

Advice of the Ombudsman for Children on  
the Draft General Scheme for the Criminal Justice  
(Withholding Information on Crimes Against Children  
and Vulnerable Adults) Bill 2011

October 2011

# **Advice of the Ombudsman for Children on**

## **The Draft General Scheme for the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011**

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## 1. Introduction

- 1.1. The Minister for Justice, Equality and Defence published the Scheme of a Bill to create a criminal offence of withholding information relating to the commission of arrestable offences, including sexual offences, against a child or a vulnerable adult on 13 July 2011. In addition, the Minister for Children and Youth Affairs has indicated that she will bring forward legislation placing certain aspects of *Children First: National Guidance for the Protection and Welfare of Children* on a statutory footing.
- 1.2. These initiatives represent a significant development in the legislative framework governing child protection in Ireland. Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children may give advice to Ministers of the Government on any matter relating to the rights and welfare of children, including the probable effect of proposals for legislation. In accordance with this statutory function, the Ombudsman for Children's Office has set out below a number of observations and recommendations on the proposals put forward by the Government.
- 1.3. This Office considers that the General Scheme of the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011 and the proposal to put *Children First* on a statutory footing consist of an overlap between them with respect to the issue of reporting abuse. It is acknowledged that the legislation relating to *Children First* will be broader in scope and address other issues such as inter-agency cooperation and information sharing<sup>1</sup>; however, the *Children First* guidance deals with arrangements for reporting child abuse and the General Scheme deals with the consequences for failure to report child abuse in certain circumstances. It is very important, therefore, that the obligations under each piece of legislation be

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<sup>1</sup> See the comments made by the Minister for Children and Youth Affairs on 27 September 2011 in response to a Parliamentary Question regarding the proposals. Dáil Éireann Debates Vol. 741, No. 3.

consistent and that the overlap - as well as the differences - between them be clearly understood by those who will be affected by the legislation.

**It is recommended therefore that both pieces of legislation be advanced through the Houses of the Oireachtas at the same time and, if possible, in the same Bill.**

- 1.4. In framing these comments the Ombudsman for Children's Office has had regard to international human rights instruments relevant to the welfare and protection of children, the experience of other jurisdictions in relation to reforming child protection systems and its own work in the area of child protection. Since the establishment of this Office, child protection has featured consistently in the complaints brought to its attention, as set out in the Ombudsman for Children's annual reports to the Houses of the Oireachtas. In addition, this Office has on two occasions submitted special reports to the Oireachtas on the matter and it carried out a national systemic investigation into the implementation of the *Children First* guidelines. The findings and recommendations from that investigation have been appended to this submission for reference.
- 1.5. International practice with respect to reporting child abuse varies considerably. The threshold for reporting, the scope of the obligation to report, and the penalties incurred for failure to do so display significant variation between jurisdictions. The wider context of how child welfare and protection services are configured and how the relevant statutory authorities work together are also crucial to determining how effectively legislative reporting requirements operate. Indeed, these elements are among those that will be addressed in the *Children First* legislation and in the ongoing reform of child welfare and protection services in Ireland.
- 1.6. In light of international experience and the fact that a significant amount of change is taking place on both a legislative and operational level, it would be prudent to include a specific provision in the legislation under consideration requiring a review of its operation within a given timeframe. We must remain

open to changing our approach if required in order to afford the greatest possible protection to children.

## **2. International Human Rights Standards**

- 2.1. A number of international instruments address the welfare and protection of children and are of relevance to the General Scheme<sup>2</sup>. The most pertinent standards contained in these instruments are set out below. It should be recalled that these international human rights obligations are minimum standards and that it is open to States to exceed these requirements.

### **European Convention on Human Rights**

- 2.2. Although the European Convention on Human Rights (ECHR) does not address the question of child abuse explicitly, Article 3 of the Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
- 2.3. The European Court of Human Rights has held that the obligation on Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. The Court has held that these measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge; this principle has been applied by the Court specifically in situations where the relevant child protection authorities failed to protect children from

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<sup>2</sup> Standards relevant to this question that are not addressed explicitly in this submission include the United Nations Convention Against Torture and the European Social Charter (Revised),

serious neglect and abuse<sup>3</sup>. A lack of investigation, communication and co-operation between relevant child protection authorities or a failure to manage their responsibilities effectively may also give rise to concerns regarding compliance with Article 3 of the Convention<sup>4</sup>.

- 2.4. This positive obligation to prevent ill-treatment should be borne in mind in drafting legislation or framing policy in the area of child protection<sup>5</sup>. The failure of the State to discharge its obligation to protect children from ill-treatment, abuse and indeed torture has in recent times been placed in stark relief by the report of the Commission to Inquire into Child Abuse, among others.

### **UN Convention on the Rights of the Child**

- 2.5. The United Nations Convention on the Rights of the Child (UNCRC) was ratified by Ireland in 1992. The UNCRC contains a range of provisions relating to the prevention of violence, exploitation and abuse, in addition to protecting and supporting victims of such abuse<sup>6</sup>.
- 2.6. Of most immediate relevance in the context of the General Scheme is Article 19, which provides that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and

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<sup>3</sup> Z. and Others v. the United Kingdom [GC] no. 29392/95, paras.74-75.

<sup>4</sup> E. and Others v. the United Kingdom, no. 33218/96 para. 100

<sup>5</sup> The European Convention on Human Rights Act (No. 20 of 2003)

<sup>6</sup> These include articles 2, 3, 6, 12, 19, 20, 27, 34, 37 and 39 of the Convention.

follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

- 2.7. The UN Committee on the Rights of the Child – the expert body charged with monitoring the implementation of the UNCRC – has elaborated on the nature of the obligations that arise from these provisions. In particular, its General Comment on the right of the child to freedom from all forms of violence provides guidance on what is required of States in order to comply with Article 19 in terms of identifying, reporting, investigating and following up on allegations of abuse and ill-treatment<sup>7</sup>.
- 2.8. The UN Committee has emphasised in the strongest terms the long-term return provided by preventive measures and that both general and targeted prevention must remain paramount in the development of child protection systems. Improved data collection and research has been identified as a key component of an effective approach to prevention in line with the requirements of the Convention<sup>8</sup>.
- 2.9. With respect to the identification of abuse, the UN Committee has emphasised that in addition to ensuring that professionals interacting with children have the required knowledge to identify signs of abuse, children must be provided with as many opportunities as possible to signal emerging problems before they reach a state of crisis. Particular vigilance is needed when it comes to marginalised groups of children who are rendered especially vulnerable due to their alternative methods of communicating, their immobility and/or the perception that they lack competence<sup>9</sup>. The recent decision by the Department of Education and Skills to require all primary schools to implement the *Stay Safe* programme is a welcome development in this regard<sup>10</sup>.

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<sup>7</sup>UN Committee on the Rights of the Child, General Comment No. 13, *The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13 (2011)

<sup>8</sup> UN Committee on the Rights of the Child, General Comment No. 13, para. 46

<sup>9</sup> General Comment No. 13, para. 48

<sup>10</sup> See Department of Education and Skills, Circular 0065/2011 *Child Protection Procedures for Primary and Post-Primary schools* (30 September 2011)



2.10. The Committee has strongly recommended that all States Parties develop safe, well-publicised, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including through the use of 24-hour toll-free hotlines and other ICTs. It has recommended that reporting mechanisms be coupled with, and should present themselves as, help-oriented services offering public health and social support, rather than as triggering responses which are primarily punitive. The Committee has further emphasised that children's right to be heard and to have their views taken seriously must be respected and that in every country, the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children<sup>11</sup>.

2.11. Article 19 has also been interpreted as requiring professionals working within the child protection system to be trained in inter-agency cooperation and the establishment of protocols for collaboration. This issue featured prominently in the investigation carried out by the Ombudsman for Children's Office into the implementation of *Children First*. The UN Committee envisages that effective inter-agency cooperation will involve: (a) a participatory, multi-disciplinary assessment of the short- and long-term needs of the child, caregivers and family, which invites and gives due weight to the child's views as well as those of the caregivers and family; (b) sharing of the assessment results with the child, caregivers and family; (c) referral of the child and family to a range of services to meet those needs; and (d) follow-up and evaluation of the adequateness of the intervention<sup>12</sup>.

2.12. As regards the investigation of allegations of abuse, the UN Committee has emphasised that rigorous but child-sensitive investigation procedures will help to ensure that violence is correctly identified and help to provide evidence for administrative, civil, child-protection and criminal proceedings. The Committee has cautioned, however, that extreme care must be taken to avoid subjecting the child to further harm through the process of the investigation<sup>13</sup>.

