller processes data for other purposes, that processing operation will presumptively be subject to the GDPR and Part 5 of the DPA 2018. The LED regime, as implemented by Part 5 of the DPA 2018, may be relevant in an adult safeguarding context where data is shared in the context of an alleged crime committed against an at-risk adult or where an at-risk adult is a witness to a crime or suspected of a crime.[62]

(i) Competent authorities

[16.69] Section 69(1)(a)-(b) of the DPA 2018 defines a "competent authority" as:

> (a) a public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties in the State, including the safeguarding against, and the prevention of, threats to public security; or
>
> (b) any other body or entity authorised by law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties in the State, including the safeguarding against, and the prevention of, threats to public security.

[16.70] The main public authority competent for the prevention, investigation and prosecution of criminal offences and the execution of criminal penalties in the State is the Garda Síochána. However as the DPC notes in its guidance:

> [the LED] is not limited to processing by bodies who might be typically considered as 'law enforcement authorities' (such as [the] Garda Síochána), but to any processing for law enforcement purposes, carried out by a public or private body who fits the definition of 'competent authority' (such as local authorities when prosecuting litter fines, or Dublin Bus in relation to ticket offences). This means that a potentially very large number and variety of bodies might fall under the scope, and the applicability of this regime will need to be assessed on a case-by-case basis.[63]

[16.71] Each body should be assessed on a case-by-case basis to determine whether they are a "competent authority" for the purposes of section 69(1) of the DPA

[62] Notably, the LED expressly applies to the data not just of persons suspected or convicted of a criminal offence, but also to the data of victims and witnesses; Article 6 of the LED and section 74 of the DPA 2018.

[63] DPC, *Law Enforcement Directive: Guidance on Competent Authorities and Scope* <https://www.dataprotection.ie/en/organisations/resources-organisations/law-enforcement-directive>accessed on 6 April 2024.

2018. Bodies active in adult safeguarding that may potentially fall within this definition on the basis of their functions are HIQA, the MHC and CORU.[64]

(ii) Data processing by competent authorities

[16.72] Section 71 of the DPA 2018 governs the processing of personal data. Section 71(2)(a) provides that data processing is lawful where, and to the extent that, the processing is necessary for the performance of a function of a controller for the purpose of the prevention, investigation, detection or prosecution of criminal offences including the safeguarding against, and the prevention of, threats to public security, or for the execution of criminal penalties. In addition, the processing must have a "legal basis in the law of the European Union or the law of the State". Processing is also permissible on the basis of consent of the data subject, pursuant to sections 71(2)(b) and (3) of the DPA 2018; but in the law enforcement context where the data subject is the person under investigation for a criminal offence, they are unlikely to provide their consent to the sharing of their information.

(iii) Processing of special categories of personal data

[16.73] Section 73(1) of the DPA 2018 provides that the processing of special categories of personal data shall be lawful only where section 71 of the DPA 2018 is satisfied and one of a number of further conditions is satisfied.[65] In this way the LED mirrors the structure of Articles 6 and 9 of the GDPR in requiring that the general provision governing the processing of personal data is satisfied and that, in addition, further requirements are satisfied in respect of the processing of special categories of personal data.

[16.74] Section 73(1)(b)(i) of the DPA 2018 provides that the processing of special categories of personal data shall be lawful where the data subject explicitly consents. As discussed in the context of the GDPR, where the at-risk adult is the data subject, it may be difficult to obtain their consent. Section 73(1)(b)(ii)(I)-(III) of the DPA 2018 permits the processing of special categories of personal data when necessary to prevent injury or damage to the data subject or another individual, to prevent loss in respect of, or damage to, property or to protect the vital interests of the data subject or another individual. Section 73(1)(b)(ii)(I)-(III) of the DPA 2018 may provide a legal basis for information sharing in an adult safeguarding context where it is necessary to prevent injury or further injury to

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[64] See the prosecutorial functions of HIQA under section 80 of the Health Act 2007, the MHC under section 74 of the Mental Health Act 2001 and CORU under section 81 of the Health and Social Care Professionals Act 2005.

[65] "Special categories of personal data" is defined in section 69(1) of the DPA 2018 as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, data concerning health or data concerning a human's sex life or sexual orientation.

an at-risk adult, to an individual by an at-risk adult, or to prevent damage or further damage to an at-risk adult's property or to an individual's property by an at-risk adult.

[16.75] Section 73(1)(b)(vi) of the DPA 2018 allows for the processing of special categories of personal data where this is necessary for medical purposes and is carried out by, or under the responsibility of, a health practitioner or a person who owes a duty of confidentiality to the data subject that is equivalent to that which would exist if that person were a health practitioner. There may be circumstances where the sharing of special categories of personal data of an at-risk adult, in particular data concerning health, may be necessary for medical purposes to safeguard the health, safety or welfare of an at-risk adult.

[16.76] Section 73(1)(b)(ix) of the DPA 2018 provides that special categories of personal data may be processed for reasons of substantial public interest where authorised by regulations made under section 73(2) of the DPA 2018. At the time of writing, no such regulations have been made.

(d) Data Sharing and Governance Act 2019

[16.77] The 2019 Act introduced a series of reforms to the way the Irish government shares data to improve public services and measures to improve the safe handling of data by bringing consistency and improved safeguards to the way data is managed. The 2019 Act was introduced as part of a programme of reform for the digitalisation of public services and the use of data. The eGovernment Strategy 2017 to 2020 set out a vision for the government's use of data and digital technology to increase efficiency and effectiveness and improve public services. Prior to the enactment of the 2019 Act, those who delivered public services often faced problems gaining access to information held by other public bodies. There was a clear need to update the legislative regime in Ireland to provide for a flexible legislative gateway to simplify the complex legal landscape.

[16.78] A key principle underpinning the development of the 2019 Act was that it should not weaken the protections afforded by data protection law, including the GDPR. The 2019 Act provides a framework for public bodies to share data in a manner that is compatible with the requirements of the GDPR, in particular that public bodies must be transparent about exactly what data is shared and for what purpose. A clear theme that emerged from public consultations prior to the enactment of the 2019 Act was that stakeholders were concerned about the risks to individuals' data protection rights arising from the sharing of data and the misuse and mismanagement of data by public bodies. In response to these

concerns, the 2019 Act introduced greater consistency across the public service in how data is collected, managed and stored.[66]

[16.79] Section 9 of the 2019 Act provides that "data sharing" means the disclosure of information, including personal data, by a public body to another public body. Part 4 of the 2019 Act provides for data sharing agreements between public bodies. The 2019 Act does not provide for information sharing with or between non-public bodies. Therefore it is important to note in the adult-safeguarding context that the 2019 Act does not apply where public and private bodies wish to share information to safeguard the health, safety or welfare of at-risk adults.

[16.80] Commenting on the 2019 Act, Safeguarding Ireland believe the introduction of a statutory code of practice for information sharing between public bodies would clarify the circumstances when information can be shared between public bodies and the types of information that can be shared for adult safeguarding purposes.[67] Safeguarding Ireland have also highlighted some limitations to the application of the 2019 Act in an adult safeguarding context.[68] For example, the 2019 Act only provides an ability to share information between public bodies and does not impose a legal obligation on public bodies to share the personal data or special categories of personal data of at-risk adults when necessary for their protection or for another person's protection.[69]

[16.81] Section 5 of the 2019 Act provides that the 2019 Act shall not apply to special categories of personal data other than for the purposes of Parts 5, 8 and Chapter 3 of Part 9 to the 2019 Act. This means that special categories of personal data can only be processed under the 2019 Act for the purposes of public service information in Part 5, the personal data access portal in Part 8, and governance in Chapter 3 of Part 9. As discussed above, because a lot of adult safeguarding data is special category data, the application of the 2019 Act in the adult safeguarding context is necessarily limited.

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66 Seanad Éireann Debates 19 June 2018 vol 258 no 11 <https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2018-06-19/debate/mul@/main.pdf> accessed on 6 April 2024.

67 Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 159.

68 Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 159.

69 Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 159.

