Advice of the Ombudsman for Children on the Heads of the Children First Bill 2012

&

The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012

June 2012

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1. Introduction

1.1. The Minister for Children and Youth Affairs published the Heads of the Children First Bill on the 25th of April 2012. The stated purpose of the proposed legislation ("the Children First Scheme") is to place certain aspects of *Children First: National Guidance for the Protection and Welfare of Children* on a statutory footing. The Minister for Justice, Equality and Defence also published the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012 on the same day. This legislation ("the Withholding Information Bill") creates a criminal offence of withholding information in relation to serious specified offences committed against a child or vulnerable person.

1.2. 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. This submission builds on previous advice provided by the Ombudsman for Children's Office in relation to the Scheme of the Withholding Information Bill and the initial proposals to place aspects of *Children First* on a statutory footing.

1.3. These initiatives represent a significant development in the legislative framework governing child protection in Ireland. This Office has decided to comment on the Children First Scheme and the Withholding Information Bill in the same submission because of the overlap between them with respect to the issue of reporting abuse. It is acknowledged that the Children First Scheme is broader in scope and addresses other issues such as the general safeguarding obligations on specified organisations, cooperation and information sharing, and the framework for the implementation of *Children First.* In addition, the threshold for reporting under the Withholding Information Bill differs from the Children First Scheme with respect to the nature of the offences to be reported and the quality of the information held by the person on whom there is an obligation to report. The Children First Scheme relates primarily to reporting obligations to the HSE, whereas the

Withholding Information Bill is concerned with reporting to An Garda Síochána. However, both deal with arrangements for reporting child abuse and, together with the National Vetting Bureau Bill, form a suite of child protection legislation being advanced by the government at present. Moreover, certain individuals will potentially find themselves subject to reporting requirements under both pieces of legislation with respect to the same child protection concerns. As a result, it is important that they be consistent with one another and provide clarity in relation to when and how members of the public, as well as particular organisations and professionals, are to report child protection concerns.

1.4. This Office previously advised that consideration be given to merging the two Bills or that they be advanced through the Houses of the Oireachtas at the same time. This would assist the Oireachtas in ensuring that the two pieces of legislation cohere fully with each other. As the Oireachtas has already begun its consideration of the Withholding Information Bill 2012, it is recommended that the latter option be taken.

It is recommended that the Withholding Information Bill 2012 and the forthcoming Children First Bill 2012 be advanced through the Houses of the Oireachtas at the same time in order to ensure that both pieces of legislation cohere fully with each other.

1.5. In framing this submission the Ombudsman for Children's Office has had regard to international human rights instruments relevant to the welfare and protection of children[1], 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 carried out a national systemic investigation into the implementation of the *Children First* guidelines, which was completed in 2010. Earlier this year, the Ombudsman for Children's Office published a review report on progress made by the relevant public

[1] The Ombudsman for Children's Office previously set out the principal human rights standards relevant to this area in its advice on the Scheme of the Withholding Information Bill. They have been included again in the first annex to this submission.

bodies in relation to the recommendations made on foot of that investigation[2].

1.6. The ultimate aim of this legislation - and indeed the other proposals being advanced by the Government - is to make children safer. In order to achieve that end, this suite of legislation must address itself to different individuals in different situations: those that would wilfully withhold information regarding the abuse of children must be compelled to pass that information on to the relevant authorities; those who fail to comply with the *Children First* guidance but not through any intention to withhold information regarding child abuse; and those that already comply with the requirements of *Children First* should be supported in making responsible decisions regarding the reporting of child protection concerns.

1.7. The international experience of introducing systems of mandatory reporting points to both positive and potentially negative consequences arising from such a change[3]. Concerns regarding the introduction of such a legal obligation relate primarily to the possibility that reporters may adopt an over-cautious approach, thereby leading to an increase in reports that do not in reality meet the thresholds set out in the relevant guidance, a decrease in rates of substantiation, and an increased demand on the relevant child protection services in order to deal with the elevated level of reports.

1.8. The potential for such a situation to arise in Ireland exists and it is prudent to consider the international experience in this regard. However, it is important to recall that contexts differ, both in terms of the statutory child protection framework and the composition and operation of child protection services. Moreover, it must be acknowledged that there have been extremely serious failures to report known situations of child abuse in Ireland and the existing criminal offences may not be sufficient to tackle the issue because they do

[2] Ombudsman for Children's Office, *Review Report on the progress made in relation to the recommendations made on conclusion of the investigation into the implementation of Children First: National Guidelines for the Protection and Welfare of Children* (OCO: Dublin, March 2012)

[3] For an overview of international practice and an examination of the advantages and disadvantages to the introduction of mandatory reporting, see Shannon, G *Third Report of the Special Rapporteur on Child Protection*: *A report submitted by the Oireachtas* (2009), Chapter 1

not criminalise the intentional failure to report. Instead, they require proof of additional matters also, such as the endangerment of a child.

1.9. It is crucial, however, that there be a firm commitment to gathering high quality and detailed information regarding the impact of this legislation on child welfare and protection services once it is commenced. The issues that have arisen in other jurisdictions regarding the quality of reports, the response of different sectors to their reporting obligations, and the impact on frontline services must all be examined. In addition to putting in place a clear monitoring and oversight framework, the legislation should include an obligation on the Minister to review its operation and for the Oireachtas to consider that review . We must remain open to the possibility of modifying our approach to the question of reporting child abuse if the evidence suggests that such a change would be in the interests of children.

On balance, therefore, this Office agrees with the general approach of the Children First Scheme and the Withholding Information Bill 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 Children First Scheme and the Withholding Information Bill;**
- **unnecessary multiple reporting of the same child protection incident should be prevented and, to that end, making a referral in accordance with *Children First* should obviate the need to make a separate report under the Withholding Information Bill 2012 where the threshold for referring under both has been met;**
- **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 legislation on child protection services; and**
- **the legislation underpinning *Children First* should include a requirement for the Minister for Children and Youth Affairs to review the effects of that legislation on child protection practice no later than three years after its commencement. The review should be considered by the Oireachtas Committee on Health and Children.**

2 The Heads of the Children First Bill 2012

2.1 The Heads and General Scheme of the Children First Bill 2012, published on the 25th April 2012, intend to place aspects of *Children First: National Guidance for the Protection and Welfare of Children* (2011) on a statutory footing.