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<sup>11</sup> General Comment No. 13, para. 48

<sup>12</sup> General Comment No. 13, para. 50

<sup>13</sup> General Comment No. 13, para. 51

2.13. In terms of support for victims of abuse, the Committee has highlighted the medical, mental health, social and legal services that may be required for children upon identification of abuse, as well as longer-term follow-up services. Services and treatment for child perpetrators of violence are also recommended. With respect to this group of young people, educational measures must have priority and be directed to improve their pro-social attitudes, competencies and behaviours<sup>14</sup>.

2.14. The UNCRC also requires continuity between the different stages of intervention and effective case management. In particular, the UN Committee has indicated that there must clarity in relation to: (a) who has responsibility for the child and family from reporting and referral all the way through to follow-up; (b) the aims of any course of action taken, which must be fully discussed with the child and other relevant stakeholders; (c) the details, deadlines for implementation and proposed duration of any interventions; and (d) mechanisms and dates for the review, monitoring and evaluation of actions<sup>15</sup>. The requirement of clarity on reporting arrangements is relevant since there appear to be some differences between the arrangements envisaged by the General Scheme and those of Children First.

### **Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention)**

2.15. Ireland has signed but not yet ratified the 2007 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, also known as the Lanzarote Convention<sup>16</sup>. As Ireland has signalled its intention to ratify the Convention, it is important to ensure that any new legislation relevant to sexual exploitation or abuse be harmonised with the requirements of the Convention.

2.16. Article 10 of the Lanzarote Convention provides that:

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<sup>14</sup> General Comment No. 13, para. 52

<sup>15</sup> General Comment No. 13, para. 53

<sup>16</sup> Ireland signed the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (CETS No. 201) on 25/10/2007

1. Each Party shall take the necessary measures to ensure the co-ordination on a national or local level between the different agencies in charge of the protection from, the prevention of and the fight against sexual exploitation and sexual abuse of children, notably the education sector, the health sector, the social services and the law-enforcement and judicial authorities.

2. Each Party shall take the necessary legislative or other measures to set up or designate:

- a independent competent national or local institutions for the promotion and protection of the rights of the child, ensuring that they are provided with specific resources and responsibilities;
- b mechanisms for data collection or focal points, at the national or local levels and in collaboration with civil society, for the purpose of observing and evaluating the phenomenon of sexual exploitation and sexual abuse of children, with due respect for the requirements of personal data protection.

3. Each Party shall encourage co-operation between the competent state authorities, civil society and the private sector, in order to better prevent and combat sexual exploitation and sexual abuse of children.

2.17. In addition to requiring States to take measures to ensure cooperation on a national or local level between the various agencies responsible for preventing and combating sexual exploitation and abuse of children, the Convention also requires accurate and reliable statistics on the nature of the phenomenon and on the numbers of children involved<sup>17</sup>.

2.18. The Lanzarote Convention addresses the issue of reporting in Article 12, which provides -

- 1. Each Party shall take the necessary legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals

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<sup>17</sup> See the explanatory report to the Convention, paras. 76-85

called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse.

2. Each Party shall take the necessary legislative or other measures to encourage any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services.

2.19. The explanatory report to the Convention clarifies that Parties must ensure that professionals normally bound by rules of professional secrecy have the possibility of reporting to child protection services any situation where they have reasonable grounds to believe that a child is the victim of sexual exploitation or abuse<sup>18</sup>. The Lanzarote Convention does not impose an obligation on such professionals to report sexual exploitation or abuse of a child; it requires that these persons be granted the possibility of doing so without risk of breach of confidence<sup>19</sup>. Each Party is responsible for determining the categories of professionals to which this provision applies and the phrase “professionals who are called upon to work in contact with children” is intended to cover professionals whose functions involve regular contacts with children, as well as those who may only occasionally come into contact with a child in their work<sup>20</sup>.

2.20. The second part of Article 12 requires Parties to encourage any person who has knowledge or suspicion of sexual exploitation or abuse of a child to report to the competent services. It is the responsibility of each Party to determine the competent authorities to which such suspicions may be reported and these competent authorities are not limited to child protection services<sup>21</sup>.

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<sup>18</sup> Explanatory report to the Convention, paras. 89-91

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

## **Summary**

2.21. There is an over-arching, positive obligation on the State to protect children from abuse, including when this abuse is carried out by private individuals. Putting in place an effective system to achieve this end requires a wide range of measures, including but going well beyond a robust legislative framework; practice on the ground and accurate data are crucial to determining whether children's right to protection from harm is being effectively realised. With respect to the issue of reporting, international standards require, at a minimum, that those working directly with children be required to report instances, suspicion or risks of violence or abuse to appropriate authorities. They also require that confidentiality rules imposed by internal law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility of reporting abuse where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse. As noted above, these are minimum standards and it is open to the State to exceed them.

### **3. The General Scheme of the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011**

3.1. The General Scheme makes it an offence for a person if he or she knows or believes that

a) an arrestable offence has been committed against a child or vulnerable adult

and

b) he or she has information which might be of material assistance in securing the apprehension, prosecution or conviction of that (*sic*) person for that arrestable offence, and he or she fails without reasonable excuse to disclose

that information as soon as is practicable to a member of the Garda Síochána.

3.2. This offence comes on top of a number of other offences in recent times relevant to the handling of child abuse cases, including:

- Section 176 of the Criminal Justice Act 2006, which created the offence of reckless endangerment of children; and
- Section 13 of the Non Fatal Offences Against the Person Act 1997 which makes it an offence to engage intentionally or recklessly in conduct which creates a substantial risk of death or serious harm to another.

However, none of those offences specifically penalises the failure to provide information in the way the General Scheme does.

3.3. There are a number of important features of the General Scheme, which resembles s.5 of the Criminal Law Act (Northern Ireland) 1967 (“section 5 of the NI Act”).

3.4. *First*, the General Scheme only applies to arrestable offences. This is defined as meaning an offence for which a person of full age and capacity and not previously convicted may be punished by imprisonment for a term of five years or more. Section 2 of the Criminal Law Act 1997 contains a similar definition of arrestable offence but adds that it includes an attempt to commit any such offence.

**For the avoidance of any doubt and given that it is expressly stated in s. 2 of the 1997 Act, it is recommended that it also be stated in the General Scheme that an arrestable offence includes an attempt to commit an offence.**

3.5. *Second*, unlike section 5 of the NI Act, the offence only arises for failure to report an arrestable offence against a *child or vulnerable adult* – and not the general population. Children may encounter particular barriers in reporting abuse. This

Office therefore believes that it is legitimate to take special measures to help to ensure their protection.

- 3.6. *Third*, the offence only arises where somebody *knows or believes* that that an arrestable offence has been committed and *knows or believes* that he or she has information which might be of material assistance. Therefore, the General Scheme is about consciously withholding information, rather than merely failing to report.
- 3.7. However, it is possible that there may be an increase in reports to An Garda Síochána (and consequently to the Health Service Executive) that do not meet the threshold for obligatory reporting under the General Scheme, given that the penalties for failure to report are significant and include a term of imprisonment for up to five years. Indeed, there is evidence of an increase in reports following the introduction of similar measures in other jurisdictions.<sup>22</sup>
- 3.8. Clearly, it is desirable that as many instances of abuse as possible be reported to the relevant authorities. However, as the Children First investigation undertaken by this Office in 2010 showed that:
- except for in Cork/Kerry in 2003, there has been no auditing of child protection practice in the State in the last decade;
  - the results of the Cork/Kerry audit demonstrated significant and worrying delays in responding to child protection referrals;
  - social work resources were not optimally matched to need across the State;
  - some social work departments were not implementing Children First properly.

Should the General Scheme lead to an increase in reporting, there is therefore the danger that social work departments may become overloaded.

- 3.9. At the same time, this Office accepts that a purely voluntary approach may be insufficient. This is particularly so if an institution decides not to make referrals

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<sup>22</sup> See Helen Buckley, Reforming the child protection system: why we need to be careful what we wish for, Irish Journal of Family Law, 12, (2), 2009.

to protect its own members or reputation; the threat of individual criminal liability may well help to overcome such institutional resistance.

3.10. This Office also accepts that the existing criminal offences may not be sufficient because they do not criminalise the intentional failure to report. Instead, they require proof of additional matters also, such as the endangerment of a child.