3. Information sharing in the context of adult safeguarding in the UK

(a) UK

[16.82] In the UK, information sharing is regulated by the UK DPA and the UK GDPR. The UK GDPR is the retained law version of the EU's GDPR and has formed part of the law of England and Wales, Scotland and Northern Ireland since 1 January 2021.[70]

(i) Data Protection Act 2018

[16.83] The UK DPA came into effect on 25 May 2018 and sets out the framework for data protection law in the UK. The UK DPA sits alongside the UK GDPR and provides exemptions to the UK GDPR. The UK DPA sets out separate data protection rules for law enforcement authorities, extends data protection to the areas of national security and defence, and sets out the functions and powers of the UK Information Commissioner. Schedule 1 to the UK DPA provides a list of conditions which, if satisfied, permit the processing of special categories of personal data and criminal conviction data. Schedule 1, Part 2, paragraph 18 of the UK DPA permits information sharing when it is necessary for "protecting an individual from neglect or physical, mental or emotional harm" or "protecting the physical, mental or emotional well-being of an individual".[71]

[16.84] According to the Explanatory Notes to the UK DPA, Schedule 1, Part 2, paragraph 18 was included in the UK DPA to permit processing of sensitive categories of data required for the protection of "individuals at risk" and to make clear that front-line workers and others can lawfully process personal data by retaining records and sharing information where necessary for safeguarding individuals at risk.[72] In contrast, the DPA 2018 does not make reference to individuals at risk or at-risk adults and does not expressly permit the processing of special categories of personal data, for example data concerning health, to safeguard the health, safety or welfare of individuals at risk or at-risk adults.

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[70] See section 3 of the European Union (Withdrawal) Act 2018 (England and Wales), as amended by Schedule 1 to the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI No 419 of 2019) (England and Wales).

[71] An "individual at risk" is defined in Schedule 1 Part 2 para 18(3) of the UK DPA as an individual aged 18 years or over and at risk because the data controller has reasonable cause to suspect that the individual (a) has needs for care and support; (b) is experiencing, or at risk of, neglect or physical, mental or emotional harm; and (c) as a result of those needs is unable to protect themselves against the neglect or harm or the risk of neglect or harm.

[72] UK Government, *Explanatory Notes to the Data Protection Act 2018* (The Stationary Office 2018) at page 83 para 635 <https://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpgaen_20180012_en.pdf> accessed on 6 April 2024.

Moreover and in contrast to the UK DPA, the DPA 2018 does not make it expressly clear that front-line practitioners and others can lawfully share the personal data and special categories of personal data of at-risk adults to safeguard the health, safety or welfare of at-risk adults.

[16.85] To rely on the legal basis of necessity for reasons of substantial public interest in Schedule 1, Part 2, paragraph 18 of the UK DPA, the information sharing must be necessary for reasons of substantial public interest and be carried out with the consent of the individual at risk.[73] Where consent cannot be obtained, information sharing can still occur where:

(a) consent to the information sharing cannot be given by the individual at risk;

(b) the data controller cannot be reasonably expected to obtain the consent of the individual at risk; or

(c) the information sharing must be carried out without the consent of the individual at risk because obtaining their consent would prejudice the protection of an individual from neglect or physical, mental or emotional harm, or would prejudice the protection of the physical, mental or emotional well-being of the individual.[74]

[16.86] Schedule 8 to the UK DPA is also relevant for the purposes of information sharing in an adult safeguarding context because it provides conditions which must be satisfied before carrying out "sensitive processing" by competent authorities for law enforcement purposes. "Sensitive processing" is defined in section 35(8)(a)-(d) of the UK DPA as the processing of:

(a) personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership;

(b) genetic or biometric data for the purposes of uniquely identifying an individual;

(c) data concerning health; and

(d) data concerning an individual's sex life or sexual orientation.

[16.87] Schedule 7 to the UK DPA defines a "competent authority" as, among others, any UK government department,[75] Scottish and Welsh Ministers, any Northern

[73] Schedule 1 Part 2 para 18(1) of the UK DPA.

[74] Schedule 1 Part 2 para 18(2)(a)-(c) of the UK DPA.

[75] Non-ministerial departments are excluded from the definition of "competent authority".

Ireland department, the chief constable and various commissioners of the police force.

[16.88] Schedule 8 to the UK DPA allows for information sharing where necessary for the purpose of protecting an individual from neglect or physical, mental or emotional harm or protecting their physical, mental or emotional well-being where the individual is an individual at risk. Information sharing is allowed when the information sharing is necessary for "protecting an individual from neglect or physical, mental or emotional harm" or "protecting the physical, mental or emotional well-being of an individual".[76] To rely on this legal basis of necessity for reasons of substantial public interest, the information sharing must be necessary for reasons of substantial public interest and carried out with the consent of the individual at risk.[77] However where consent cannot be obtained, information sharing can still occur for any of the three reasons listed in paragraph 16.85(a)-(c) above.[78]

[16.89] Schedule 10 to the UK DPA is also relevant for the purposes of information sharing in an adult safeguarding context because it outlines conditions which must be met before sensitive processing can be carried out by the UK's Security Service, the Secret Intelligence Service and the Government Communications Headquarters. Information sharing will be allowed where it is necessary for "protecting an individual from neglect or physical, mental or emotional harm" or "protecting the physical, mental or emotional well-being of an individual".[79] To rely on this legal basis of necessity for reasons of substantial public interest for the purposes of sharing information, the information sharing must be necessary for reasons of substantial public interest.[80] Where consent cannot be obtained, information sharing under the legal basis of necessity for reasons of substantial public interest can still occur for any of the three reasons listed in paragraph 16.85(a)-(c) above. [81]

[16.90] As is evident from the above discussion of the UK DPA, the UK DPA is more accessible and empowering for at-risk adults and those working in adult safeguarding than the DPA 2018 in Ireland. In contrast to the DPA 2018 in Ireland, the UK DPA makes specific reference to individuals at risk, care and support, neglect, physical or emotional harm, and the fact that some data subjects, for example individuals at risk, are unable to protect themselves

[76] Schedule 8 para 4(1)(a)(i)-(ii) of the UK DPA.

[77] Schedule 8 para 4(1)(c)-(d) of the UK DPA.

[78] Schedule 8 para 4(2)(a)-(c) of the UK DPA.

[79] Schedule 10 para 4(1)(a)(i)-(ii) of the UK DPA.

[80] Schedule 10 para 4(1)(d) of the UK DPA.

[81] Schedule 10 para 4(2)(a)-(c) of the UK DPA.

against neglect or harm or the risk of neglect or harm.[82] The absence of specific references to adult safeguarding and at-risk adults in the DPA 2018 may be due to the fact that there is currently no dedicated adult safeguarding legislation in Ireland whereas in the UK, primary legislation provides for adult safeguarding.[83] At present, the UK DPA appears to be more capable of safeguarding and providing for the rights of individuals at risk in the UK than the DPA 2018 is capable of safeguarding and providing for the rights of at-risk adults in Ireland.

[16.91] As Lord Ashton explained during the House of Lords' consideration of the House of Commons' amendments to the UK's Data Protection Bill which subsequently became the UK DPA, these amendments related to information sharing for safeguarding purposes and inserted wording into the Bill providing for information sharing to safeguard individuals at risk.[84] These amendments aimed to ensure that sensitive data could be processed without consent in certain circumstances for legitimate safeguarding activities which are in the substantial public interest.[85] When these amendments were considered and approved by the House of Lords on 14 May 2018, it was noted that the unfortunate reality was that up until this point in time there existed a great deal of uncertainty in UK law about what personal data could be processed for safeguarding purposes.[86] Lord Ashton commented that this resulted in some UK organisations withholding information from the police and other law enforcement agencies for fear of breaching data protection law. These amendments to the Bill intended to address this uncertainty by providing relevant UK organisations with a specific processing condition for sharing the most sensitive personal data for safeguarding purposes.[87]

[16.92] In contrast to the UK DPA, the DPA 2018 makes no reference to at-risk adults, care and support, neglect, physical or emotional harm, or the fact that some at-risk adults, as data subjects, are unable to protect themselves against neglect or harm or the risk of neglect or harm. Unlike the UK DPA, information sharing for adult safeguarding purposes was neither debated nor discussed when drafting and enacting the DPA 2018. Moreover, the DPA 2018 was not drafted to ensure

[82] Schedule 1 Part 2 para 18; Schedule 8 para 4 of the UK DPA; Schedule 10 para 4 of the UK DPA.

[83] See, for example, the Safeguarding Vulnerable Groups Act 2006 (England, Wales and Northern Ireland), the Adult Support and Protection (Scotland) Act 2007 (asp 10), the Care Act 2014 (England, Wales, Scotland and Northern Ireland), and the Social Services and Well-being (Wales) Act 2014.

[84] House of Lords Debates 14 May 2018 vol 791 col 485 <https://hansard.parliament.uk/lords/2018-05-14/debates/5DC9320C-09DC-4F0B-9F57-7C3D1089F072/DataProtectionBill(HL)> accessed on 6 April 2024.

[85] House of Lords Debates 14 May 2018 vol 791 col 485.

[86] House of Lords Debates 14 May 2018 vol 791 col 485.