2.2 This Office welcomes the publication of the Children First Scheme and the very open engagement of the Department of Children and Youth Affairs in consulting on the scope of the legislation and elements to be included in it. The following comments have been framed in light of this Office's investigation into the implementation of *Children First* and its previous advice on the proposals to place aspects of *Children First* on a statutory footing, submitted to the Minister for Children and Youth Affairs in November 2011.

Definitions of abuse and organisations coming within the scope of the Scheme

2.3 Head 2 provides for the definition of terms used in the Scheme, including those relating to the forms of abuse comprehended by the legislation.

2.4 The definitions of abuse included in the Scheme do not correspond to those contained in Chapter 2 of the *Children First* guidance. In particular, emotional abuse is not included under Head 2 and the definition of physical abuse is limited to non-accidental injury or injury that results from a wilful failure to protect a child, whereas the *Children First* guidance includes actual or potential physical harm from an interaction or lack of interaction which is reasonably within the control of a parent or person in a position of responsibility, power or trust[4]. Physical abuse within the meaning of the guidance as distinct from the Scheme would therefore include observing violence and terrorising a child with threats, for example.

2.5 It is acknowledged that the various forms of child abuse differ with respect to how readily identifiable they are, and that this difference underpins the

[4] Department of Children and Youth Affairs, *Children First: Guidance for the Protection and Welfare of Children* (Dublin: Government Publications, 2011), paragraph 2.4.1

rationale for omitting certain forms of abuse contained in the *Children First* guidance from the legislation. However, symmetry between the guidance and the legislation has distinct advantages and significant problems may arise from a discrepancy between them.

2.6 During the course of this Office's investigation into the implementation of *Children First*, it became clear that consistent definitions of abuse were not being employed across the country; this in turn gave rise to a concern about the impact on the prioritisation of certain forms of abuse over others in terms of the allocation of human resources to address them. Although Head 5 of the Scheme is clear in stating that nothing in the Bill diminishes in any way the duties and responsibilities of any person which arise under *Children First*, this Office has a concern that distinguishing between forms of abuse that give rise to statutory obligations and those that do not may have the effect of according a greater priority to the former. In light of the serious nature of emotional abuse – and indeed its prevalence – this would be a concerning development.

2.7 In addition, this discrepancy could have implications beyond the obligation on individuals to report concerns regarding child abuse and has the potential to give rise to a certain amount of confusion. The other provisions of the Scheme relating to obligations to have Keeping Children Safe Plans, recoding instances of abuse, developing protocols, and the role of the HSE in addressing compliance issues are predicated on addressing child abuse within the meaning of the Scheme. A question then arises regarding what the implications are for organisations that comply fully with their obligations with respect to the forms of abuse contained in the Scheme but do not with respect to emotional abuse and the forms of physical abuse that are not contained in the Scheme. For example, could the HSE issue an improvement notice under Head 14 to an organisation that consistently failed to report cases of emotional abuse but otherwise reported all forms of abuse within the meaning of the Scheme? It may be that the forthcoming *Guidance for the Reporting of Abuse* and *Safeguarding Guidance for Organisations* will clarify that Keeping Children Safe Plans should include a requirement that all forms of abuse contained in the *Children First* guidance be reported; however, this would imply that a failure to report emotional abuse could constitute a failure to comply with the legislation (albeit not the specific obligation on individuals to report abuse under Head 11). As noted above, this could give rise to some

confusion regarding the forms of abuse that one is statutorily obliged to report; this potential difficulty could be avoided, however, by including the definitions of abuse contained in the *Children First* guidance in the legislation.

This Office recommends that the same definitions of abuse as found in *Children First: National Guidance for the Protection and Welfare of Children* (2011) be relied on in the Bill.

2.8 Head 2 also addresses the issue of sexual activity between children. The Children First Scheme presumes that consensual sexual activity "permitted by law" (i.e. where both children are over the age of consent) is not sexual abuse. The Children First scheme also states that sexual abuse is considered to have occurred where one of the children is deemed by reason of age or immaturity to have insufficient capacity to have consented to the activity.

2.9 It is unclear whether this provision is intended to exclude from the definition of sexual abuse a situation where both children are deemed by reason of their age or maturity to have insufficient capacity to have consented to the activity and where the circumstances do not fall within the first limb of the definition of sexual abuse as set out in the Scheme regarding situations of coercion.

2.10 This Office is concerned that automatic referrals of consensual sexual activity between minors under 17 to the HSE would act to prevent minors from seeking appropriate services and assistance. It is acknowledged that, in light of the Criminal Law (Sexual Offences) Act 2006, this will remain a very difficult issue to address. This Office is of the view, however, that any circumstance of age-inappropriate but consensual sexual activity should be considered on its facts and, depending on the age and circumstances of the minors involved, the particular considerations in each case would be taken into account by the medical professional treating the minors in question and that the professional in question would have discretion to determine in their opinion whether the particular circumstances give rise to a necessity to report to the HSE, as opposed to each case mandatorily requiring an automatic referral. It may be that a medical professional may have concerns for the health and wellbeing of a sexually active teenager but that the identified needs are not ones that can be addressed most appropriately by child

protection services. This issue is addressed further below in relation to the Withholding Information Bill 2012.

It should be clarified that professionals working with children under the age of consent who have engaged in non-abusive sexual relations should be able to use their discretion to decide whether, given the facts of the case and any risk factors present, a referral to the statutory authorities should be made.

2.11 Head 6 of the Scheme provides for the organisations that will have a statutory obligation to report child abuse. Head 6(1) defines organisations that come within the meaning of the Bill as services where a child can attend without a parent or guardian or any other adult to whom the parent or guardian has entrusted a child being present, and where an employee or volunteer in the organisation has access to or works directly with a child. This Office would recommend that this section be clarified to ensure that "any other adult" cannot be an employee or volunteer of the organisation.

2.12 Head 6(3) sets out a range of organisations and services that are not included within the scope of the Scheme, including those providing child-minding services. It is acknowledged that many parents rely on informal arrangements in this area and that it would not be feasible to include all child-minders within the ambit of the legislation. However, if such services are being provided by an agency rather than on an informal basis, it would be preferable to include such service providers within the scope of the Scheme.