**On balance, therefore, this Office agrees with the general approach of the General Scheme provided the following recommendations are implemented, being that -**

- **all necessary resources be put in place to ensure that social work departments can respond effectively to any increase in reporting consequent upon the General Scheme;**
- **the recommendation made later in this paper with regard to Designated Liaison Persons is implemented;**
- **an effective system of monitoring, for example by the Social Services Inspectorate of the Health Information and Quality Authority, is put in place to monitor the effects of the General Scheme and**
- **an independent review of the effects on child protection practice is required to be undertaken no later than three years after implementation. This should be informed by inspection by HIQA/SSI. The review should be considered by the Select Committee on Children and Youth Affairs and debated by the Houses of the Oireachtas.**

This offence will only be useful if it makes our children safer. An independent review would measure whether this has been achieved. It is worth noting in this regard that following experience of its implementation, in New South Wales it was recently decided to remove any criminal sanction for breach of the duty to report.<sup>23</sup>

3.11. *Fourth*, in order to bring a prosecution under s.5 of the NI Act, it is necessary to show that an arrestable offence was actually committed about which information was withheld. By contrast, the General Scheme does not require proof that an arrestable offence was actually committed. This is welcome, and should

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<sup>23</sup> See s.27 of the Children and Young Persons (Care and Protection) Act 1998, as amended.



facilitate the bringing of prosecutions in circumstances where, for example, the perpetrator of the offence about which information was withheld was never actually prosecuted – for example because he or she has died.

3.12. However, the General Scheme is breached if somebody believes that an arrestable offence has been committed and believes that he or she has information in connection with it, even if in reality

- no offence was committed; or
- the person did not in fact have information which might be of material assistance.

In other words, those of an overly suspicious disposition who fail to report will be guilty of more offences than those who are less suspicious who fail to report. To deal with this issue, it is recommended that it be made an offence to withhold information where a person knows or believes on reasonable grounds that an arrestable offence has been committed. This would be consistent with the approach in Victoria, Australia, under s.184 of the Children, Youth and Families Act 2005.<sup>24</sup>

**It is recommended that it only be an offence to withhold information where a person knows or believes on reasonable grounds that an arrestable offence has been committed.**

3.13. *Fifth*, s.5 of the NI Act is clear that the obligation to report relates to offences committed by other people. Therefore it is not an offence to fail to self-incriminate. This is not clarified in the General Scheme but it is assumed that this is an unintentional omission. This Office is not calling for steps that would weaken the privilege against self-incrimination.

3.14. *Sixth*, the offence will not be made out if the person had a reasonable excuse. Like section 5 of the NI Act and many other offences under Irish law<sup>25</sup>, there is

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<sup>24</sup> Available at: [http://www.austlii.edu.au/au/legis/vic/consol\\_act/cyafa2005252/s184.html](http://www.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s184.html), accessed on 15 August 2011.

<sup>25</sup> See e.g. s 7(2) of the Criminal Law Act 1997.

no explanation of what a reasonable excuse may be, save in one respect only. This matter is discussed further below.

### **Reasonable excuse: The victim's wishes**

3.15. The General Scheme states that:

“reasonable excuse” may include circumstances where the person in respect of whom the sexual offence concerned was committed makes it known that he or she does not want that offence, or information relating to that offence, to be disclosed.”

As set out below, this Office is concerned that this conflicts with *Children First*.

3.16. It is notable that this “may” be a reasonable excuse. The General Scheme does not clarify when it will or will not be a reasonable excuse. In the case of a child, presumably there are a number of factors which will influence whether it is a reasonable excuse, including:

- the age of the child;
- the understanding of the child;
- whether the child's wishes were freely arrived at;
- whether the wishes of the child are in his or her best interests; and
- whether other children are at risk.

However, this is not spelt out in the General Scheme, leaving it vague. Indeed, the factors listed above are also subjective to a degree, meaning that the matter could remain uncertain even if they were specified in the General Scheme.

3.17. Furthermore, the logic of restricting the offence to those who are children or vulnerable presumably is because they may face barriers in reporting the matter themselves. But that policy is undermined if at the same time their wishes can eliminate the duty to report. The situation may, of course, be different in respect of vulnerable adults with physical disabilities only – but that situation is outside the remit of this Office.

3.18. Also, the obligation conflicts with *Children First*, which is explicit in stating that:

“The HSE Children and Family Services should always be informed when a person has reasonable grounds for concern that a child may have been, is being or is at risk of being abused or neglected.”<sup>26</sup>

It also states:

“No undertakings regarding secrecy can be given. Those working with a child and family should make this clear to all parties involved, although they can be assured that all information will be handled taking full account of legal requirements.”<sup>27</sup>

There is the risk, therefore, that the General Scheme will cause confusion and undermine the clear message of *Children First* that *all* such cases need to be referred. In addition, this provision only applies with regard to sexual offences and not other offences; however, for example, physical abuse may be no less traumatic for a child.

**It is recommended that the General Scheme be revised to clarify in the case of children that a reasonable excuse does not include circumstances where the person in respect of whom the offence concerned was committed makes it known that he or she does not want that offence, or information relating to that offence, to be reported.**

### **Reasonable excuse and vagueness/uncertainty**

3.19. It is only in the case of the victim’s wishes that there is any clarification on what a reasonable excuse may be.

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<sup>26</sup> At para 3.2.2.

<sup>27</sup> At para 3.9.3.

3.20. This lack of clarity may give rise to constitutional issues. This is illustrated by the recent High Court case *Dokie v Minister for Justice*.<sup>28</sup> That case concerned s.12 of the Immigration Act 2004. It stated:

“Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances to prevent him or her from so doing, [*certain specified identity documentation*]”

Kearns P found s.12 to be unconstitutional. He stated:

“I am of the view that the failure to define the term “satisfactory explanation” within s.12 of the Act does give rise to vagueness and uncertainty. The section as worded has considerable potential for arbitrariness in its application by any individual member of An Garda Síochána.”

He pointed to equivalent British legislation and stated:

“It is ... noteworthy that under this British measure the defendant need only produce an explanation which is “reasonable and thus susceptible to evaluation by an objective standard.

“In my view Section 12 is not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. Furthermore, there is no requirement in the section to warn of the possible consequences of any failure to provide a satisfactory explanation.

“As a result, the offence purportedly created by s.12 is ambiguous and imprecise. In my view it lacks the clarity necessary to legitimately create a criminal offence.”

3.21. The full implications of this judgment are unclear. On one reading, the problem is with the use of the term “satisfactory” rather than “reasonable”, but it also appears to mean that one must define or provide guidance in legislation as to what satisfactory is. By the same logic, one must define or provide guidance on

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<sup>28</sup> *Dokie v Minister for Justice* [2011] IEHC 110.

what a “reasonable excuse” is so that people are able to foresee when they will and will not be breaking the law. Even if this is not constitutionally required, it would nonetheless be desirable.

**It is recommended that the General Scheme clarify what a reasonable excuse for not reporting is.**

3.22. A comprehensive definition may not be possible without introducing new words of equal abstraction but it should be possible to clarify the status of some of the most likely excuses that will be invoked. A particular concern in this regard is privilege, which is examined below.

### **Reasonable excuse and privilege**

3.23. At present, a person may decline to answer questions with regard to information because it is privileged. There are a number of kinds of privilege recognised at law, including:

- legal professional privilege;
- statutory privilege;
- marital privilege;
- sacerdotal privilege, that is to say privilege relating to certain work of priests and ministers of religion; and
- counselling privilege.

3.24. If a person cannot be compelled to provide evidence because the matter is privileged, the person is likely to have a “reasonable excuse” within the meaning of the General Scheme.<sup>29</sup>

3.25. The law also imposes other restrictions on the dissemination of information, including restrictions on in camera information. These are also discussed below.

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<sup>29</sup> See in this regard by analogy the discussion of the fourth amendment in the decision of the 9<sup>th</sup> Circuit in *Mockaitis v Harclerod* 104 F 3d 1522.

## Legal professional privilege

- 3.26. Legal professional privilege is not simply a rule of evidence but a common law right based on the right of any person to obtain skilled advice about the law.<sup>30</sup> It is protected by the European Convention on Human Rights.<sup>31</sup> It may also be protected by the Constitution. However, no Irish case has yet clearly determined this or stated the extent to which it is constitutionally protected.<sup>32</sup>
- 3.27. The right to legal professional privilege has not been found to be absolute by the European Court of Human Rights. So for example, the Court has suggested that it can be overturned if it is being abused or there are other exceptional circumstances.<sup>33</sup>
- 3.28. It has been held in Britain that consultations and communications between a lawyer and his client that are in furtherance of crime or fraud are not protected by this privilege.<sup>34</sup> In Ireland it has also been held that communications in furtherance of conduct injurious to the interests of justice are also not covered by the privilege, such as those involving dishonesty or moral turpitude – for example the bringing of a case for an improper and ulterior motive.<sup>35</sup> But this exception only applies where the communications are *in furtherance of* crime, fraud, dishonesty or moral turpitude. Information otherwise acquired regarding arrestable offences will not override legal professional privilege.
- 3.29. In Britain the House of Lords has held that an exception exists to legal professional privilege for child care proceedings because they are non-adversarial in nature.<sup>36</sup> However, this has not been applied in Ireland to the

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<sup>30</sup> See *Miley v Flood* [2001] 2 IR 50, *R v Derby Magistrate's Court ex p B* [1996] AC 487, *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.