[87] House of Lords Debates 14 May 2018 vol 791 col 485.

that special categories of personal data, for example data concerning health, could be processed without consent in certain circumstances for legitimate safeguarding activities which are in the substantial public interest. Unlike the UK DPA, the DPA 2018 was not introduced to address uncertainty under existing law about what personal data could be processed for safeguarding purposes. Therefore in contrast to the UK DPA, the DPA 2018 does not provide relevant organisations with a specific processing condition for sharing special categories of personal data, for example data concerning health, for adult safeguarding purposes.

[16.93] The UK DPA demonstrates how laws relating to information sharing can be tailored to be accessible and empowering for at-risk adults and those involved in adult safeguarding. The provisions of the UK DPA commenced on various dates between 23 May 2018 and 2 December 2019.[88] The UK DPA was commenced in its entirety before the UK's departure from the European Union ("Brexit") on 31 January 2020 at 23:00 GMT.[89] Brexit did not make any changes to the UK DPA and therefore the UK DPA was tailored to be accessible and empowering for at-risk adults while the UK was a member of the European Union and subject to the same requirements as Ireland.

(ii) UK General Data Protection Regulation

[16.94] The UK GDPR came into effect on 1 January 2021 and sets out the key principles, rights and obligations for most processing of personal data in the UK, except for law enforcement and intelligence agencies. The UK GDPR is based on the EU's GDPR which applied in the UK before 1 January 2021.

(iii) Codes and Guidance

[16.95] The Information Commissioner's Office ("ICO") is the UK's independent regulator for data protection with responsibilities under the UK DPA and UK GDPR. The ICO's Data Sharing Code of Practice ("Code") is aimed at public, private and social sector organisations sharing data under the UK DPA and UK GDPR. The Code states that information sharing "can also identify people at risk, help protect them from harm and address problems before they have a

[88] Sections 212(2) and (3) of the UK DPA; the Data Protection Act 2018 (Commencement No 1 and Transitional and Saving Provisions) Regulations 2018 (England, Wales, Scotland and Northern Ireland); the Data Protection Act 2018 (Commencement No 2) Regulations 2019 (England, Wales, Scotland and Northern Ireland); and the Data Protection Act 2018 (Commencement No 3) Regulations 2019 (England, Wales, Scotland and Northern Ireland).

[89] See the European Union (Withdrawal Agreement) Act 2020 (England, Wales, Scotland and Northern Ireland).

significant adverse impact."[90] The Code recognises that in emergency situations involving "safeguarding vulnerable adults", data controllers "should go ahead and share data as is necessary and proportionate".[91] The Code notes that "it might be more harmful not to share data than to share it" and data controllers "should factor in the risks involved in not sharing data" when deciding whether to share information.[92]

[16.96] The UK Department of Health & Social Care updated its guidance on the Care Act 2014 of England and Wales on 19 January 2023 ("Guidance").[93] When reporting or responding to the abuse or neglect of someone who is receiving care, the Guidance advises that early information sharing is crucial.[94] The Guidance recommends that organisations should have arrangements in place which set out the processes and principles for sharing information with other organisations, professionals and Safeguarding Adults Boards in the UK.[95]

[16.97] The Guidance notes that a care professional should not assume that someone else will share information which they think may be critical to the safety and wellbeing of an adult.[96] If a care professional has concerns about an adult's welfare and believes they are suffering or likely to suffer abuse or neglect, they should share the information with a local authority or the police if they believe or suspect that a crime has been committed.[97] Agencies or bodies who operate within a local authority's area should ensure they have mechanisms in place that enable early identification and assessment of risk through timely information sharing and multiagency intervention.[98]

[16.98] The Adult Support and Protection (Scotland) Act 2007 ("2007 Act") supports and protects, among others, "adults at risk" who are defined in section 3(1)(a)-(c) of

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[90] ICO, *Data Sharing Code of Practice* (17 October 2022) at page 14 <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/data-sharing-a-code-of-practice-1-0.pdf> accessed on 6 April 2024.

[91] ICO, *Data Sharing Code of Practice* (17 October 2022) at page 66.

[92] ICO, *Data Sharing Code of Practice* (17 October 2022) at page 66.

[93] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance> accessed on 6 April 2024.

[94] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) at para 14.43.

[95] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) at para 14.43.1.

[96] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) at para 14.43.2.

[97] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) at para 14.43.2.

[98] Department of Health & Social Care (UK), *Care and support statutory guidance* (28 March 2024) at para 14.67.

the 2007 Act as adults who are unable to safeguard their well-being, property, rights or interests, are at risk of harm, and 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. An adult "at risk of harm" is defined in section 3(2)(a)-(b) of the 2007 Act as an adult who is at risk of harm because another person's conduct is causing, or is likely to cause, the adult to be harmed or the adult is engaging, or is likely to engage, in conduct which causes, or is likely to cause, self-harm. Section 48 of the 2007 Act required the relevant Scottish Minister to prepare and publish a code of practice containing guidance on the operation of the adult protection measures contained within Part 1 of the 2007 Act.

[16.99] The code of practice was published in 2014 and revised in July 2022 ("Revised Code of Practice"). The Revised Code of Practice clarifies information sharing expectations and provides useful guidance on information sharing.[99] The Revised Code of Practice refers to the ICO's Code of Practice on Data Sharing in an Urgent Situation or in an Emergency and notes that the ICO advises that in an emergency, those working in adult safeguarding "should go ahead and share data as is necessary and proportionate".[100] The key point in the Revised Code of Practice is that the UK GDPR and the UK DPA do not prevent organisations and practitioners working in adult safeguarding from sharing data where it is appropriate to do so.[101] The Revised Code of Practice advises that in an emergency, "it might be more harmful not to share data than to share it".[102] The Revised Code of Practice also advises that information should only be shared where disclosure will provide benefit to the adult which could not reasonably be provided without such an intervention.[103]

[16.100] In Wales, local authorities must act in accordance with codes of practice issued under section 145 of the Social Services and Well-being (Wales) Act 2014

[99] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 9 <https://www.gov.scot/publications/adult-support-protection-scotland-act-2007-code-practice-3/documents/> accessed on 6 April 2024.

[100] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 37; ICO, *Code of Practice on Data Sharing in an Urgent Situation or in an Emergency* <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/data-sharing-a-code-of-practice/data-sharing-in-an-urgent-situation-or-in-an-emergency/> accessed on 6 April 2024.

[101] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 37.

[102] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 37.

[103] Scottish Government, *Adult Support and Protection (Scotland) Act 2007 Code of Practice* (July 2022) at page 71.

("Welsh 2014 Act") when exercising their social service functions.[104] These codes of practice provide useful guidance on information sharing. Under section 145 of the Welsh 2014 Act, Welsh Ministers may issue and revise codes on the exercise of social services functions.[105] A local authority must, when exercising social services functions, act in accordance with, and have regard to, codes.[106] Part 4 of the Welsh Government's Code of Practice (Meeting Needs) of the Welsh 2014 Act advises that the willingness and ability to share appropriate and relevant information between practitioners and service providers is vital to the delivery of effective care and support services.[107]

4. Proposals for Reform

(a) The need for primary legislation to improve information sharing in the adult safeguarding context

[16.101] The current data protection legal framework in Ireland does not adequately provide for information sharing by relevant bodies to safeguard the health, safety or welfare of at-risk adults. Under existing law, there is no specific legal obligation or permission to share information where necessary to safeguard the health, safety or welfare of at-risk adults. This means that various provisions under Irish data protection law that provide legal bases for data processing, in the form of information sharing, cannot be relied on, or confidently relied on, to share information in an adult safeguarding context. Furthermore, there is no specific guidance in Ireland on how the legal bases for processing personal data under Article 6(1)(a)-(f) of the GDPR and the conditions for processing special categories of personal data under Article 9(2)(a)-(j) of the GDPR can be relied on to share the personal data and special categories of personal data of at-risk adults insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of at-risk adults.

[16.102] A consequence of this legal uncertainty is the adoption of inconsistent approaches to information sharing by various bodies and persons involved in

[104] Although the geographical extent of section 145 of the Social Services and Well-being (Wales) Act 2014 applies to England and Wales, the Social Services Codes (Appointed Day) (Wales) Order 2016 (2016 No 142 (W 67)) and the Social Services Code (Role of the Director of Social Services) (Appointed Day) (Wales) Order 2016 (2016 No 414 (W 132))—which appointed 6 April 2016 as the day on which the social services codes issued by the Welsh Ministers under section 145(1) of the 2014 Act came into force—state at article 1(2) that the orders apply "in relation to Wales" only.

[105] Section 145(1) of the Social Services and Well-being (Wales) Act 2014.

[106] Section 145(3)(a)-(b) of the Social Services and Well-being (Wales) Act 2014.