Vetting and the responsibilities of organisations under the Scheme

2.13 Head 7 provides that organisations that fall within the scope of the Bill will have a number of duties, including those relating to vetting and the need to ensure that all employees or volunteers are suitable to work with children. Although the explanatory note to Head 7(8) indicates that a vetting application is to be made for each employee or volunteer, Head 7(8) itself makes reference only to the need to make such an application for volunteers; this is clearly an omission and will no doubt be addressed when the Bill itself is ultimately published.

2.14 More generally, however, this Head raises a question regarding compatibility between the Children First Scheme and the forthcoming legislation governing the vetting process. The Scheme of the National Vetting Bureau Bill was clear in setting out its intention to align an obligation to vet staff with the nature of their particular roles, rather than the nature of the organisation for which they work. With the exception of a number of categories of employer, the Scheme allowed only for the vetting of those whose work involves regular or ongoing unsupervised contact with children.

2.15 In its advice on the Scheme of the National Vetting Bureau Bill, this Office expressed concern that the scope of that legislation was too narrow and that confining vetting obligations in this way would not be compatible with the revised *Children First* guidance. In particular, that submission drew attention to the recommendation contained in *Children First* that "employers/heads of organisations where staff or volunteers have access to children should at all times implement safe recruitment practices, including vetting of applicants and staff, rigorous checking of references, interview procedures and monitoring of good professional practice"[5]. This section of the guidance makes reference to the importance of vetting in the context of staff or volunteers having access to children rather than employment that involves regular or ongoing unsupervised contact with children. This approach is confirmed and expanded in the Heads of the Children First Bill, which make it clear that certain organisations will be required to make a vetting application for each employee and volunteer. In effect, this appears to depart from the principle contained in the Scheme of the National Vetting Bureau Bill, which sought to define the positions which will be subject to vetting by reference to the type of employment rather than type of employer. The explanatory note to the relevant provision of the National Vetting Bureau Bill stated that it was considered important to make clear that even in registered organisations, employment positions which do not involve working with children would not require vetting.

2.16 This Office believes that the approach of the Children First Scheme is to be preferred to that contained in the Scheme of the National Vetting Bureau Bill,

[5] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (Department of Children and Youth Affairs: Dublin, 2011), section 4.5.5, p. 21

for a number of reasons set out in its advice on the latter. They include, for example, the fact that individuals who have access to sensitive information regarding children (including designated liaison persons) but who do not otherwise have regular or ongoing unsupervised access to children would not appear to be subject to the vetting requirements of the National Vetting Bureau Bill. It is hoped that this discrepancy will be addressed and that when the National Vetting Bureau Bill is published, its provisions will cohere fully with those of the Children First Scheme.

It is recommended that any discrepancies between the Children First Scheme and the Scheme of the National Vetting Bureau Bill be addressed in the forthcoming National Vetting Bureau Bill.

2.17 This Office welcomes the provisions of Head 7(14) relating to the obligation on organisations to carry out annual internal audits of compliance with the requirements of the legislation. Maintaining accurate records and putting in place robust monitoring structures is crucial. However, this Office is conscious that smaller organisations may find it difficult to appoint a sufficient number of independent persons to act on an internal audit committee. Scope could also be afforded for smaller organisations to seek a special exemption from the HSE in certain circumstances permitting an internal audit committee to have fewer than three members, or for external personnel to be able to assist with such an audit.

Designated Officers

2.18 Head 9 provides that an organisation which comes under Head 6 is to appoint a Designated Officer whose functions may be delegated to an employee or volunteer of senior management rank. These functions include reporting concerns or allegations of child abuse to the HSE, cooperating with the HSE, reviewing and ensuring the implementation of the Keeping Children Safe Plan and developing protocols for the reporting of child abuse. The Scheme clarifies that certain functions are delegable but that responsibility for the exercise of those functions remains that of the Designated Officer.

2.19 The role of Designated Officer brings with it a serious responsibility; this is reflected in the fact that it is a position which is to be occupied only by an

individual at the highest level within an organisation. It is also a position that will have to be filled in organisations that vary considerably in terms of their size, diffusion and whether they are staffed by professionals or volunteers. This Office has a number of observations with respect to this Head; the issue of sanctions is also of direct relevance to the role of the Designated Officer but will be addressed in the comments below on Head 11.

2.20 It is recommended that Head 9(1)(a) include provisions for circumstances in which there is no one senior executive but rather a Board structure whereby each person is regarded as a Designated Officer in law until such time as one specific Designated Officer has been appointed. Although this may arise infrequently, it is important that there are identifiable individuals who hold responsibility for carrying out the different functions provided for by Head 9 in such situations.

2.21 Head 9(2)(a) requires a Designated Officer to record all concerns or allegations of child abuse brought to his or her attention. However, it does not provide for a similar obligations regarding information that comes directly to the attention of the Designated Officer herself/himself rather than being referred to the Designated Officer by an employee or volunteer in the organisation. It is recommended that Head 9(2)(a) include within its scope an obligation to record such concerns as well.

2.22 With respect to the obligation to develop protocols regarding child abuse under Head 9(3)(d), it would be useful to clarify that all the details listed under this Head should be included in a referral to the HSE "as far as practicable". In practice, information may be incomplete and while it is more helpful for the HSE to have as much information as possible, this will not always be available.

It is recommended that Head 9 be amended to provide for the amendments identified above.

Sanctions

2.23 Head 11 sets out the obligation on Designated Officers, those working in organisations falling under Head 6 and specified professionals listed in Schedule 1 to report concerns or allegations of child abuse in line with the *Guidance for the Reporting of Child Abuse*. Designated Officers and professionals set out in Schedule 1 who contravene the requirements of Head

11 will be guilty of an offence and liable on summary conviction to a class A fine or imprisonment or a term not exceeding 12 months or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years.

2.24 The severity of the sanction reflects the potential seriousness of a failure to report, and the desire to adopt a maximal approach is understandable. However, in its preliminary comments on the proposals to place *Children First* on a statutory footing, this Office recommended that criminal sanctions not be used to deal with non-compliance in this area. The principal reason for taking this position is that those to whom this section applies may adopt an over-cautious approach to reporting and refer concerns that do not in reality meet the threshold for referral under the *Children First* guidance for fear of criminalisation, with the consequent increase in demand on HSE resources.