<sup>31</sup> *Campbell v United Kingdom* (1992) 15 EHRR 137; *Niemitz v Germany* *Foxley v United Kingdom* (2000) 31 EHRR 637.

<sup>32</sup> See on this point *Martin v Legal Aid Board* [2007] 2 IR 759 at 785.

<sup>33</sup> *Foxley v UK* (2001) 35 EHRR 637 at para 44 regarding privileged documents and, regarding legal consultations, *Brennan v UK* (2001) 34 EHRR 507 at para 58, *Ocalan v Turkey* (2003) EHRR 238 at para 146.

<sup>34</sup> *R v Cox and Railton* (1884) 14 QBD 153, *McE v Prison Service of Northern Ireland* [2009] 1 AC 908.

<sup>35</sup> *Murphy v Kirwan* [1993] 3 IR 501.

<sup>36</sup> [1997] AC 16.

proceedings of a tribunal of inquiry, and has been questioned more generally.<sup>37</sup> But this approach has been applied to family law proceedings in Ireland, where McGuinness J commented that “in suitable circumstances where the welfare of the child was in issue, the court has the power to override legal professional privilege.”<sup>38</sup>

3.30. Despite this, it is far from clear that legal professional privilege would not constitute a reasonable excuse. While this Office accepts the very important role of legal professional privilege in the administration of justice, it is recommended that the General Scheme clarify that such privilege should not be a reasonable excuse.

3.31. This Office does not believe that the overriding of legal professional privilege would be unconstitutional or would violate the ECHR given that –

- legal professional privilege is designed to protect the interests of justice;
- it is not in the interests of justice for information regarding arrestable offences to be withheld;
- children are a particularly vulnerable group and may face particular barriers in reporting abuse;
- exceptions can be made to legal professional privilege under the ECHR; and
- exceptions already exist where an action is in furtherance of a crime, fraud or an act of moral turpitude.

**It is recommended that legal professional privilege should not be a reasonable excuse and this Office urges the Government to consider this matter.**

### **Statutory privilege**

3.32. There are also a number of statutory provisions which privilege communications.

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<sup>37</sup> Ahern v Mahon [2008] 4 IR 704 at 724-727.

<sup>38</sup> TL v VL [1994] WJSC-CC 4431.

3.33. For example, s.7(a) of the Judicial Separation and Family Law Reform Act 1989 provides that a court may adjourn an application for a judicial separation to allow the parties to consider reconciliation or to reach agreement on the terms of a separation. Any communication made in this context, including with a mediator, is not admissible in any court. S.9 of the Family Law (Divorce) Act 1996 contains a similar provision.

3.34. While it is entirely correct that statements made in such negotiations and mediations should not generally be used in any proceedings, this Office believes that different considerations arise where an arrestable offence may have been committed against a child. Similarly, this Office recommends that it should be clarified that being a mediator does not constitute a reasonable excuse notwithstanding s.7A of the Judicial Separation and Family Law Reform Act 1989 and s.9 of the Family Law (Divorce) Act 1996. This would bring Irish practice into line with practice in Western Australia where mediators, counsellors and court personnel in family law cases are obliged to report such matters.<sup>39</sup>

**It is recommended that it should be clarified that being a mediator does not constitute a reasonable excuse, notwithstanding s.7A of the Judicial Separation and Family Law Reform Act 1989 and s.9 of the Family Law (Divorce) Act 1996. Furthermore, an examination of the statute book should be undertaken to consider other instances of statutory privilege and to clarify the application of the Scheme to them.**

3.35. In particular, this Office recalls that s.16 of the Ombudsman for Children Act 2002, taken in conjunction with s.9 of the Ombudsman Act 1980, restricts the circumstances in which this Office can disclose information acquired in the course of a preliminary examination or investigation. That has not hindered the referral of child protection concerns to the HSE by this Office or the sharing of information with An Garda Síochána in the context of a criminal investigation. However, this Office recommends that s.16 of the Ombudsman for Children Act

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<sup>39</sup> See Higgins, Bromfield, Richardson, Holzer, Berlyn, Mandatory Reporting of Child Abuse (updated August 2010), Australian Institute of Family Studies, available at <http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.html>, accessed on 15 August 2011.



and s.9 of the Ombudsman Act 1980 be amended to put beyond doubt the ability of this Office to make child protection notifications, to provide information to the Garda Síochána and to ensure that the confidentiality of investigations cannot be cited as a reasonable excuse. This Office will be making further recommendations in this regard as part of the review of its powers that it is currently undertaking.

**It is recommended that s.16 of the Ombudsman for Children Act 2002 and s.9 of the Ombudsman Act 1980 be amended to put beyond doubt the ability of this Office to make child protection notifications, to provide information to the Garda Síochána and to ensure that the confidentiality of investigations cannot be cited as a reasonable excuse.**

### **Marital privilege**

3.36. Section 3 of the Evidence (Amendment) Act 1853 ensured that no spouse could be compelled to disclose any communication made to him by the other spouse during the marriage. This provision was repealed by the Criminal Law (Evidence) Act 1992. Marital privilege appears therefore no longer to exist in Irish law, nor indeed have the courts suggested that the right to marital privacy permits the withholding of information about arrestable offences against children.

**However, in the interests of certainty, it is recommended that it be clarified that marital privilege is not a reasonable excuse for a person to refuse to provide information about his or her spouse or civil partner.**

### **Sacerdotal and counselling privilege**

3.37. English common law does not recognise sacerdotal privilege, even in the confessional.<sup>40</sup> However, pre-independence Irish common law recognised that a priest could not be compelled to break the confessional seal.<sup>41</sup>

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<sup>40</sup> *Wheeler v Le Marchant* 17 C. D. 675. See the dictum of Jessel M.R. at p.681: "communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune are not protected".

- 3.38. In the 1945 case, *Cook v Carroll*, it was made clear that sacerdotal privilege applied outside the confessional also - so that a priest was not obliged to answer questions on what he had been told in his conversations in confidence with a woman and the man she alleged was the father of her child.
- 3.39. Gavan Duffy J stated that in reaching a decision on whether the priest should be compelled to give evidence he had to decide the matter in conformity with the Constitution of Ireland which (then) recognised the special position of the Catholic Church. He did, however, comment that the Oireachtas had the power to determine how far to recognise sacerdotal privilege. But later he stated that he was bound by the Constitution to privilege the conversations of the priest, which suggests that the Oireachtas has only a limited discretion or none at all.
- 3.40. However, ultimately the case was decided not according to the Constitution but rather by common law principles known as the Wigmore criteria. These criteria are that –
- (1) the communications must originate in a *confidence* that they will not be disclosed;
  - (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation;
  - (3) the relation must be one which in the opinion of the community ought to be sedulously *fostered*; and
  - (4) the *injury* which would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
- 3.41. Gavan Duffy J was satisfied that all four criteria were met by all conversations in strict confidence by a parish priest with a parishioner. He also expressed the view that the privilege belonged to the priest and therefore he could not be

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<sup>41</sup> Tannian v Synnott 37 I. L. T. & Sol. Journ. 275.

obliged to answer questions simply by the parishioners purporting to release him from it.

3.42. Later case law has:

- confined sacerdotal privilege outside the confessional to discussions between parishioners and parish priests – and not priests outside the parish<sup>42</sup> - although this has since been doubted<sup>43</sup>;
- found in *JR v ER* that the discussions of a marital counsellor who is a priest are privileged, having regard to the protection of the family in the Constitution, but that this can be waived by those counselled. It was also suggested that the same privilege would attach to ministers of religion generally;<sup>44</sup>
- suggested – consistent with *Cook v Carroll* - that the priest/penitent relationship *in the confessional* cannot be waived by the penitent;<sup>45</sup>
- suggested that secular counselling may also be privileged, particularly marriage counselling.<sup>46</sup>

3.43. It follows from the above that it may very well be that:

- a priest will have a reasonable excuse for withholding information obtained in the confessional, whether or not the confessor seeks to waive privilege;
- a priest will have a reasonable excuse for withholding information obtained in confidence outside the confessional, unless this has been waived by the persons confiding; and
- a secular counsellor may have a reasonable excuse for withholding information obtained in confidence, unless this has been waived by the persons being counselled.

3.44. These conclusions cannot, however, be stated with certainty since none of the cases to date have dealt with a situation where an arrestable offence was committed against a child. It is clear from the Wigmore criteria that the

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<sup>42</sup> *Forristal v Forristal and O'Connor* (1966) 100 ILTR 182.

<sup>43</sup> *Johnston v Church of Scientology* [2001] 1 IR 682 at 686.

<sup>44</sup> *JR v ER* [1981] ILRM 125.

<sup>45</sup> *Johnston v Church of Scientology* [2001] 1 IR 682 at 686.