[107] Welsh Government, *Social Services and Well-being (Wales) Act 2014 Code of Practice, Part 4 Code of Practice (Meeting Needs)* (2015) at para 102 <https://gov.wales/sites/default/files/publications/2019-05/part-4-code-of-practice-meeting-needs.pdf>accessed on 6 April 2024.

adult safeguarding in Ireland. Safeguarding Ireland notes that much of this inconsistency is likely due to a lack of understanding and a lack of clarity around the legal bases for information sharing in the specific context of adult safeguarding.[108] Engagement with stakeholders to provide guidance on, and clarification of, the legal bases for information sharing in the adult safeguarding context would assist in developing a consistent approach to information sharing by bodies and persons involved in adult safeguarding in Ireland.

[16.103] On 24 August 2022, HIQA published its key considerations to inform policy for the collection, use and sharing of health and social care information in Ireland and made a number of recommendations to improve the sharing of information between health and social care services.[109] HIQA highlighted the need for legislation to support information sharing between health and social care services and to act as a catalyst for a more integrated health and social care sector. In January 2022, the Department of Health announced plans to develop new health information-specific legislation.[110] On 18 April 2023, the Minister for Health received Cabinet approval to develop the General Scheme of a Health Information Bill.[111] On 7 July 2023, HIQA published its key considerations to inform the National Policy Framework for Children and Young People 2023-2028 and stated that the development of the Health Information Bill provides an opportunity to ensure clarity on information sharing within and between the HSE, the CFA and other appropriate statutory bodies.[112] According to the Government's Legislation Programme for Spring 2024 which was published on 16 January 2024, pre-legislative scrutiny of the Health Information Bill was completed in May 2023 and the Bill is scheduled for priority drafting in the 2024 spring session.[113]

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[108] Safeguarding Ireland, *Discussion Paper on Identifying Risks, Sharing Responsibilities: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults* (May 2022) at page 162.

[109] HIQA, *Key considerations to inform policy for the collection, use and sharing of health and social care information in Ireland* (24 August 2022) <https://www.hiqa.ie/sites/default/files/2022-08/Key-policy-considerations-for-health-information.pdf> accessed on 6 April 2024.

[110] HIQA, *Key considerations to inform the National Policy Framework for Children and Young People 2023-2028* (7 July 2023) at page 9 <https://www.hiqa.ie/sites/default/files/2023-06/Key-considerations-to-inform-the-National-Policy-Framework-for-Children-and-Young-People-2023-2028.pdf> accessed on 6 April 2024.

[111] Department of Health, *Minister Donnelly receives Cabinet approval for the General Scheme of a Health Information Bill* (18 April 2023) <https://www.gov.ie/en/press-release/13b1f-minister-donnelly-receives-cabinet-approval-for-the-general-scheme-of-a-health-information-bill/> accessed on 6 April 2024.

[112] HIQA, *Key considerations to inform the National Policy Framework for Children and Young People 2023-2028* (7 July 2023).

[113] Department of the Taoiseach, *Legislation Programme Spring 2024* (16 January 2024) at page 10 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/283170/1e4c4505-aa02-4b5e-a35b-a793fa74eee8.pdf#page=null> accessed on 6 April 2024.

[16.104] The Commission welcomes the Government's approval of the General Scheme of the Health Information Bill on 18 April 2023 and awaits the prioritised drafting of the Bill in the 2024 spring session. As noted at the beginning of this Chapter, most of the information that is relevant in the adult safeguarding context is the personal data and special categories of personal data of at-risk adults, in particular their "data concerning health" which is "personal data related to the physical or mental health of [an at-risk adult], including the provision of health care services, which reveal information about [their] health status".[114]

[16.105] The Commission believes that the development of the Health Information Bill provides an opportunity to ensure clarity on information sharing within and between the HSE, the CFA and other appropriate statutory bodies in the Irish adult safeguarding context. However, the Commission notes that health information is only one category of the special categories of personal data.[115] Furthermore, the proposed duty in Head 18 of the Health Information Bill to share information for care and treatment is only imposed on "health service providers", which does not capture all bodies whose functions relate, in whole or in part, to safeguarding the health, safety or welfare of at-risk adults in Ireland.[116] The Commission believes that other primary legislation is required in Ireland, in addition to the Health Information Bill, to provide for the sharing of information between relevant bodies to safeguard at-risk adults. The Commission also believes that other bodies, in addition to health service providers, should be subject to statutory duties to cooperate, including a statutory duty to share information, where appropriate, to safeguard the health, safety or welfare of at-risk adults.[117] For these reasons, the Commission believes that other primary legislation is required, in addition to the Health Information Bill, to provide for the sharing of information, including but not limited to health information, between a wider group of relevant bodies than health service providers in order to safeguard the safety, health or welfare of at-risk adults in Ireland.

[16.106] Accordingly, the Commission recommends that primary legislation should provide for information sharing between relevant bodies whose functions relate, in whole or in part, to safeguarding the health, safety or welfare of at-risk adults.

[114] Article 4(15) of the GDPR.

[115] See "data concerning health" in Article 9(1) of the GDPR and the definition of "data concerning health" in Article 4(15) of the GDPR.

[116] General Scheme of the Health Information Bill 2023 (18 April 2023) <https://assets.gov.ie/256084/03a387c6-0957-4917-9db0-857e1da2cbbe.pdf> accessed 11 April 2024.

[117] The Commission's recommendations on cooperation are contained in Chapter 15.

R. 16.1 **The Commission recommends that** primary legislation should provide for information sharing between relevant bodies whose functions relate, in whole or in part, to safeguarding the health, safety or welfare of at-risk adults.

(b) Introduction of a statutory obligation and a statutory permission to share information with relevant bodies to safeguard the health, safety or welfare of at-risk adults

[16.107] The Commission believes that the enactment of both a statutory obligation and a statutory permission providing for information sharing among relevant bodies whose functions relate, in whole or in part, to safeguarding the health, safety or welfare of at-risk adults would form an integral part of the multiagency and multidisciplinary approach required to adequately safeguard at-risk adults in Ireland.

[16.108] When considering how a statutory obligation, if introduced in primary legislation, should be articulated, section 45 of the Care Act 2014 of England and Wales is instructive. Section 45(1) provides that if a Safeguarding Adults Board in England and Wales ("SAB") requests a person to supply information to it, or to some other person, the person requested must comply with the request if:

(a) the request is made for the purpose of enabling or assisting the SAB to exercise its functions;

(b) the request is made to a person whose functions or activities the SAB considers to be such that the person is likely to have information relevant to the exercise of a function by the SAB, for example a GP who provides medical advice or treatment to an at-risk adult in respect of whom the SAB is carrying out a serious case review, or a family member or carer of that adult;[118] and

(c) the information relates to:

(i) the person to whom the request is made;

(ii) a function or activity of that person; or

(iii) a person in respect of whom that person exercises a function or engages in an activity; or

[118] UK Government, *Explanatory Notes to the Care Act 2014* (The Stationery Office 2014) at para 296.

(d) the information is:

(i) requested by the SAB from a person to whom information was supplied in compliance with another request under section 45 of the Care Act 2014; and

(ii) the same as, or is derived from, information supplied in compliance with another request under section 45.

[16.109] A statutory permission for a relevant body to share information with another relevant body insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of at-risk adults in Ireland could address situations where a relevant body is in possession of information relevant to safeguarding the health, safety or welfare of an at-risk adult that it wishes to share with another relevant body who may not know about the safeguarding concern. If introduced in primary legislation, the statutory permission to share information should specifically state to whom it refers, define the information which may be permitted to be shared, and be directed towards the sharing of information relating to a narrowly defined cohort of society, namely at-risk adults.

[16.110] However there may be situations where information should be obliged or permitted to be shared to determine whether an individual does in fact come within the narrowly defined cohort of at-risk adults whose safeguarding the statutory obligation and permission are designed to facilitate. Otherwise, the statutory obligation and permission would only permit the sharing of information relating to those who are already known to be at-risk adults and would be unable to usefully oblige or permit information sharing to determine whether an individual is in fact an at-risk adult. For this reason, the Commission believes that it would be important for both a statutory obligation and permission to encompass the sharing of information relating to the safeguarding of an adult who is, or is reasonably believed to be, an at-risk adult.

(i) Ensuring Compliance with the GDPR

[16.111] The Commission has considered the necessity to enact the reform of Irish law on information sharing within the parameters of the GDPR. As discussed, in the vast majority of adult safeguarding situations, a legal basis for information sharing must exist under Article 6 of the GDPR and an exception must exist under Article 9 of the GDPR. As such, the Commission has sought to craft statutory provisions that satisfy both Article 6 and Article 9 in all instances. This ensures the greatest degree of GDPR compliance, even if this results in some non-special categories of personal data being subject to a higher level of protection than is required by the GDPR.