2.25 The intention of allowing Designated Officers in particular to act as effective filters of concerns being passed to the HSE may be thwarted by including a criminal sanction for a failure to report. This is particularly so in relation to organisations that may not be staffed with professionals who are already fully conversant with *Children First* but who will be subject to the provisions of the Scheme. In one sense, it is easier for Designated Officers not to exercise any discretion in whether to refer matters to the HSE and to refer all concerns even when the threshold for referral has not been met. However, the failure to exercise discretion would lead predictably to an increase in the volume of poor quality referrals to the HSE.

2.26 The findings of an inquiry into the operation of child protection services in New South Wales in 2008 are instructive in this regard[6]. The Inquiry found that mandatory reporting had the useful effect of overcoming privacy and ethical concerns by compelling the timely sharing of information where risk exists and of raising awareness among professionals working with children and young persons. However, the Inquiry recommended that the penal consequences attaching to a failure to report be repealed, citing the possibility of over-reporting arising from criminal sanctions and the fact that internal systems within organisations and professional regulation would be sufficient to

[6] Report of the Special Commission of Inquiry into Child Protection Services in New South Wales (State of New South Wales, 2008), Volume 1, Chapter 6

guarantee compliance. The statutory obligation remains but the criminal sanction has been removed.

2.27 It is important to remember in this regard that the Withholding Information Bill will already provide for a criminal offence of failing to report; the absence of a criminal sanction in the Children First Scheme will not afford those who consciously withhold information regarding serious offences against children any protection. In addition, it should be recalled that the Children First Scheme establishes a robust framework for monitoring compliance, particularly for organisations that are subject to the Scheme's provisions. Finally, consideration might be given to non-criminal sanctions other than those already provided for in the Scheme. These include: non-eligibility for public funding for organisations in which Designated Officers fail to report concerns appropriately; disciplinary procedures within the relevant professional regulatory framework for mandated professionals who fail to report; and the possibility that a finding within an employment or professional regulatory context that an individual failed to report a child protection concern could be passed on to the National Vetting Bureau.

Although sanctions are an important element of creating a culture of compliance with *Children First*, this Office recommends that non-criminal sanctions be employed for failure to comply with *Children First* and that the criminal sanctions currently in the Scheme be removed.

2.28 Head 11(3) states that an offence is committed only if a person described in subhead 1(c) or 2 fails to report a concern without reasonable excuse. In the interests of consistency, it should be clarified that what constitutes a reasonable excuse for designated officers and mandated reporters under the Children First Scheme will be the same as the reasonable excuses that apply to the Withholding Information Bill.

There should be consistency between the Children First Scheme and the Withholding Information Bill with respect to what constitutes a reasonable excuse for not reporting concerns to the relevant authorities.

2.29 Head 11(3) of the Children First Scheme also provides that a person otherwise required to report a concern or allegation of child abuse to the HSE will not be

guilty of an offence if that person makes a report to An Garda Síochána. In light of the mutual reporting obligations set out in Chapter 7 of *Children First*, this will assist the efficient operation of the Act because it will prevent separate reporting to two statutory authorities that will refer concerns to each other in any event. Against this background, it should also be unnecessary for a person to have to report a serious concern relating to an arrestable offence to An Garda Síochána if that concern has already been passed on to the HSE. This matter is addressed further in the comments below on the Withholding Information Bill.

Role of the HSE

2.30 Head 12 sets out the HSE's responsibilities in relation to providing advice and promoting awareness in the area of child welfare and protection for organisations and professionals working with children.

2.31 One of the specific functions of the HSE will be to provide advice to Designated Officers and to persons who are statutorily required to report child abuse which will allow him/her to make a decision as to whether a report of a concern or allegations of abuse requires to be made under this Bill. The Scheme clarifies, however, that advice provided by the HSE is not a defence for not reporting concerns or allegations of abuse which meet the criteria set out in the *Guidance for the Reporting of Child Abuse*.

2.32 The purpose of seeking advice from the HSE on possible referrals is to clarify whether, given the information received by the Designated Officer/professional, the concerns meet the relevant threshold. Checking with the HSE only arises in liminal cases; situations where the threshold is clearly met or exceeded will not occasion a contact for advice. If there is doubt, there will be a reflex to err on the side of caution. It is reasonable for others to assume that, having provided the information to the statutory body with responsibility for receiving and investigating allegations and been informed that it would not meet the threshold, it is reasonable not to make a referral. The risk is that if this defence is explicitly removed and potential criminal liability is retained, there will be no incentive not to refer in any event - the advice-giving function of the HSE will become redundant. The effect of this would be to further diminish the likelihood that the Designated Officer will act as an effective filter.

If the criminal offence of failing to report concerns under *Children First* is retained, it is recommended that the legislation include a defence for not referring a concern where the HSE has advised that the information provided does not meet the threshold for referral.

2.33 Head 14 sets out the powers of the HSE to examine whether an organisation is complying with the provisions of the Bill and to take appropriate action where it is of the view that an organisation has failed to do so.

2.34 In its preliminary comments on the proposals to place aspects of *Children First* on a statutory footing, this Office supported the granting of more robust powers to the HSE in order to ensure that organisations were observing their child protection obligations in full. The need for such a change has become apparent in the course of investigations undertaken by this Office. The HSE and any successor body should not be expected to accept non-cooperation from any entity where there are concerns that it is failing to discharge its obligations under *Children First.* The provisions of Head 14 are therefore a welcome development. However, this Office would query whether the powers of the HSE to compel cooperation are sufficiently strong and recommends that the relevant enforcement mechanisms be clarified in the Bill.

It is recommended that the powers of the HSE to monitor compliance with the legislation be enhanced and that the enforcement mechanisms under Head 14 be further clarified.

HSE/Garda Cooperation

2.35 Head 17 provides for cooperation between the HSE and An Garda Síochána in accordance with *Children First*. This Office previously recommended that a general duty on the HSE and An Garda Síochána to cooperate in the best interests of children should be placed on a statutory footing. This principle is set out in Head 17 and there is a further requirement for the HSE and An Garda Síochána to develop protocols and procedures to achieve that end.