<sup>46</sup> *Johnston v Church of Scientology* [2001] 1 IR 682 at 687.

according of privilege is based on an assessment that the injury to the relationship with the counsellor and priest would be greater than the benefit of disclosure. In the opinion of this Office, this ought not to hold true where a child has been abused and may be placed at risk by the withholding of the information.

3.45. But if the Oireachtas fails to clarify this area, the courts would be fully entitled to assume that sacerdotal or marital counsellor privilege can give rise to a reasonable excuse.

**It is therefore recommended that the General Scheme clarify the issue of sacerdotal and counsellor privilege. It is also recommended that sacerdotal privilege and counsellor privilege should not provide a reasonable excuse for withholding information, given the serious nature of arrestable offences against children.**

3.46. There is, of course, a question whether it would be constitutional for these privileges to be overridden. As seen above, Gavan Duffy J in *Cook v Carroll* was unclear on the extent to which the Oireachtas can limit sacerdotal privilege. Moreover, his comments have subsequently been treated as non-binding. Further, they related to a provision of the Constitution on the special position of the Catholic Church which has now been repealed and which, in any event, the courts made clear did not have legal effect.<sup>47</sup>

3.47. In *JR v ER Carroll J* also had regard to the protection of the family in the Constitution when reaching her conclusion that marriage counselling conducted by a priest or a minister of religion was privileged. But this was essentially a comment in passing made by the judge and the case was decided on common law principles. Further, it was not a case where there was any question of an arrestable offence having been committed against a child.

3.48. However, this Office is aware that the confessional has been treated as protected in the United States because of the fourth amendment which guards

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<sup>47</sup> *Johnston v Church of Scientology* [2001] 1 IR 682 at 687.

against unreasonable searches and American statutes which protect religious freedom.<sup>48</sup> It is possible that the Irish courts would take the same view in the light of the protection of religious freedom in Article 44 of the Irish Constitution.

3.49. On the other hand, there is no decided caselaw of the European Court of Human Rights that has protected the confessional in this way. Moreover, a blanket protection has not been afforded to the seal of the confessional in Canada. The leading case there is *R v Gruenke*, where a woman convicted of murder argued unsuccessfully that the use of an admission that she had made to a Christian fundamentalist pastor violated the guarantee of freedom of religion in s.2(a) of the Canadian Charter of Rights.<sup>49</sup>

3.50. Lamer J for the majority stated:

“While the value of freedom of religion, embodied in s. 2(a), will become significant in particular cases, I cannot agree with the appellant that this value must necessarily be recognized in the form of a *prima facie* privilege in order to give full effect to the *Charter* guarantee. The extent (if any) to which disclosure of communications will infringe on an individual's freedom of religion will depend on the particular circumstances involved, for example: the nature of the communication, the purpose for which it was made, the manner in which it was made, and the parties to the communication.”

3.51. He made clear that this balancing could be done on a case by case basis by bearing the guarantee of religious freedom in mind when applying the Wigmore criteria. On the facts, it was found that the evidence was properly admitted because it had never been clear that the admission would be kept confidential.

3.52. As already stated, a criminal offence needs to be certain – so that people can know clearly what is criminal and what is not. A case by case balancing is therefore not appropriate. But arrestable offences against children as a class are very serious ones, where in the view of the Ombudsman for Children's Office the benefit to the community of maintaining the confessional is not outweighed

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<sup>48</sup> See the decision of the 9<sup>th</sup> Circuit in *Mockaitis v Harclerod* 104 F 3d 1522.

<sup>49</sup> [1991] SCR 263.

by the potential danger to children of withholding information. Applying the approach of the Canadian courts to cases of this class, it does not appear that it would violate the guarantee of freedom of religion for priests to be obliged to refer matters in the confessional.

3.53. Further, Article 44.2.1 of the Constitution, which guarantees the free profession and practice of religion, is expressly stated to be subject to public order and public morality. In the view of this Office, the conscious withholding of information regarding arrestable offences against children offends against both public morality and public order.

3.54. It is likely that most priests will become aware of child abuse through sources outside the confessional. It is imperative in any event that it be clarified that withholding of information by counsellors and by priests as part of their wider pastoral functions, even if acquired confidentially, is not a reasonable excuse.

**While it is for the Attorney General to advise on the constitutionality of any proposed legislation, this Office does not believe that it would be unconstitutional for the legislation to be extended to the confessional and this Office recommends that it be so extended. In any event, it should be clarified that sacerdotal privilege in respect of communications outside the confessional cannot give rise to a reasonable excuse.**

### **Reasonable excuse and the in camera rule**

3.55. Breach of the in camera rule is a contempt of court.<sup>50</sup> Therefore, breach of the in camera rule must be a reasonable excuse not to report a matter to the HSE or the Garda Síochána.

3.56. While there has been little decided case law on the issue, the in camera rule appears to cover all matters which derive from or were introduced in proceedings protected by the rule.<sup>51</sup>

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<sup>50</sup> Eastern Health Board v Fitness to Practise Committee [1999] 3 IR 399.

<sup>51</sup> RM v DM [2000] 3 IR 373 at 386.

3.57. Limited exceptions have been made to the in camera rule by s 40 of the Civil Liability and Courts Act 2004. It provides that the in camera rule does not prohibit the production of documents or the giving of information to a body “when it... is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter.”<sup>52</sup> Thus, the in camera rule will not be breached when the Garda Síochána are already conducting an investigation. The problem is that it appears that the in camera rule will be breached where no investigation is already underway into the matter.

**It is recommended that it be clarified that the General Scheme overrides in camera restrictions and that compliance with the in camera rule cannot therefore be a reasonable excuse.**

### **Reasonable excuse and breach of confidence and data protection**

3.58. Restrictions can also be imposed on the distribution of information by virtue of the law on breach of confidence.

3.59. For the avoidance of doubt, it is recommended that it be clarified that the duty to report applies notwithstanding the law on breach of confidence. Such clarification would be entirely consistent with the Protection for Persons Reporting Child Abuse Act 1998 which protects those making referrals reasonably and in good faith from all civil liability, including – by implication – that arising from the law on breach of confidence.

3.60. The Data Protections Acts 1988-2003 also impose restrictions on the processing of personal data. S.8 of the 1988 Act clarifies that restrictions on the processing of personal data do not apply if the processing is required for the purpose of preventing, detecting or investigating offences or apprehending or prosecuting

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<sup>52</sup> Ss 40(6) and (7).

offenders in any case where the application of those restrictions would be likely to prejudice any of these matters.

3.61. Accordingly, the Data Protection Acts 1988-2003 appear not to provide a reasonable excuse for the failure to report a matter. However, for the avoidance of doubt, it is recommended that it be explicitly clarified that the duty to report applies notwithstanding the Data Protection Acts 1988-2003.

**For the avoidance of doubt, it is recommended that the General Scheme clarify that the duty to report applies notwithstanding the law on breach of confidence and that the report applies notwithstanding the Data Protection Acts 1988-2003.**

### **Reasonable excuse and the payment of compensation**

3.62. Section 5 of the NI Act states:

“It shall not be an offence under this section for the person suffering loss or injury by reason of the commission of the offence (in this section referred to as “the injured person”) or some other person acting on his behalf not to disclose information upon that loss or injury being made good to the injured person or upon the injured person being reasonably recompensed therefore so long as no further or other consideration is received for or on account of such non-disclosure.”

Therefore, under the NI Act, if a person who is the victim of a sexual attack is paid reasonable compensation, there is no obligation to report on that person or any third party. But if he or she is not paid reasonable compensation, there is an obligation to report.

3.63. The General Scheme approaches this differently. It makes clear that a child or vulnerable adult cannot be guilty of withholding information. It also makes clear that a victim cannot be guilty of the offence. This reflects the viewpoint that



children, vulnerable people and victims should not be criminalised for withholding. This Office believes that this is a better position to adopt.

3.64. But the General Scheme could be strengthened if it were clarified that the paying of compensation is not a reasonable excuse for not reporting. There should be no question of those who, for example, employ or manage persons who are known to have committed arrestable offences being able to buy their way out of a duty to report through the payment of compensation.

**It is therefore recommended that it be made explicit that payment of compensation is not a reasonable excuse for withholding information.**

### **Consistency with *Children First*: Reporting to the HSE and an Garda Síochána**

3.65. By law, the Garda Síochána is the statutory body tasked with the prevention and investigation of crime.<sup>53</sup> Meanwhile, the HSE is the body responsible for promoting the welfare of children. This includes child protection.<sup>54</sup>

3.66. Of course, there is a major overlap between the two. For example, physical abuse and sexual abuse can raise both criminal and child protection issues. On the other hand, emotional abuse and non-intentional neglect raise child protection concerns only. This distinction may be lost on many ordinary people. That is probably why the revised *Children First* has the following “Key Message”:

“As a member of the public, if you have concerns about a child but are not sure what to do, or if you are worried about a child’s safety or welfare, you should contact your local HSE Children and Family Services...”