[16.112] The Commission considers that is Article 6(1)(e) of the GDPR is the most appropriate basis, namely that the information sharing is necessary for the

performance of a task carried out in the public interest. The Commission believes that information sharing insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of an at-risk adult in Ireland constitutes a task carried out in the public interest. The Commission further notes that the protection of "vulnerable groups", such as at-risk adults, has been identified by the DPC, a public body, as one of its strategic goals. The DPC's Regulatory Strategy 2022-2027 ("Regulatory Strategy") states that one of its strategic goals is to prioritise the protection of children and "other vulnerable groups" which, it is reasonable to assume, includes at-risk adults.[119] The DPC also notes that it has a duty, as a public body under section 42(1) of the Irish Human Rights and Equality Commission Act 2014, to "promote equality, prevent discrimination and protect the human rights of all who will be impacted by its policies and plans".[120] The DPC states that its strategy is to ensure that "the provisions of data protection law are enjoyed equally by all, including those who require extra support to uphold their rights".[121]

[16.113] In addition, processing under Article 6(1)(e) of the GDPR must be proportionate to the legitimate aim pursued, as required by Article 6(3) of the GDPR. Therefore proportionality must be built into the architecture of both the statutory obligation and permission.

[16.114] The Commission is of the view that the most appropriate Article 9 exception is Article 9(2)(g) of the GDPR. The Commission acknowledges that Article 9(2)(h) is also a potentially relevant exception for the sharing of special categories of personal data of at-risk adults in the adult safeguarding context. In light of the fact that Article 9(2)(h) of the GDPR is specifically directed towards processing by a health practitioner for health matters such as preventive or occupational medicine, medical diagnosis, the provision of medical care or treatment or pursuant to a contract with a health practitioner, the Commission is of the view that Article 9(2)(h) of the GDPR is perhaps not as suitable as Article 9(2)(g), which is broader in scope.

[16.115] The proposed primary legislation in section 4(b)(ii) below could provide a basis for the processing of the personal data and special categories of personal data of at-risk adults in Irish Member State law. To ensure compliance with Article 6(1)(e) and 9(2)(g) of the GDPR, both the statutory obligation and permission must:

(a) identify the public interest to be served;

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[119] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 8 <https://www.dataprotection.ie/sites/default/files/uploads/2021-12/DPC_Regulatory%20Strategy_2022-2027.pdf> accessed on 6 April 2024.

[120] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

[121] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

(b) ensure that the sharing of data is necessary and proportionate to the aim pursued; and

(c) provide for suitable and specific safeguards to safeguard the fundamental rights and interests of data subjects.

(ii) Statutory Obligation and Permission to Share Information with Relevant Bodies to Safeguard the Health, Safety or Welfare of Adults at Risk of Harm

Information sharing between relevant bodies to safeguard the health, safety or welfare of adults at risk of harm[122]

(1) In this section:

"adult at risk of harm" means an adult who by reason of their physical or mental condition or other particular personal characteristics or family or life circumstance (whether permanent or otherwise) needs support to protect himself or herself from harm at a particular time;

"data concerning health" has the meaning given to it in Article 4 of the General Data Protection Regulation;

"General Data Protection Regulation" means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016[123] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;

"information" means information, including personal data and special categories of personal data, pertaining to the health, safety or welfare of an adult at-risk of harm;

"Minister" means the Minister for Justice or other Minister of the Government, as determined by the Government and the Oireachtas;

[122] The Commission uses the term "at-risk adult" in this Report and uses the term "adult at risk of harm" in its Adult Safeguarding Bill 2024. The term "at-risk adult" is used in the Report because it is shorter than "adult at risk of harm". Both "at-risk adult" and "adult at risk of harm" have the same meaning, namely "an adult who by reason of their physical or mental condition or other particular personal characteristics or family or life circumstance (whether permanent or otherwise) needs support to protect himself or herself from harm at a particular time".

[123] OJ No L 127, 23.05.2018, p 1.

"personal data" has the meaning given to it in Article 4 of the General Data Protection Regulation;

"relevant body" means the following:

(a) the Child and Family Agency;

(b) a Department of State;

(c) the Garda Síochána;

(d) the Health and Social Care Professionals Council;

(e) the Health Information and Quality Authority;

(f) the Health Service Executive;

(g) a body or office established under adult safeguarding legislation to perform the functions conferred on it, by or under this Act or any other enactment, whether on a permanent or temporary basis as determined by the Government and the Oireachtas;

(h) the Mental Health Commission;

(i) a designated centre for the purposes of the Health Act 2007;

(j) an agency in receipt of funding pursuant to section 38 or 39 of the Health Act 2004;

(k) an approved centre for the purposes of the Mental Health Act 2001;

(l) a local authority within the meaning of the Local Government Act 2001;

(m) a local community development committee established pursuant to section 49A of the Local Government Act 2001;

(n) a local community safety partnership established pursuant to the Policing, Security and Community Safety Act 2024; and

(o) any other person or public or private body, organisation or group that the Minister may prescribe by regulations pursuant to *subsection (10)(a),*

insofar as one or more of their functions relate to safeguarding the health, safety or welfare of an adult at risk of harm;

"request for information" means a request in writing or by electronic means from a relevant body to another relevant body for information;

"special categories of personal data" shall be construed in accordance with the General Data Protection Regulation and includes data concerning health.

(2) A relevant body may make a request for information to another relevant body.

(3) In order to make a request for information to another relevant body pursuant to *subsection (2)*, a relevant body shall satisfy one, or more, of the following conditions:

(a) the sharing of the information is necessary in the public interest to safeguard the health, safety or welfare of an adult at risk of harm;

(b) the prior consent of an adult at risk of harm cannot reasonably be expected to be obtained;

(c) the nature and volume of the information requested is necessary and proportionate to the aim of safeguarding the health, safety or welfare of an adult at risk of harm;

(d) suitable and specific measures are, or will be, provided to safeguard the fundamental rights and interests of an adult at risk of harm which may include, but are not limited to, the measures contained in section 36(1) of the Data Protection Act 2018.

(4) The relevant body making the request for information shall:

(a) specify the public interest served by sharing the information; and

(b) have regard to the following:

(i) the nature of the substantial public interest to safeguard the health, safety or welfare of the adult at risk of harm;

(ii) any benefits likely to arise for the adult at risk of harm; and

(iii) any risks, including their likelihood and severity, arising for the rights and freedoms of the adult at risk of harm.

(5) A relevant body that receives a request for information pursuant to *subsection (2)* that is made in accordance with *subsections (3) and (4)* shall:

(a) comply with such a request; and

(b) only share such information that is necessary and proportionate to the aim of safeguarding the health, safety or welfare of the adult at risk of harm.

(6) A relevant body shall not, in discharging the obligation under *subsection (5)*, be required to share information that it would be entitled to refuse to share on the grounds of legal professional privilege.

(7) No action shall lie against a relevant body that acts in accordance with *subsection (6)*.

(8) A relevant body may share information with another relevant body if the following conditions are met:

(a) the sharing of the information is necessary in the public interest to safeguard the health, safety or welfare of the adult at risk of harm;

(b) the prior consent of the adult at risk of harm cannot reasonably be expected to be obtained;

(c) the nature and volume of the information shared is necessary and proportionate to the aim of safeguarding the health, safety or welfare of the adult at risk of harm;

(d) suitable and specific measures are, or will be, provided to safeguard the fundamental rights and interests of the adult at risk of harm which may include, but are not limited to, the measures contained in section 36(1) of the Data Protection Act 2018.

(9) Where a relevant body shares information pursuant to *subsection (8)*, it shall:

(a) specify the public interest served by sharing the information; and

(b) have regard to the following:

(i) the nature of the substantial public interest to safeguard the health, safety or welfare of the adult at risk of harm;

(ii) any benefits likely to arise for the adult at risk of harm;

(iii) any risks, including their likelihood and severity, arising for the rights and freedoms of the adult at risk of harm.

(10) The Minister may prescribe the following by regulations:

(a) a person or public or private body, organisation or group as a relevant body for the purposes of this section; and

(b) a form for the making of a request for information in accordance with this section.

a. Partial model for the statutory obligation

[16.116] The proposed statutory obligation above is partly modelled on the relevant subheads of Head 10 of a Bill to amend the Child Care Act 1991.[124] Head 10 of the Bill proposes to amend the Child Care Act 1991 by inserting a new section after section 7 of the Child Care Act 1991 which would confer a legal duty on relevant bodies to comply with a lawful request for information by another body and provide the requesting body with such information as it considers necessary and proportionate. Head 10 aims to address longstanding concerns about the ability of organisations to share information with the CFA and seeks to facilitate interagency cooperation.

b. Definition of "adult at risk of harm"

[16.117] In formulating the definition of "adult at risk of harm", a balance needs to be struck between specificity and generality, and requires the adoption of a definition that is workable in practice. When formulating the definition of "adult at risk of harm" of the statutory obligation and permission above, the Commission has focused on adults in the greatest need of safeguarding without stigmatising, infantilising or 'othering' people. The vast majority of respondents to the Issues Paper were in favour of moving away from the use of the word 'vulnerable' and noted that the word 'vulnerable' is widely interpreted as implying that it is a person's characteristics, namely a weakness on their part, which results in them being abused or harmed. Respondents also noted that the use of the word 'vulnerable' negatively reinforced the assumption that all disabled people are dependent and in need of protection. In drafting the definition of "adult at risk of harm", the Commission has sought to avoid unhelpful, stigmatising and inaccurate stereotypes.