2.36 It would be useful to clarify a number of points, however. Head 17(1) requires that a Standard Notification Form is to be completed by and forwarded to An

Garda Síochána or the HSE as appropriate in cases where they have notified one another of a report or allegation of child abuse. This suggests that some form of notification will have taken place before the Standard Notification Form has been sent. It is unclear what form this notification could take, as the Standard Notification Form is itself the notification mechanism envisaged by section 7.4.5 of *Children First.*

2.37 In addition, Head 16(2) provides that where An Garda Síochána receives a report of child abuse or has concerns for the well-being of a child, An Garda Síochána will disclose, as soon as practicable, those concerns to the HSE. This reflects the requirements of section 7.7 of *Children First*. However, the equivalent provision relating to the requirement on the HSE to refer certain matters (though not all concerns referable under *Children First* generally) to An Garda Síochána in section 7.4.5 of *Children First* is not included. Both of these provisions relate to the completion by each statutory authority of a Standard Notification Form for onward transmission to the other. Given that the particular obligation is set out for one statutory body (An Garda Síochána), it would be useful to include for the other (the HSE).

It is recommended that the provisions of the Scheme relating to HSE/Garda cooperation be clarified to ensure that the mutual reporting obligations reflect fully the requirements of the *Children First* guidance.

3. The Withholding Information Bill

3.1. The Scheme of the Withholding Information Bill was published in July 2011 and the Ombudsman for Children's Office had occasion to submit its views regarding the Scheme to the Minister for Justice and Equality. This Office welcomes the incorporation of some its recommendations into the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012, although there are other key recommendations that have not been accepted. This submission reiterates the principal points made with respect to the Scheme of the Withholding Information Bill and examines the new elements contained in the Bill in light of this Office's previously stated position and the provisions of the Children First Scheme.

General Issues

3.2. Section 2 of the Withholding Information Bill makes it an offence for a person if:

> a) he or she knows or believes that a Schedule 1 offence has been committed against a child
>
> and
>
> b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence,
>
> and
>
> c) he or she fails without reasonable excuse to disclose that information as soon as is practicable to a member of the Garda Síochána.[7]

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

[7] S. 2 of the Bill.

- 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.

3.4. There are a number of important features of the Withholding Bill, which resembles s.5 of the Criminal Law Act (Northern Ireland) 1967 ("section 5 of the NI Act").

3.5. First, the Bill only applies to offences in Schedule 1 and 2 that are 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 ten years or more.[8]

3.6. Unlike the Scheme that preceded it, the Withholding Information Bill makes clear that attempt, participation as an accomplice and conspiring to commit or inciting the commitment of an offence are included within its scope.[9] This is welcome and responds to a recommendation made by this Office with respect to the Scheme.

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

3.8. 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.

3.9. 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

[8] See s.2 of the Criminal Law Act 1997.
[9] S.1(2) of the Bill.

information was withheld. By contrast, the Withholding Information Bill does not require proof that an arrestable offence was actually committed. This is welcome, and should 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.

3.10. However, the Withholding Bill 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.

To deal with this issue, it is recommended that it be made an offence to withhold information where a person knows or believes <u>on reasonable grounds</u> that an arrestable offence has been committed and likewise that on reasonable grounds he or she believes that he or she has information of material assistance. This would be consistent with the approach in Victoria, Australia, under s.184 of the Children, Youth and Families Act 2005.[10]

It is recommended that it only be an offence to withhold information where a person knows or believes <u>on reasonable grounds</u> that an arrestable offence has been committed and on reasonable grounds knows or believes that he or she has information of material assistance.

3.11. Fifth, 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[11], there is no explanation of what a reasonable excuse may be, although a number of specific defences are inserted in s.4 of the Withholding Information Bill. This matter is discussed further below.

[10] Available at: http://www.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s184.html, accessed on 15 August 2011.
[11] See, for example, s 7(2) of the Criminal Law Act 1997.

3.12. Sixth, the Withholding Information Bill only applies to the withholding of information regarding children or vulnerable adults. As noted above, this selective criminalisation of withholding of information is justifiable since children and vulnerable adults can be expected to have difficulty reporting crimes themselves. It is therefore a matter of serious concern that, unlike the Scheme that preceded it, the Withholding Information Bill makes it an offence for children over the age of criminal responsibility to withhold information. This means, for example, that a child of 13 who knows of or has witnessed the abuse of another child may be committing an offence by failing to disclose that information to An Garda Síochána. This would remain the case even if that child was himself or herself a victim of abuse; although the Bill is clear that in such a situation a child does not commit an offence by failing to disclose abuse he or she has suffered[12], the Bill does not provide an equivalent exception relating to abuse suffered by other children. The absence of such a provision represents a serious gap in the legislation and should be remedied; under no circumstances should a child be criminalised for failing to report abuse to the Gardaí.

It is strongly recommended that the withholding of information by a child not be an offence.

Consistency with the Children First Scheme

3.13. In its previous submission on the Scheme of the Withholding Information Bill, this Office drew attention to a number of areas in which the proposed legislation was not consistent with the *Children First* guidance. Some of these have yet to be addressed and it is a matter of concern that an individual who complies fully and responsibly with obligations under the Children First Scheme will not be explicitly protected from criminal liability under the Withholding Information Bill in certain situations. The principal points of dissonance between the Bill and the Children First Scheme are set out below.

[12] See section 2(3) of the Withholding Information Bill

It is strongly recommended that the Withholding Information Bill be reconsidered in order to ensure that it is entirely consistent with the Children First Scheme and *Children First* guidance.

Reporting to the HSE and an Garda Síochána

3.14. By law, the Garda Síochána is the statutory body tasked with the prevention and investigation of crime.[13] Meanwhile, the HSE is the body responsible for promoting the welfare of children. This includes child protection.[14]

3.15. 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 and 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...
>
> If you think a child is in immediate danger and you cannot contact the HSE Children and Family Services, you should contact the Gardaí at any Garda station."[15]

3.16. The original Children First contained similar guidance, with the message that the Gardaí are to be contacted when the HSE is not available.[16] 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.[17]

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[13] S 7 Garda Síochána Act 2005.
[14] S 3 of the Child Care Act 1991. See also s 16 of the 1991 Act.
[15] See Department of Children and Youth Affairs, *Children First: Guidance for the Protection and Welfare of Children* (Dublin: Government Publications, 2011)
[16] See Department of Health and Children, *Children First: Guidelines for the Protection and Welfare of Children* (Dublin: Government Publications, 1999) at para 4.4.1.
[17] See the revised Children First at chapter 7, the original Children First at chapter 9.