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<sup>53</sup> S 7 Garda Síochána Act 2005.

<sup>54</sup> S 3 of the Child Care Act 1991. See also s 16 of the 1991 Act.

If you think a child is in immediate danger and you cannot contact the HSE Children and Family Services, you should contact the Gardai at any Garda station.”<sup>55</sup>

3.67. The original Children First contained similar guidance – with the message that the Gardai are to be contacted when the HSE is not available.<sup>56</sup> Both the original and revised Children First also make clear that the HSE must pass information to the Garda Síochána where referrals may have criminal aspects.<sup>57</sup>

3.68. This arrangement has the merit of simplicity. However, it does rely on the Health Service Executive to make referrals to the Garda Síochána – a matter which this Office has already recommended in its *Children First* investigation to be a priority for inspection.

3.69. In any event, in circumstances where *Children First* recommends that referrals be made to the Health Service Executive, this Office believes that those who follow Children First should not be criminalised.

**It is therefore recommended that the General Scheme should be revised so that it is an offence not to report to an “appropriate person” within the meaning of s 1 of the Protection for Persons Reporting Child Abuse Act 1998. This term encompasses both members of an Garda Síochána and designated persons within the Health Service Executive such as social workers. This Office also reiterates its recommendation that Garda/HSE cooperation be inspected.**

### **Consistency with *Children First*: Designated Liaison Persons**

3.70. One of the particular problems encountered in New South Wales when mandatory reporting was introduced there was the problem of multiple reporting of child protection concerns.

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<sup>55</sup> See Children First, Department of Children and Youth Affairs, 2011.

<sup>56</sup> See Children First, Department of Health and Children, 1999, at para 4.4.1.

<sup>57</sup> See the revised Children First at chapter 7, the original Children First at chapter 9.

3.71. *Children First* has a mechanism to avoid such problems in organisations. It provides that every organisation, both public and private, that is providing services for children or that is in regular contact with children should identify a designated liaison person. Persons in that organisation should raise their concerns with the designated liaison person, who is then responsible for ensuring that a referral is made when required by *Children First*.<sup>58</sup>

3.72. *Children First* also stipulates that in those cases where an organisation decides not to report concerns to the HSE or an Garda Síochána, the employee or volunteer who raised the concern should be given a clear written statement of the reasons why the organisation is not taking action.<sup>59</sup>

3.73. In New South Wales, the Children and Young Persons (Care and Protection) Act 1998 was amended by the insertion of a new s 27A in order to ensure that reporters could follow the New South Wales equivalent of the designated liaison person procedure under *Children First*.

**It should be clarified that it is a reasonable excuse for a person not to report the information to the Garda Síochána/HSE where he or she has instead reported the matter to the designated liaison person in his or her organisation in accordance with *Children First*.**

#### **4. Strengthening protection of reporters**

4.1. This Office also calls for changes to the Protection for Persons Reporting Child Abuse Act 1998 to ensure better protection for persons reporting abuse. This Office believes that it is important that those who report matters reasonably and in good faith are legally protected.

4.2. Section 3 of the Protection for Persons Reporting Child Abuse Act 1998 (the 1998 Act) provides that a person “shall not be liable in damages in respect of the communication, whether in writing or otherwise, by him or her to an appropriate

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<sup>58</sup> See para 3.3 of the revised *Children First*.

<sup>59</sup> See para 3.8 of the revised *Children First*.

person of *his or her* opinion” that a child has been, for example, neglected or abused unless the person making the referral did not act reasonably and in good faith.

4.3. *Children First* 2011, like *Children First* 1999, requires persons and organisations to report reasonable grounds for concern. Nowhere is it suggested that the person must actually have the opinion that the child was abused. Many making referrals will not know what to think, other than that referring is the right thing to do. They should be confident that they will be legally protected in so doing.

4.4. *Children First* 1999 went on to give examples of reasonable grounds for concern, including a specific indication from a child that (s)he was abused. *Children First* 2011 does not give specific examples but there is no reason to believe that a specific indication from a child would not be a reasonable ground for concern, whether the reporter actually has an opinion that a child was abused or not.

**In order to ensure legal protection for those who make reports in line with Children First, it is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that reporters have protection whether or not they have formed the opinion that the child has been abused or neglected.**

4.5. *Children First* is also clear that a *potential risk* to children should be referred.<sup>60</sup> But s.3 does not cover this situation.

**It is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that the reporting of potential risk is protected from civil liability.**

4.6. *Children First* requires any professional who suspects child abuse or neglect to inform the parents/carers if a report is to be submitted to the HSE or to an Garda Síochána. While this is certainly good practice, the Ombudsman for Children

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<sup>60</sup> See *Children First* 2011 at para 3.2.4.

does not believe that professionals who fail to inform the parents/carers should face civil liability.

4.7. It is also important that those making referrals can discuss with the Health Service Executive their child protection concerns, even if they do not meet the threshold of “reasonable grounds for concern” in *Children First*. Indeed, *Children First* envisages that those contemplating a referral should be free to discuss their concerns with the HSE.<sup>61</sup> Were the concept of “reasonableness” in s.3 to be interpreted in line with “reasonable grounds for concern” in *Children First*, such discussions would not be possible.

4.8. It is notable in this regard that the Ferns Report recommended that “rumour, innuendo and suspicion” be reported to the Health Service Executive. The purpose of this recommendation was explained by the authors:

“The Inquiry would be anxious to eradicate the problem which so often arose in the past, namely, that after a disclosure of abuse, people in the community claimed to have known for a long time of rumours of wrongdoing or abuse by particular priests. If there are rumours it should be possible ... to establish whether there is any basis to them.”<sup>62</sup>

4.9. This Office does not wish to encourage speculative reporting. But nor, on the other hand, would the Office wish to see those engaged in legitimate work of the kind recommended by Judge Murphy exposed to civil liability.

4.10. This Office does not believe that discussions by persons with the Health Service Executive that do not meet the threshold for “reasonable grounds of concern” in *Children First* are unreasonable or in bad faith within the meaning of s.3 of the 1998 Act. But the matter should be put beyond doubt.

**For the avoidance of doubt, it is recommended that it be clarified that a person should not be deemed not to have acted unreasonably or in bad faith for the**

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<sup>61</sup> See *Children First* 2011 at para 3.4.2.

<sup>62</sup> The Ferns Report, chaired by Mr Justice Francis Murphy, October 2005, recommendation G.9 at page 265.

**purposes of s.3 of the Protection of Persons Reporting Child Abuse Act 1998 for the sole reason that -**

- **he or she failed to follow a procedure envisaged by Children First; or**
- **the referral made did not meet the threshold of “reasonable grounds for concern” in Children First.**

## **5. Recommendations**

- 5.1 It is recommended that the General Scheme and the proposal to put Children First on a statutory footing be advanced through the Houses of the Oireachtas at the same time and, if possible, in the same Bill.
- 5.2 For the avoidance of any doubt and given that it is expressly stated in s. 2 of the Criminal Law Act 1997, it is recommended that it also be stated in the General Scheme that an arrestable offence includes an attempt to commit an offence.
- 5.3 This Office agrees with the general approach of the General Scheme provided the following recommendations are implemented, being that -
- all necessary resources be put in place to ensure that social work departments can respond effectively to any increase in reporting consequent upon the General Scheme;
  - the recommendation made later in this paper with regard to Designated Liaison Persons is implemented;
  - an effective system of monitoring, for example by the Social Services Inspectorate of the Health Information and Quality Authority, is put in place to monitor the effects of the General Scheme and
  - an independent review of the effects on child protection practice is required to be undertaken no later than three years after implementation. This should be

informed by inspection by HIQA/SSI. The review should be considered by the Select Committee on Children and Youth Affairs and debated by the Houses of the Oireachtas.

- 5.4 It is recommended that it only be an offence to withhold information where a person knows or believes on reasonable grounds that an arrestable offence has been committed.
- 5.5 It is recommended that the General Scheme be revised to clarify in the case of children that a reasonable excuse does not include circumstances where the person in respect of whom the offence concerned was committed makes it known that he or she does not want that offence, or information relating to that offence, to be reported.
- 5.6 It is recommended that the General Scheme clarify what a reasonable excuse for not reporting is.
- 5.7 It is recommended that legal professional privilege should not be a reasonable excuse. This Office urges the Government to consider this matter.
- 5.8 It is recommended that it should be clarified that being a mediator does not constitute a reasonable excuse, notwithstanding s.7A of the Judicial Separation and Family Law Reform Act 1989 and s.9 of the Family Law (Divorce) Act 1996. Furthermore, an examination of the statute book should be undertaken to consider other instances of statutory privilege and to clarify the application of the Scheme to them.
- 5.9 It is recommended that s.16 of the Ombudsman for Children Act 2002 and s.9 of the Ombudsman Act 1980 be amended to put beyond doubt the ability of this Office to make child protection notifications, to provide information to the Garda Síochána and to ensure that the confidentiality of investigations cannot be cited as a reasonable excuse.
- 5.10 In the interests of certainty, it is recommended that it be clarified that marital privilege is not a reasonable excuse for a person to refuse to provide information about his or her spouse or civil partner.