[124] Heads and General Scheme of Bill to amend the Child Care Act 1991 at page 21 <https://assets.gov.ie/254561/1b92fe3a-97b6-46e2-8db2-87f21b813db7.pdf> accessed on 6 April 2024.

[16.118] The proposed statutory obligation and permission, by proposing a broad definition of "adult at risk of harm", requires a relevant body making a request for information to assess the applicability of the definition of "adult at risk of harm" to a data subject. The relevant body is required to determine whether the data subject is a person aged 18 years or older who is, or is reasonably believed to be, by reason of their physical or mental condition or other particular personal characteristic or family or life circumstance, whether permanent or otherwise, in need of support to protect themselves from harm at a particular time. The Commission notes that this determination should be made in relation to the risk of specific and relevant identifiable harm arising in the context of the particular situation and circumstances of the data subject to ensure that the sharing of the personal data and special categories of personal data of the data subject is necessary and proportionate.

[16.119] The Commission acknowledges that in taking a broad approach to defining an "adult at risk of harm", there is potential for further guidance to be required to provide clarity and foreseeability about the persons who come within the definition of "adult at risk of harm". For example, the term "physical or mental condition" in the definition of "adult at risk of harm" may encompass a wide variety of people in various situations, with varying degrees of exposure to risk depending on the specific context. Moreover the words "other particular personal characteristic or family or life circumstance" are broad, and relevant bodies may make different decisions regarding whether a person falls inside or outside the definition based on a person's personal characteristics or family or life circumstances.

[16.120] To mitigate the potential risk that some relevant bodies may incorrectly make a once-off determination of an individual to justify information sharing on an ongoing basis or make blanket determinations regarding information sharing applicable to groups of data subjects, it may be necessary to adopt measures such as the introduction of statutory codes of practice or the making of ministerial regulations to provide clarity and certainty to relevant bodies and the public.

[16.121] The Commission notes that the legislative consultation process under Article 36 of the GDPR provides the DPC with the opportunity to engage in a full discussion of these definitional issues with the relevant government department and stakeholders on the development of codes or regulations.

c. Definition of "relevant body"

[16.122] The statutory obligation and permission explains who can share information pursuant to the obligation and permission. It is the intention of the Commission that this definition could encompass both public and private bodies. The statutory obligation and permission includes within the definition of "relevant body" a number of bodies that work closely with at-risk adults, provide services to at-risk adults, and form part of a multiparty response to safeguarding at-risk

adults. For example, CORU is a "relevant body" because its object is to protect the public by promoting high standards of professional conduct and professional education, training and competence among social workers, speech and language therapists, radiographers and radiation therapists, physiotherapists, podiatrists, occupational therapists, opticians, medical scientists and dietitians ("Registrants of Designated Professions") and to enforce standards of practice for Registrants of Designated Professions, including codes of professional conduct. Section 8 of CORU's codes of professional conduct and ethics for Registrants of Designated Professions states that such designated professions must be aware of, and comply with, national guidelines and legislation for the protection of "vulnerable adults" and report welfare concerns to the appropriate authorities.[125] A breach of these codes could amount to professional misconduct or poor professional performance and could result in a disciplinary sanction being imposed by CORU following a fitness to practice inquiry.

[16.123] A "local authority" within the meaning of the Local Government Act 2001 is a "relevant body" in the statutory obligation and permission because in Ireland, no sector is assigned an overall coordinating role in relation to safeguarding adults but local authorities play a role in relation to at-risk adults who are social housing tenants. Irish local authorities employ social inclusion social workers who may engage with at-risk adults in their capacity as social housing tenants. An anti-social behaviour complaint to a local authority may trigger a concern that a local authority tenant, who is or is reasonably believed to be an at-risk adult, is being subjected to cuckooing, a hostile takeover or another form of abuse.[126]

[16.124] A "local community development committee" ("LCDC") established pursuant to section 49A of the Local Government Act 2001 is a "relevant body" in the statutory obligation and permission. Section 49A of the Local Government Act 2001 allows local authorities to establish LCDCs in their administrative areas for the purposes of developing, co-ordinating and implementing coherent and integrated approaches to local and community development. Each LCDC is independent in the performance of its functions. LCDCs engage with members of the community when planning community development programmes including the delivery of community-based services. In the course of such engagement, it is possible that information may come to the attention of a member of a LCDC which may give rise to an adult safeguarding concern.

[16.125] A "local community safety partnership" ("LCSP") established pursuant to the Policing, Security and Community Safety Act 2024 ("2024 Act") is a "relevant

[125] CORU, *Codes of Professional Conduct and Ethics* <https://www.coru.ie/health-and-social-care-professionals/codes-of-professional-conduct-and-ethics/> accessed on 6 April 2024.

[126] Cuckooing is further discussed in Chapters 14 and 19.

body" in the statutory obligation and permission. At the time of writing, the 2024 Act has not yet commenced. The 2024 Act makes community safety a whole-of-government responsibility by providing a new framework at national and local level to improve community safety, including through the establishment of LCSPs. LCSPs aim to combat anti-social behaviour by creating tailored community safety plans with input from local community and public services. LCSPs aim to engage with the community to prioritise issues raised by their members as security concerns. A LCSP acts as a forum to create dialogue between community representatives and agencies such as the Garda Síochána. LCSPs have been piloted on a non-statutory basis in Longford, Waterford and Dublin's north inner city.[127] Section 114(1) of the 2024 Act provides for the making of regulations by the Minister for Justice, following consultation with other Ministers, relating to the establishment and operation of LCSPs. Such regulations may make provision for the membership of LCSPs, which may include members of the local authority, representatives of public service bodies, and representatives of local community and voluntary bodies involved in activities relating to community safety.[128] Under section 116(1)(b) of the 2024 Act, a LCSP will develop and adopt, on a three-year basis, a plan to improve community safety in its functional area.

[16.126] Having regard to the establishment and operation of LCSPs in Ireland and references in the 2024 Act to the prevention of harm to individuals who are "vulnerable" or "at risk",[129] LCSPs may have sub-roles in relation to adult safeguarding as part of their main role in improving community safety in their functional areas. It is possible that information regarding actual or suspected cases of cuckooing, hostile takeovers or other abuse of at-risk adults in the community may be brought to the attention of LCSPs. In improving community safety in their functional areas, LCSPs may seek to share information in an adult safeguarding context to protect at-risk adults as part of their overall aim of improving community safety in their functional areas. Accordingly, it would be prudent for a LCSP to be included as a "relevant body" subject to a statutory obligation and permission to share information in an adult safeguarding context in Ireland.

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[127] Department of Justice, *Local Community Safety Partnerships* (1 November 2022) <https://www.gov.ie/en/collection/e166a-pilot-local-community-safety-partnerships/> accessed on 6 April 2024; Dublin City Council, *The Local Community Safety Partnership (LCSP)* <https://www.dublincity.ie/residential/improving-my-community/have-your-say-community-safety#:~:text=The%20Local%20Community%20Safety%20Partnership%20(LCSP)%20is%20a%20new%20government,tackling%20community%20safety%20issues%20locally> accessed on 6 April 2024.

[128] Section 114(2)(c)(iii) of the Policing, Security and Community Safety Act 2024.

[129] See sections 2(1), 9(1)(f), 43(3), 118(1), 118(3) and 124(3)(b)(vi) of the Policing, Security and Community Safety Act 2024.

[16.127] There may be circumstances in the future when, for example, a person or public or private body, organisation or group that is:

(a) designated as a "relevant body" in the statutory obligation and permission would like to share information with a person or public or private body, organisation or group that is not designated as a "relevant body"; or

(b) not designated as a "relevant body" but would like to request information from a "relevant body",

insofar as is necessary and proportionate to the aim of safeguarding the health, safety or welfare of an at-risk adult.