3.17. 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 to be a priority for inspection in its systemic investigation into the implementation of the *Children First* guidelines. Indeed, one of the findings of unsound administration made in that investigation was that there was a failure to implement fully the requirements of *Children* First on HSE/Garda cooperation[18].

3.18. Professionals fully conversant with the distinction between the Children First Scheme and the Withholding Information Bill may be sensitive to the different types of offence that trigger a reporting obligation under the latter; others will not be. Given that the scope of *Children First* is broader than the offences contained in Schedule 1 of the Withholding Information Bill, and that child protection referrals involving an arrestable offence perpetrated against a child may include concerns relating to other forms of abuse (neglect, for example) that may not be referable under the Withholding Information Bill, it is entirely reasonable for an individual to report a concern to the HSE, as that person may be unaware that an allegation meets the threshold for referral to the Gardaí in whole or in part. This is an entirely responsible approach that should not incur the possibility of criminal sanction.

It is therefore recommended that the Withholding Bill 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.

[18] Ombudsman for Children's Office, *A report based on an investigation into the implementation of Children First: National Guidelines for the Protection and Welfare of Children* (Dublin, OCO: 2010), pg. 78

Designated Liaison Persons/Designated Officers

3.19. 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.

3.20. *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.[19] That sensible system is legislated for in the Children First Scheme with the creation of the role of Designated Officer[20]. It helps to avoid a situation where multiple child protection reports are received regarding the same event, which can waste the time of child protection workers and thereby reduce the efficiency and safety of the system.

3.21. *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.[21]

3.22. Where an individual reports a child protection concern in good faith to a Designated Officer, it is reasonable to assume generally that that Designated Officer will carry out his or her statutory function and refer that information on to the relevant statutory authorities. In such a situation, the individual who passed the information to the Designated Officer will have acted responsibly and should not be exposed to criminal liability for a failure to report the matter separately to An Garda Síochána.

It should be clarified that it is a reasonable excuse for a person not to report the information to the Garda Síochána/HSE where

[19] See para 3.3 of the revised Children First.
[20] See Head 9 of the Children First Scheme
[21] See para 3.8 of the revised Children First.

he or she has instead reported the matter to the Designated Officer in his or her organisation in accordance with the provisions of the Children First Scheme.

Defences: The child's wishes or best interests

3.23. The Withholding Bill has a number of defences related to the child's wishes or best interests. These are summarised below.

3.24. First, it is clarified that it is a defence for the accused person to show that the child against whom the offence was committed made known his or her view that the matter should not be disclosed to the Garda Síochána.[22] But :

- It is presumed that a child under 14 does not have the capacity to form a view on the matter and this defence will not then apply.[23]
- However, that presumption may be rebutted on the facts, in which case the defence will apply after all.[24]

3.25. Second, if the child is under 14, it is a defence for an accused person to show that the parent or guardian of the child made known "his or her view on behalf of that child" that the matter should not be disclosed to the Garda Síochána.[25]

3.26. Third, it is a defence for a parent or guardian of a child under 14 to show that he or she formed the view on behalf of the child that the matter should not be disclosed to the Garda Síochána.[26]

3.27. However, the *second* and *third* defences only apply if:

[22] S.4(1) of the Bill.
[23] S.4(2) of the Bill.
[24] S.4(2) of the Bill.
[25] S.4(4) of the Bill.
[26] S.4(5) of the Bill.

- the presumption is not rebutted that the child under 14 does not have the capacity to form a view on the matter;[27]
- the parent or guardian concerned had reasonable grounds for forming the view on behalf of the child and acted bona fide in the best interests of the child;[28] and
- the parent or guardian making that decision is not a family member of the person who is known or believed to have committed the offence.[29]

3.28. It is also stated that a parent or guardian must have regard to the wishes of the child insofar as practicable. But it is not stated whether this means that the parent or guardian or the accused person informed by the parent or guardian will not be entitled to invoke the second and third defences above if the parent or guardian fails to do so.[30]

3.29. Fourth, it is a defence for the accused person (including a parent or guardian) to show in respect of a child under 14 where the person known or believed to have committed the offence is a family member to show that a doctor, nurse, psychologist or social worker formed the view that it should not be disclosed to the Garda Síochána.[31]

3.30. However, this defence is only available if:

- the presumption is not rebutted that the child does not have the capacity to form a view on the matter;[32]
- the doctor, nurse, psychologist or social worker had reasonable grounds for forming the view and did so bona fide in the best interests of the child;[33]
- the doctor, nurse, psychologist or social worker acted in a manner that can reasonably be expected of a member of that profession.[34]

[27] S.4(3) of the Bill.
[28] S.4(6) of the Bill.
[29] S.4(7) of the Bill.
[30] S.4(9) of the Bill.
[31] S.4(8) of the Bill.
[32] S.4(3) of the Bill.
[33] S.4(11)(a) of the Bill.
[34] S.4(11)(b) of the Bill.

The doctor, nurse, psychologist or social worker, parent or guardian must have regard to the wishes of the child, insofar as practicable, but it is not stated whether a failure to do so has any impact on the availability of the defence.[35]

3.31. Fifth, it is a defence for an accused person who is a doctor, nurse, psychologist or social worker to show that he or she is or was providing services to the child and formed the view that the matter should not be disclosed to the Garda Síochána.[36]

3.32. Unlike the previous defences, this defence is available whether or not the child is under or over 14.

3.33. But the defence is only available if the following conditions apply:

- the doctor, nurse, psychologist or social worker had reasonable grounds for forming the view for the purpose of protecting the child;[37]
- the doctor, nurse, psychologist or social worker acted in a manner that can reasonably be expected of a member of that profession.[38]

The doctor, nurse, psychologist or social worker must have regard to the wishes of the child, insofar as practicable in forming his or her view. But, again, it is not stated that failure to do so would mean that the defence could not be relied upon.[39]

3.34. Sixth, the Minister may make regulations prescribing a body or organisation that provides services to children or vulnerable persons who have suffered injury, harm or damage as a result of physical or sexual abuse. It is a defence for a person employed or engaged by a prescribed organisation providing services to the child to show that he or she formed the view that the matter should not be disclosed to the Garda Síochána.[40]

[35] S.4(9) of the Bill.
[36] S.4(10) of the Bill.
[37] S.4(11)(a) of the Bill.
[38] S.4(11)(b) of the Bill.
[39] S.4(9) of the Bill.
[40] S.4(14) of the Bill.