- 5.11 It is recommended that the General Scheme clarify the issue of sacerdotal and counsellor privilege. It is also recommended that sacerdotal privilege and counsellor privilege should not provide a reasonable excuse for withholding information, given the serious nature of arrestable offences against children.
- 5.12 While it is for the Attorney General to advise on the constitutionality of any proposed legislation, this Office does not believe that it would be unconstitutional for the legislation to be extended to the confessional and this Office recommends that it be so extended. In any event, it should be clarified that sacerdotal privilege in respect of communications outside the confessional cannot give rise to a reasonable excuse.
- 5.13 It is recommended that it be clarified that the General Scheme overrides in camera restrictions and that compliance with the in camera rule cannot therefore be a reasonable excuse.
- 5.14 For the avoidance of doubt, it is recommended that the General Scheme clarify that the duty to report applies notwithstanding the law on breach of confidence and that the report applies notwithstanding the Data Protection Acts 1988-2003.
- 5.15 It is recommended that it be made explicit that payment of compensation is not a reasonable excuse for withholding information.
- 5.16 It is recommended that the General Scheme be revised so that it is an offence not to report to an “appropriate person” within the meaning of s 1 of the Protection for Persons Reporting Child Abuse Act 1998. This term encompasses both members of an Garda Síochána and designated persons within the Health Service Executive such as social workers. This Office also reiterates its recommendation that Garda/HSE cooperation be inspected.
- 5.17 It should be clarified that it is a reasonable excuse for a person not to report the information to the Garda Síochána/HSE where he or she has instead reported the matter to the designated liaison person in his or her organisation in accordance with Children First.



***With regard to the Protection for Persons Reporting Child Abuse Act 1998:***

- 6.18 In order to ensure legal protection for those who make reports in line with Children First, it is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that reporters have protection whether or not they have formed the opinion that the child has been abused or neglected. This would ensure legal protection for a reporter of a disclosure of abuse by a child – even if the reporter had not formed the opinion that the child had been abused.
- 6.19 It is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that the reporting of potential risk is protected from civil liability.
- 6.20 For the avoidance of doubt, it is recommended that it be clarified that a person should not be deemed not to have acted unreasonably or in bad faith for the purposes of s.3 of the Protection of Persons Reporting Child Abuse Act 1998 for the sole reason that -
- he or she failed to follow a procedure envisaged by Children First; or
  - the referral made did not meet the threshold of “reasonable grounds for concern” in Children First.

## Appendix 1

### ***Findings and recommendations of the Ombudsman for Children's Investigation into the implementation of Children First: National Guidelines for the Protection and Welfare of Children (May 2010)***

#### **(a) Findings**

1. The Review of Adequacy 2008 conducted by the HSE is contrary to sound administration within the meaning of s.8 of the Ombudsman for Children Act 2002 as the HSE failed to ensure determination of adequacy in any meaningful way in each of its functional areas.
2. This Office concludes that the failure in the period from 2003 up to (but not including) 2008 to put in place appropriate mechanisms to drive forward interagency implementation of Children First involved unsound administration within the meaning of s.8 of the Ombudsman for Children Act 2002. Responsibility for the unsound administration as regards interagency matters lay with the Department of Health and Children to the extent that it related to problems such as with Garda/HSE cooperation, variable implementation by health boards in the period prior to the creation of the HSE and the failure to ensure interagency cooperation more generally – for example through Local Child Protection Committees and Regional Child Protection Committees.
3. Separately, up until the establishment of a HSE Taskforce in February 2009, this Office concludes that insufficient efforts were made to drive forward implementation of Children First by the HSE internally, such as failure to ensure that Local Health Offices had local procedures, and that this involved unsound administration by the HSE in the period since its creation.
4. In the period from the disbandment of the Health Boards Executive Resource Team in late 2002 to the disbandment of the Health Boards themselves on 1 January 2005, this Office concludes that there was unsound administration by the Health Boards in failing to resolve collectively problems that had arisen with Children First, including regarding its variable implementation.
5. This Office concludes that the failure by the HSE (and the Health Boards before 1 January 2005<sup>63</sup>) to put in place appropriate quality assurance through internal audit of casefiles more widely than in one part of the State (Cork/Kerry) and more frequently than once in a decade involves unsound administration and is therefore within s.8 of the Ombudsman for Children Act 2002, especially having regard to the worrying nature of the findings of the Cork/Kerry audit.
6. This Office concludes that the HSE in failing to ensure that Local Health Offices all have local procedures acted contrary to sound administration within the meaning of s.8 of the Ombudsman for Children Act 2002.

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<sup>63</sup> With the exception of the *Southern Health Board*.

7. This Office believes that in its analysis of submissions to the OMCYA review and in the OMCYA review document itself proper mention should have been made of the real industrial relations issues that had arisen in the former Eastern Regional Health Authority region, given their effects on the ground. This Office concludes that the failure to be transparent about the industrial relations dispute in the OMCYA review and analysis of submissions involved unsound administration within the meaning of s.8 of the Ombudsman for Children Act 2002 on the part of the Department of Health and Children through the OMCYA.
8. The failure to ensure consistent definitions of abuse in local procedures across the HSE involves unsound administration by that public body within the meaning of s.8 of the Ombudsman for Children Act, 2002.
9. The failure to ensure clarity and consistency regarding the basis for reporting child abuse concerns across the HSE in local procedures involves unsound administration within the meaning of s.8 of the Ombudsman for Children Act, 2002.
10. This Office believes that the failure of the HSE to ensure 24 hour external access to the Child Protection Notification System in most of the State involves unsound administration within the meaning of s.8 of the Ombudsman for Children Act 2002.
11. While this Office has no power to investigate an Garda Síochána, it is satisfied that in a number of instances – notably concerning joint action sheets and notifications – responsibility lies in particular with the HSE for the failure to implement the requirements of Children First on Garda/HSE cooperation. To the extent that this flows from industrial relations difficulties, the lack of transparency regarding such difficulties involves unsound administration by the Department of Health and Children for reasons already stated. To the extent that it does not – and it appears that there are other reasons for non implementation of, for example, joint action sheets such as a belief that they serve no useful purpose - this Office believes that the failure to implement such important requirements is also an unsound administrative practice by the HSE within the meaning of s.8 of the Ombudsman for Children Act 2002, not least because the failure to coordinate Garda and HSE action is unlikely to ensure effective protection of children.

**(b) Recommendations**

1. **That resources be better matched to need around the State in social work departments to ensure equitable service provision through evidence based resource allocation.**

*Response of HSE*

*Equitable services provision through evidenced based resource allocation was very much the focus and one of the key outcomes of the HSE Task Force Sub – Group: National Social Work and Family Support Survey Report and in conjunction with the Ryan Report Implementation Plan will address deficits in*

*relation to social work resources being better matched to need. The HSE National Service Plan 2010 also commits to an audit of resources targeted at children and families across the statutory and non-statutory sector and the recruitment of an additional 200 social workers for Child Protection and Alternative Care Services will be targeted at areas of greatest need.*

*Response from OMCYA*

*An audit of resources targeted at children and families across the statutory and non-statutory sector is one of the HSE led actions set out in the Government's Implementation Plan for the findings of the Ryan Commission recommendations and is included in the HSE Service Plan for 2010. The 2010 Employment Control Framework for the HSE includes provision for the recruitment of an additional 200 social workers for child protection services, as well as a further 65 posts in respect of the Ryan Report Implementation Plan (the required funding has also been provided to the HSE). The filling of these posts will be a matter in the first instance for the National Care Group Lead for Children in consultation with this Department and the Department will work to ensure that these posts are allocated in a way which takes account of service needs. It is envisaged that the audit of existing resources, referenced above, along with the improvements being made by the HSE in relation to standardised processes and management information, will provide a basis for the development of a more evidence-based allocation of available resources. This issue will also be considered further by the Department following receipt of the forthcoming report of the Resource Allocation Group.*

2. **Given the well documented cases of clerical child sex abuse and the systemic failure to report such cases, that the application of the revised Children First Guidelines to churches be made explicit in the Guidelines themselves.**