[16.128] In such situations, it may be appropriate to designate a person or public or private body, organisation or group as a "relevant body". The statutory obligation and permission allows the Minister to prescribe by regulations a person or public or private body, organisation or group as a "relevant body" in the event that the list of relevant bodies in the statutory obligation and permission needs to be expanded.

d. Drafting of the statutory obligation and statutory permission to ensure compliance with the GDPR and the DPA 2018

[16.129] The Commission has endeavoured to draft the statutory obligation and permission to ensure compliance with the GDPR by fitting within Article 6(1)(e) and 9(2)(g) of the GDPR and to satisfy the requirements outlined in paragraphs 16.110 to 16.113 of this Chapter.

[16.130] The statutory obligation and permission draws on section 51(7)(a)-(e) of the DPA 2018, which address the making of regulations for the processing of special categories of personal data. The statutory obligation and permission also draws on section 36 of the DPA 2018 which specifies suitable and specific measures for processing.

[16.131] The statutory obligation and permission requires that the requesting body be satisfied that the prior consent of the adult at-risk cannot reasonably be obtained. Consent is not a requirement of the GDPR for information sharing in this instance because consent is not the relevant legal basis. However the Commission has recommended the inclusion of this requirement to ensure the vindication of the right to autonomy of the at-risk adult.

[16.132] A relevant body requesting the special categories of personal data of an at-risk adult (in particular data concerning health) from another relevant body must make a "request for information" under the statutory obligation. A number of requirements need to be satisfied to make a "request for information" compliant with the GDPR and the DPA 2018. These requirements derive from:

(a) the principles relating to the processing of personal data in Article 5 of the GDPR;

(b) the lawful basis of public interest under Article 6(1)(e) of the GDPR;

(c) the substantial public interest processing condition under 9(2)(g) of the GDPR;

(d) the suitable and specific measures for processing outlined in section 36 of the DPA 2018; and

(e) the requirements for the making of regulations in respect of the processing of special categories of personal data for reasons of substantial public interest contained in section 51 of the DPA 2018.

e. The statutory obligation

[16.133] The proposed statutory provision expressly mentions the obligation and provides that a relevant body shall comply with a request for information. However the obligation is qualified by provisions which state that a relevant body shall only share such information that is necessary and proportionate to the aim of safeguarding the health, safety or welfare of the at-risk adult and shall not be required to share information that it would be entitled to refuse to share on the grounds of legal professional privilege.

f. Immunity

[16.134] The proposed statutory provision provides that no action shall lie against a relevant body that acts in accordance with the provision and shares information that is necessary and proportionate to the aim of safeguarding the health, safety or welfare of the at-risk adult.

[16.135] This immunity is available to a "relevant body". As drafted, regulated financial service providers ("RFSPs") in Ireland are not included in the definition of "relevant body" and do not benefit from the immunity. However, the proposed statutory provision allows the Minister to prescribe by regulations a person or public or private body, organisation or group as a "relevant body" in the event that the list of relevant bodies in the proposed statutory provision needs to be expanded. Accordingly, there is scope for RFSPs to be designated as relevant bodies and to benefit from the immunity.

[16.136] In Chapter 14, the Commission discusses the actual or suspected financial abuse of at-risk adults. The Commission notes in Chapter 14 that it is important for there to be legal provision under which relevant personnel can be protected in taking proactive measures, including information sharing, and that relevant personnel are empowered to share information with the Garda Síochána and

other bodies in appropriate cases, for example with the HSE, the Decision Support Service or the Safeguarding Body. In Chapter 14, the Commission also notes that protection in taking proactive steps, for example information sharing, could be included in the revised Consumer Protection Code or in proposed regulations to be issued by the Central Bank of Ireland under the Central Bank Acts 1942 to 2018. Moreover the Commission recommends in Chapter 14 that a statutory immunity should be introduced in primary legislation to clarify that no action shall lie against a RFSP or a branch manager, director, officer, employee, agent or other representative of a RFSP in respect of an action taken in good faith to safeguard an at-risk adult, who is a customer of the RFSP, from actual or suspected financial abuse when there is knowledge or a reasonable belief that the at-risk adult is being, has been or is likely to be subject to financial abuse.

R. 16.2 **The Commission recommends that** both a statutory obligation and a statutory permission should be introduced in primary legislation to specifically provide for information sharing between relevant bodies whose functions relate, in whole or in part, to safeguarding the health, safety or welfare of at-risk adults.

(c) Provision for information sharing pursuant to regulations made under the Data Protection Act 2018 or amendment of the Data Sharing and Governance Act 2019

[16.137] As per the previous recommendations, the Commission believes that the optimal way to address information sharing in an adult safeguarding context in Ireland is through primary legislation as part of a comprehensive regulatory regime for adult safeguarding.

[16.138] However, the Commission observes that there are other steps that may be taken on an interim basis that could improve the current situation. The Commission has observed that the 2019 Act is of limited application in an adult safeguarding context because it cannot be relied on to share special categories of personal data except for the limited purposes of Parts 5, 8 and Chapter 3 of Part 9 to the 2019 Act. Therefore one option may be to amend the 2019 Act to allow public bodies to share the special categories of personal data of at-risk adults to safeguard the health, safety or welfare of at-risk adults. Such an amendment would have to be tightly crafted to conform to the requirements of the GDPR, following a similar approach to that recommended for primary legislation above.

[16.139] Section 38(4) of the DPA 2018 provides for the power to make regulations to specify when personal data may be shared by a data controller for the performance of a task carried out in the public interest. However as discussed above, section 6(2) of the 2019 Act provides that section 38 of the DPA 2018 shall not apply to the disclosure of information by one public body to another public body.

[16.140] Section 51(3) of the DPA 2018 provides for the making of regulations authorising the processing of special categories of personal data where necessary for reasons of substantial public interest. Section 51 is not limited by the 2019 Act, and therefore it would seem to be the more appropriate basis for the making of regulations in the adult safeguarding context. Such regulations could be revoked, in due course, if replaced by primary legislation. A similar regulation-making power is provided for in the law enforcement context in section 73(2) of the DPA 2018.

[16.141] Regulations under sections 51(4) and 73(2) of the DPA 2018 could follow a similar approach to that recommended for the statutory obligation and permission above. Those regulations must strictly comply with the requirements of the DPA 2018 and the GDPR. Sections 51(4)(a) and 73(2) of the DPA 2018 state that regulations made under these sections must identify the substantial public interest concerned. As such, the regulations should expressly identity the safeguarding of the health, safety or welfare of at-risk adults in Ireland as the substantial public interest concerned.

[16.142] Section 51(4)(b) of the DPA 2018 states that regulations made under section 51(3) of the DPA 2018 must identify the suitable and specific measures to safeguard the fundamental rights and freedoms of data subjects in sharing the personal data which is authorised by the regulations. Section 36(1) of the DPA 2018 states that suitable and specific measures may include:

(a) limitations on access to the information;

(b) strict time limits for the erasure of the information and mechanisms to ensure the strict time limits are observed;

(c) specific targeted training for those involved in processing operations;

(d) logging mechanisms to permit verification of whether, and by whom, the information has been accessed, altered, disclosed or erased;

(e) designation of a data protection officer;

(f) pseudonymisation of the information; and

(g) encryption of the information.

[16.143] These suitable and specific measures should be expressly included in regulations made under section 51(3) of the DPA 2018. These measures have been incorporated by reference in the proposed statutory obligation and permission outlined in section 4(b)(ii) of this Chapter.

R. 16.3 **The Commission recommends that** until adequate provision is made for information sharing in the adult safeguarding context in primary legislation, regulations under sections 51(3) and 73(2) of the Data Protection Act 2018 should be introduced to allow relevant bodies, whose functions relate in whole or in part to safeguarding the health, safety or welfare of at-risk adults, to share the special categories of personal data of at-risk adults with relevant bodies for the substantial public interest reason of safeguarding the health, safety or welfare of at-risk adults in Ireland.

(d) The publication of guidance and/or codes of conduct to assist in the practical application of data protection law in the adult safeguarding context

[16.144] The Commission is mindful that data protection is a field in which guidance from regulators is of great assistance in clarifying the application of the law to practical situations. Ideally, this guidance should supplement a comprehensive regulatory framework. Accordingly, if primary or secondary legislation were introduced, as per the above recommendations, it would be valuable for the DPC to consider disseminating guidance to accompany those legislative provisions.

[16.145] The Commission has also considered whether guidance could help ameliorate the legal uncertainty surrounding information sharing in the short term, before any legislation is introduced. While acknowledging that it is not the duty of the DPC or any other public body to fill a legislative gap, the Commission is of the view that such guidance would be valuable. Accordingly, the Commission recommends that guidance should be published on the sharing of the personal data and special categories of personal data of at-risk adults in the adult safeguarding context. Given the complexity and uncertainty with regard to relying on a legal basis under Article 6(1) of the GDPR and an exception under Article 9(2) of the GDPR to share special categories of personal data (in particular data concerning health) in an adult safeguarding context in Ireland, the publication of guidance would be useful both in the short term and in advance of any substantive law reform in the area of adult safeguarding.