3.35. Again, this defence is available regardless of whether the child is over or below 14. But in order to invoke the defence, the prescribed person must have:

- reasonable grounds for forming the view for the purpose of protecting the child;
- acted in a manner that can reasonably be expected of such a person.[41]

But unlike the situation for doctors, nurses, psychologists and social workers, there is no obligation of prescribed persons to have regard insofar as practicable to the wishes of the child. This is so even though the defence applies to children up to 18 years of age.

3.36. This Office has a number of concerns with respect to these defences.

3.37. First, they conflict with the approach of the *Children First* guidance, 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."[42]

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."[43]

One of the reasons for stating that certain types of information cannot be kept in strict confidence is that a disclosure of abuse by a named individual may be relevant to the protection of children other than the victim making the disclosure. Nowhere is it suggested in *Children First* that information would not be shared with the Health Service Executive because of the wishes of the child. There is the risk, therefore, that the Withholding Information Bill will

[41] S.4(15) of the Bill.
[42] At para 3.2.2.
[43] At para 3.9.3.

cause confusion and undermine the clear message of *Children First* that *all* such cases need to be referred notwithstanding the fact that it relates to reporting matters to An Garda Síochána rather than the HSE.

3.38. Furthermore, with respect to the obligation on professionals to refer concerns it is important to note that the Children First Scheme is explicit that a sole practitioner, such as a doctor or psychologist, must refer concerns regarding child abuse to the HSE. It is an offence not to do so.[44] The HSE is obliged to notify the Garda Síochána formally where it suspects that a child has been or is being physically or sexually abused or wilfully neglected[45]. Therefore, if the Scheme and the current Children First guidance are applied, the Garda Síochána will in any event get most if not all of the information provided to the HSE by professionals in these situations.

3.39. A second aspect of the defences is that some are uncertain. For example:

- whether or not a child under 14 has the capacity to form a view is a relatively subjective judgment;
- it is stated that parents/guardians and doctors, nurses, psychologists and social workers must have regard to the wishes of the child insofar as practicable in forming their view. But it is not stated what the consequence of a failure to do so is. For example, does it deprive that person – or any person relying on the view of that person – of a defence?
- It is stated that a defence will not apply if, for example, a doctor did not have reasonable grounds for his belief. It appears that a lack of reasonable grounds may also deprive a person relying on the view of a doctor of a defence. But how is such a person to know whether the doctor is acting unreasonably?

3.40. Third, while it is always important to take account of the wishes of a child, a situation where the individual child's views dominate may:

- lead to the child being put under undue pressure;

[44] Head 11(2) and (3) of the Children First Scheme.
[45] Section 7.4.1 of the Children First guidance July 2011

- endanger other children, who may also have suffered abuse.

Furthermore, the logic of restricting the offence of withholding information to information regarding the abuse of those who are children or vulnerable presumably is because they may face barriers in reporting the matter themselves. That policy may be undermined if at the same time their wishes can eliminate the duty to report.

3.41. There are certain exceptional circumstances in which one could envisage there being a reasonable excuse not to report information regarding child abuse. For example, if an abuser's partner is herself or himself being subjected to domestic violence and threatened explicitly in the context of potentially passing on information, it is arguable that a failure to report abuse should not attract criminal liability. However, the defences set out in sections 4(4) and 4(5) are different and relate to parents and guardians determining on behalf of the child that not reporting is in the child's interests, rather than their own. Including a defence of this nature could potentially place other children at risk if the actions of an abuser are not made known to the relevant authorities.

3.42. One of the possible reasons for the defences based on the child's interests is that, in the absence of such defences, non-abusive sexual relations between underage minors may otherwise have to be referred to An Garda Síochána. This is a sensitive issue and clearly this legislation should not operate in such a way as to prevent young people from seeking assistance and advice. But this simply begs the question whether underage teenagers of proximate age who have non-abusive sexual relations should be criminalised. Sexual relations at such a young age are undesirable and to be discouraged but this Office does not believe that this is best effected through the criminal law. Indeed, criminalising such relations may make it harder to deal with other consequences of such relations, for example in accessing health services.

3.43. The Ombudsman for Children's Office drew attention to this issue in its advice on the Criminal Law (Sexual Offences) Bill 2006. It is hoped that the Government will consider this matter further when examining future amendments to the 2006 Act and more general reforms to the law governing sexual offences in Ireland. In the meantime, it should be clarified that

professionals working with children under the age of consent who have engaged in non-abusive sexual relations should not necessarily have to report such incidents as instances of child abuse to the relevant statutory authorities. It is important that medical professionals in particular have clarity on this issue and are supported in providing their services to young people in a manner that is consistent with their best interests. However, if the professionals in question have any concerns regarding risk factors that are apparent or suspect that there may be an abusive element in the case under consideration, the matter should clearly be referred in the usual way.

In light of the proposals above regarding the need for consistency with the Children First Scheme, the availability of a reasonable excuse not to report in exceptional circumstances and the need to address the issue of non-abusive sexual relations between teenagers, it is recommended that the defences in section 4 of the Withholding Information Bill 2012 be removed.

Privilege

3.44. This Office's previous advice on the Scheme of the Withholding Information Bill drew attention to the question of reasonable excuse and privilege. It is acknowledged that the Bill is clearer than the Scheme that preceded it, though it still does not provide substantial guidance on what a reasonable excuse for failing to report would be. Unlike the Scheme, the Bill makes clear that the obligation to report is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information.[46]

3.45. However, this Office is concerned that this position conflicts with the general principle of *Children First* that information should always be shared in the best interests of the child.