*Response of OMCYA*

*You are correct in pointing out that the revised Children First Guidelines state that the guidelines are for organisations providing services to children. However, they go beyond this in stating that they apply to organisations "in regular contact with children". As such there can be little doubt that the Guidelines apply to churches and are clearly not limited to organisations providing "services" to children. This is set out in Chapter 1 of the revised Guidelines. However, in order to avoid any risk that the revised guidelines might be misinterpreted they have now been expanded upon in Chapter 1 to clarify that they apply to voluntary and community groups including all faith based organisations. These amendments have now been incorporated in the final text for printing.*

3. **It is important that family support services, locally and nationally, are properly planned for with appropriate strategies in place and it is recommended that all necessary steps be taken to this end, whether under the auspices of the revised Children First Guidelines or not.**

*Response of HSE*

*An HSE specific action under the Ryan Implementation Plan commits to “all agencies that provide services to children and families develop and implement an operational plan based on the The Agenda for Children’s Services.” The HSE Strategy to support the Agenda for Children’s Services was completed in 2009 and the National Service Plan 2010 advances implementation of the strategy in line with Task Force outputs. An operational plan is currently being finalised by the HSE in relation to the development of Family Support Services incorporating an action plan to improve our engagement with children and young people and we are in the process of finalising the “Investing in Parents and Children’s Strategy which will clearly outline the targeting of prevention and early intervention services. There will also be a requirement built into all local Service Level Agreements with all community and voluntary agencies that are funded and provide services to children and families of the necessity to develop and implement an operational plan based on the Agenda for Children’s Services.*

*Response of OMCYA*

*The OMCYA is committed to the future development and enhancement of family support services in line with Government policy set out in The Agenda for Children’s Services.*

4. **This Office is aware that the HSE is undertaking a Strategic Review of the Delivery and Management of Child Protection Services. It is important that this review considers all options and asks new questions. That should include whether child protection services are best delivered within the context of the HSE and, if concluded that they are, how to ensure that a focus on them is not lost amid wider concerns about health services.**

*Response of HSE*

*Focus on the delivery and management of Child Protection Services is underpinned by the creation of the Children and Families Care Group and the appointment of the Assistant National Director. This is enhanced by the Ryan Implementation Plan; “The HSE will act to reform its management structures following the review it commissioned in July 2009 to ensure a transparent and accountable management system, confirmed in the 2010 Service Plan, with the implementation of the “Strategic Review of Child Protection Services”*

5. **It is strongly recommended that the High Level group established by the OMCYA meet to resolve all outstanding interagency policy issues regarding Children First identified in the context of the OMCYA review.**

*Response of OMCYA*

*This recommendation will be addressed in the context of the structures to be put in place as part of the implementation framework referred to above.*

6. **It is recommended that SSI, upon recommencing inspection of child protection work and consistent with its normal practice in other fields, examine case files to get a true picture of the state of implementation in practice.**

*Response of OMCYA*

*It is doubtful if the previous SSI role could be validly described as “inspection of child protection work”. As outlined on page 20 of your report an inspector of the SSI was appointed to monitor the implementation of Children First. The subsequent report from the SSI was informed by meetings with key stakeholders and information collated by way of health board questionnaires. However, this recommendation will be addressed in the context of the action referred to above, i.e. that the Social Services Inspectorate of HIQA “develop standards and commence inspection of child protection and welfare services (by September, 2011).”*

7. **That efforts be made on all sides to resolve all outstanding industrial relations issues affecting the implementation of Children First.**

*No response received from HSE in relation to this recommendation.*

*Response of OMCYA*

*This is a matter in the first instance for the HSE as employer but the Department of Health & Children will provide the HSE with any support and assistance which is necessary to ensure this matter is addressed, particularly in the context of the information provided in your report and the opportunity presented by the revised Guidelines.*

8. **It is strongly recommended that work to standardise processes and improve datasets by the HSE be continued as a priority. This should include clarity on screening and initial assessments, clarity on when to accept to the Child Protection Notification System and when to close a case to the Child Protection Notification System, as well as clarity on the non-removal of cases from the Child Protection Notification System.**

*Response of HSE*

*The National Child Care Information System with concomitant Standardised Business Processes has been prioritised by the HSE for implementation subject*

to approval by the Department of Finance and is included in the HSE National Service Plan 2010.

9. **It is recommended that all necessary steps be taken to ensure that information be stored and searchable otherwise than solely on grounds of alleged victim, at least prospectively if it is not feasible to do so retrospectively.**

*Response of HSE*

*The HSE commits to address information retrieval systems to include the Ombudsman's recommendations in addition to development of a National Archive managed professionally for the records of all children in care including records from non-statutory agencies.*

10. **While this is not a requirement of Children First, given the reality that families and children can move between counties, it is recommended that consideration be given to the creation of a national the Child Protection Notification System system, rather than only a local one.**

*Response of HSE*

*The HSE will give consideration to the creation of a National Child Protection Notification System System. In addition a cross border working party under the auspices of the North / South Ministerial Conference is currently devising a protocol in relation to the movement of vulnerable children and families across jurisdictions.*

11. **While not a requirement of Children First, this Office strongly recommends the rolling out of an out of hours service throughout the State and that all necessary funding be given priority to this end.**

*Response of HSE*

*Ryan Implementation Plan actions; subject to funding, the HSE putting in place a national Out of Hours Social Work Crisis Intervention Service built into the existing HSE Out of Hours Service. This will be piloted initially in two areas of the country.*

*Response of OMCYA*

*One of the actions in the Ryan Implementation Plan is that "The HSE will put in place a national out-of-hours social work crisis intervention service, built into the existing HSE out-of-hours service. This will be piloted initially in two areas of the country"*

12. **It is noted that the current role of CCMs is under review and it is recommended that issues of access to information by the CCM or designate and ability to direct be fully considered in that context.**

*Response of HSE*

*The role of Child Care Managers is actively under review and is a key management reform component of the structural management and accountability process.*

13. **This Office can see merit in the proposal for a dedicated child protection service in an Garda Síochána and recommends consideration of this proposal.**
14. **It is strongly recommended that joint liaison structures be established between the HSE and the Garda Síochána in all areas where they are outstanding.**

*Response of HSE*

*In order to advance and enhance joint working arrangements between the HSE and An Garda Síochána a recent high level meeting was convened by the Assistant National Director, Children and Families Social Services, with Gardai at Assistant Commissioner level identifying key areas including joint liaison structures to address deficits. This work is ongoing.*

15. **Reports that Garda notifications are not being completed are a serious matter, and it is recommended that the SSI and an Garda Síochána Inspectorate jointly inspect the extent to which this is the case.**
16. **It is also recommended that SSI and an Garda Síochána Inspectorate jointly inspect the implementation of Children First's requirements on Garda/HSE cooperation more generally, including as regards the early holding of strategy meetings.**

*Response of OMCYA*

*These recommendations [15 and 16] will be addressed as part of the implementation framework referred to above and, in particular, the action in the Ryan Implementation Plan to the effect that compliance with the Children First guidelines be linked to all relevant inspection processes across the education, health and justice sectors.*

17. **It is recommended that all necessary steps be taken to ensure that a list of all convicted sex offenders in the area can be given to each Local Health Office so that it can assess risk to any children. It is also recommended**



**that current practice in this area be examined as part of the joint SSI/Garda Síochána Inspectorate inspection recommended above.**

18. **It is recommended that record keeping be sufficient to record decisions taken and to guide future actions and that sufficient resources be put in place to ensure this.**

*Response of OMCYA*

*The record keeping requirements, as provided for in Children First, will be addressed as part of the implementation framework referred to above.*

19. **It is recommended that practices regarding record keeping be included in future inspections by SSI.**

20. **It is recommended that SSI, when it resumes inspection of child protection services, inspect in particular implementation of protocols on the transfer of files.**

*Response of OMCYA*

*These recommendations [19 and 20] will be addressed in the context of implementing the action in the Ryan Report Implementation Plan to the effect that the Social Services Inspectorate of HIQA “develop standards and commence inspection of child protection and welfare services (by September, 2011).”*

21. **It is recommended that the High Level Group provide further guidance on information sharing and data protection. This should not await any forthcoming legislation on this issue.**

*Response of OMCYA*

*This recommendation will be addressed as part of the implementation framework referred to above. In addition, considerable work is currently being undertaken on this issue with regard to legislation.*

22. **It is recommended that the HSE provide further training to professionals on their duty to report abuse, including regarding retrospective cases.**

*Response of HSE*

*The HSE is committed to the ongoing professional development of staff including training for professionals moving into management positions. A National Steering Group representing the Health, Education and Justice sectors to strategically plan for the training needs of staff working with children and families is being established and will target priority areas under the auspices of the National Steering Group.*

*A National Specialist with responsibility for training has been designated to lead out on this process and child protection has been designated as a key priority.*