[16.146] Useful precedents for guidance on information sharing in a specific context include the ICO’s 10 Step Guide to Sharing Information to Safeguard Children which was published on 14 September 2023 or the DPC’s Fundamentals for a Child-Oriented Approach to Data Processing.[130] The Commission notes

[130] DPC, *Fundamentals for a Child-Oriented Approach to Data Processing* (17 December 2021) <https://www.dataprotection.ie/sites/default/files/uploads/2021-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_FINAL_EN.pdf>accessed on 6 April

however, that the topics on which it is appropriate to issue guidance, and the nature of that guidance, will largely depend on regulatory strategies and legislative developments in the field of adult safeguarding.

[16.147] Having consulted with the DPC in relation to this Chapter, the Commission notes that considerable efforts are already underway to prioritise the protection of at-risk adults. Regarding regulatory strategies in the field of adult safeguarding, it is notable that the DPC's Regulatory Strategy states that one of its five strategic goals from 2022 to 2027 is to prioritise the protection of children and "other vulnerable groups" which, it is reasonable to assume, includes at-risk adults.[131] Respondents to the DPC's consultation on its Regulatory Strategy identified the risks posed to "vulnerable groups" when persons advocating for them were "unclear on the provisions of data protection legislation, most particularly when it came to sharing data with third parties".[132] In an adult safeguarding context, the Commission notes, as is clear from consultees' responses to the Issues Paper, that those advocating for at-risk adults remain unclear on the provisions of data protection legislation, in particular what legal bases may be relied upon under Article 6(1) of the GDPR and what exception may be relied upon under Article 9(2) of the GDPR to share special categories of personal data, in particular data concerning health, to safeguard the health, safety or welfare of at-risk adults.

[16.148] Respondents to the DPC's consultation on its Regulatory Strategy also cited instances where confusion around information sharing resulted in "vulnerable" adults "enduring prolonged exposure to adverse situations, due to what had become an incapacitating perplexity around how, what and when to share data".[133] As noted throughout this Chapter, there is confusion around data sharing in an adult safeguarding context in Ireland. Such confusion has, and is likely to continue to, result in at-risk adults enduring prolonged exposure to adverse situations due to the incapacitating perplexity for those working in adult safeguarding to understand how to share information, what information may be shared, and when to share information.

[16.149] The DPC also notes in its Regulatory Strategy that it has a duty, as a public body under section 42(1) of the Irish Human Rights and Equality Commission Act 2014, to "promote equality, prevent discrimination and protect the human rights

2024; ICO, *A 10 Step Guide to Sharing Information to Safeguard Children* (14 September 2023) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/a-10-step-guide-to-sharing-information-to-safeguard-children/> accessed on 6 April 2024.

[131] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 8.

[132] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

[133] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

of all who will be impacted by its policies and plans”.[134] The DPC states that its strategy is to ensure that “the provisions of data protection law are enjoyed equally by all, including those who require extra support to uphold their rights”.[135] The Commission welcomes the DPC’s Regulatory Strategy and agrees that the provisions of data protection law must be enjoyed equally by all, in particular at-risk adults who require extra support to uphold their rights.

[16.150] To achieve its strategic goal to prioritise the protection of children and other “vulnerable groups”, the DPC proposes, amongst other things, to engage and partner with representative bodies and advocacy groups who act on behalf of “vulnerable persons”, to get their insight into how best to tailor guidance for their clients, “as well as guidance for those tasked with the care of vulnerable persons”.[136] It is understood that the DPC intends to publish guidance in the adult safeguarding context. The Commission welcomes this proposal by the DPC and notes that the publication of guidance would form an integral part of the multiagency and multidisciplinary approach required to adequately safeguard at-risk adults in Ireland.

[16.151] In addition to the publication of guidance on the sharing of the personal data and special categories of personal data of at-risk adults in the adult safeguarding context, the Commission notes that there are existing measures that have been used, and can continue to be used, to ensure that the sharing of the personal data and special categories of personal data of at-risk adults in the adult safeguarding context is compliant with data protection law.

[16.152] For example, the DPC has engaged and assisted, and is available to engage and assist, data protection officers (“DPOs”), those working with at-risk adults and those who come into contact with the personal data and special categories of personal data of at-risk adults to ensure information sharing in the adult safeguarding context is compliant with data protection law. The DPC examines complaints, conducts inquiries and investigations, drives improved awareness of, and compliance with, data protection law, consults with organisations and, in appropriate cases, may directly intervene in issues that give rise to immediate data protection concerns for large groups of people.

[16.153] The DPC has published extensive guidance on the lawfulness of processing personal data which is applicable to data controllers and organisations in all sectors, including the adult safeguarding sector. Such guidance is intended to assist data controllers in implementing measures to ensure and be able to demonstrate compliance with data protection law, as required by the principle of accountability in Article 5(2) of the GDPR. The DPC’s supervision unit

[134] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

[135] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 15.

[136] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 16.

frequently engages with DPOs to assist with data protection queries and the DPC has previously engaged with bodies in the adult safeguarding context. As stated in its 2022 Annual Report, the overall aim of the DPC is to foster a consistent approach to data protection and to promote equality, prevent discrimination and ensure that the data protection rights of vulnerable groups are given appropriate consideration.[137] This consultative engagement process will continue until the end of the DPC's current regulatory strategy in 2027 and the DPC will continue to look at additional solutions to identified sectoral issues including, for example, the publication of guidance and the development of codes of conduct.[138]

[16.154] In its Regulatory Strategy the DPC proposes, amongst other things, to actively promote the development of codes of conduct on the processing of personal data of "vulnerable groups".[139] Article 40(1) of the GDPR provides that a supervisory authority, such as the DPC, shall encourage the drawing of up codes of conduct intended to contribute to the proper application of the GDPR, taking into account the specific features of various processing sectors, for example the health and social care sector.[140]

[16.155] The Commission believes that codes of conduct pursuant to Article 40 of the GRPR would be valuable, both before and after law reform in the area of adult safeguarding.

[16.156] In Chapter 18, the Commission discusses provisions relating to reporting of concerns in relation to the welfare of "vulnerable" persons which are contained in professional codes of conduct, such as the codes of CORU, the Medical Council and the Nursing and Midwifery Board of Ireland.[141] These codes of

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[137] DPC, *2022 Annual Report* at page 42 <https://www.dataprotection.ie/sites/default/files/uploads/2023-03/DPC%20AR%20English_web.pdf> accessed on 6 April 2024.

[138] DPC, *2022 Annual Report* at page 42.

[139] DPC, *Regulatory Strategy 2022 – 2027* (22 December 2021) at page 16.

[140] Recitals 98 and 99 of the GDPR.

[141] Sections 8 and 20 of each Code of Professional Conduct and Ethics published by CORU. All Codes are available at <https://coru.ie/health-and-social-care-professionals/codes-of-professional-conduct-and-ethics/>accessed on 6 April 2024. Section 8 of each Code of Professional Conduct and Ethics published by CORU states that such designated professions must be aware of, and comply with, national guidelines and legislation for the protection of "vulnerable adults" and report welfare concerns to the appropriate authorities. A breach of the codes could amount to professional misconduct or poor professional performance, and could result in a disciplinary sanction being imposed by CORU following a fitness to practice inquiry; Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* 9th ed (1 January 2024) at paras 6, 7.2, 29.1, 45 and 56.3 <https://www.medicalcouncil.ie/news-and-publications/publications/guide-to-professional-conduct-and-ethics-for-registered-medical-practitioners-2024.pdf> accessed on 6 April 2024; Nursing and Midwifery Board of Ireland, *Code of Professional Conduct and Ethics for*

conduct are distinct from those referred to under Article 40 of the GDPR. The Commission observes that there may be scope for the DPC to assist in the development of amendments or extensions to existing professional codes to provide clarity on reporting and information sharing for regulated professionals.

R. 16.4 **The Commission recommends that** guidance and/or codes of conduct should be published on the sharing of the personal data and special categories of personal data of at-risk adults in the adult safeguarding context.

Registered Nurses and Registered Midwives (11 May 2021) at pages 16, 17 and 20 <https://www.nmbi.ie/NMBI/media/NMBI/Code-of-Professional-Conduct-and-Ethics.pdf?ext=.pdf> accessed on 6 April 2024; Pharmaceutical Society of Ireland, *Code of Conduct: Professional Principles, Standards and Ethics for Pharmacists* (21 October 2019) <https://www.thepsi.ie/Libraries/Pharmacy_Practice/PSI_s_Code_of_Conduct_2019.sflb.ashx> accessed on 6 April 2024.

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.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its 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.

The Commission's Access to Legislation work makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject matter headings).

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