3.46. This Office understands that this will mean that all existing privileges, both at common law and in statute, will be retained. At present, a person may

[46] S.2(4) of the Bill.

decline to answer questions with regard to information because it is privileged. There are a number of kinds of possible privilege, 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.

These will be examined in turn.

Legal professional privilege

3.47. 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.[47] It is protected by the European Convention on Human Rights.[48] 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.[49]

3.48. 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.[50]

3.49. 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.[51] In Ireland it has also been held that communications in furtherance of conduct injurious to the interests of justice

[47] 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.
[48] Campbell v United Kingdom (1992) 15 EHRR 137; Niemitz v Germany Foxley v United Kingdom (2000) 31 EHRR 637.
[49] See on this point Martin v Legal Aid Board [2007] 2 IR 759 at 785.
[50] 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.
[51] R v Cox and Railton (1884) 14 QBD 153, McE v Prison Service of Northern Ireland [2009] 1 AC 908.

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.[52] 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.

3.50. 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.[53] However, this has not been applied in Ireland to the proceedings of a tribunal of inquiry, and has been questioned more generally.[54] 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."[55]

3.51. 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.

3.52. 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

[52] Murphy v Kirwan [1993] 3 IR 501.
[53] [1997] AC 16.
[54] Ahern v Mahon [2008] 4 IR 704 at 724-727.
[55] TL v VL [1994] WJSC-CC 4431.

- exceptions already exist where an action is in furtherance of a crime, fraud or an act of moral turpitude.

It is recommended that s.2 of the Withholding Bill should override legal professional privilege.

Statutory privilege

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

3.54. For example, s.7A 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.

3.55. 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 mediators are subject to s.2 of the Withholding Bill 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.[56]

It is recommended that s.2 of the Withholding Bill should override the statutory privilege of mediators, 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

[56] 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.

should be undertaken to consider other instances of statutory privilege with the general principle in mind that s.2 of the Withholding Bill *should* apply and that privilege should not be a reasonable excuse.

3.56. 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 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 to prevent the application of s.2 of the Withholding Bill.

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 and to provide information to the Garda Síochána and, further, to make clear that such statutory privileges are overridden by s.2 of the Withholding Bill.

Marital privilege

3.57. 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 does not override the offence in s.2 of the Withholding Bill.

Sacerdotal and counselling privilege

3.58. English common law does not recognise sacerdotal privilege, even in the confessional.[57] However, pre-independence Irish common law recognised that a priest could not be compelled to break the confessional seal.[58]

3.59. 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.

3.60. 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.

3.61. 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;

[57] 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".
[58] Tannian v Synnott 37 I. L. T. & Sol. Journ. 275.

(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.

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

3.63. Later case law has:

- confined sacerdotal privilege outside the confessional to discussions between parishioners and parish priests – and not priests outside the parish[59] - although this has since been doubted[60];
- 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;[61]
- suggested – consistent with *Cook v Carroll* - that the priest/penitent relationship *in the confessional* cannot be waived by the penitent;[62]
- suggested that secular counselling may also be privileged, particularly marriage counselling.[63]

3.64. It appears from the above that:

[59] Forristal v Forristal and O'Connor (1966) 100 ILTR 182.
[60] Johnston v Church of Scientology [2001] 1 IR 682 at 686.
[61] JR v ER [1981] ILRM 125.
[62] Johnston v Church of Scientology [2001] 1 IR 682 at 686.
[63] Johnston v Church of Scientology [2001] 1 IR 682 at 687.

- a priest will be able to withhold information obtained in the confessional, whether or not the confessor seeks to waive privilege;
- a priest will be able to withhold information obtained in confidence outside the confessional, unless this has been waived by the persons confiding; and
- a secular counsellor will be able to withhold information obtained in confidence, unless this has been waived by the persons being counselled.

3.65. 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 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.

3.66. But if the Oireachtas does not clarify this, the courts will be fully entitled to assume that sacerdotal or marital counsellor privilege overrides the offence created by s.2 of the Withholding Bill.

It is therefore recommended that the Withholding Bill be amended so that sacerdotal and counsellor privilege are overridden by s.2 of the Withholding Bill, given the serious nature of arrestable offences against children.

3.67. 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.[64]

3.68. 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

[64] Johnston v Church of Scientology [2001] 1 IR 682 at 687.

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.

3.69. However, this Office is aware that the confessional has been treated as protected in the United States because of the fourth amendment which guards against unreasonable searches and American statutes which protect religious freedom.[65] 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.

3.70. 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.[66]

3.71. 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."

3.72. 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

[65] See the decision of the 9th Circuit in Mockaitis v Harcleroad 104 F 3d 1522.
[66] [1991] SCR 263.

admitted because it had never been clear that the admission would be kept confidential.

3.73. 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 the benefit to the community of maintaining the confessional is not outweighed 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.

3.74. 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.

3.75. 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 an offence.

While it is for the Attorney General to advise on the constitutionality of any Bill, this Office does not believe that it would be unconstitutional for the offence in s.2 of the Withholding Bill to override sacerdotal and counsellor privilege. In any event, it should be clarified that s.2 overrides sacerdotal privilege in respect of communications *outside* the confessional.

<u>In camera rule</u>

3.76. Breach of the in camera rule is a contempt of court.[67] Therefore, non-disclosure appears to be permitted in order to ensure non-compliance with the in camera rule.

3.77. 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.[68]

3.78. 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."[69] 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. This is anomalous.

It is recommended that it be clarified that the Withholding Bill overrides in camera restrictions.

Reasonable excuse

3.79. As already stated, it is not an offence to withhold information if there is a "reasonable excuse." S.4 of the Bill provides guidance on when the failure to disclose to the Garda Síochána will constitute a defence. However, the ambiguous concept of a "reasonable excuse" remains.

3.80. This lack of clarity may give rise to constitutional issues.[70] It is important therefore that every effort be made to clarify what is or is not a reasonable excuse. While this Office does not agree with the defences in s.4 of the Bill, it is acknowledged that these defences do attempt to respond to this

[67] Eastern Health Board v Fitness to Practise Committee [1999] 3 IR 399.
[68] RM v DM [2000] 3 IR 373 at 386.
[69] Ss 40(6) and (7).
[70] See Dokie v Minister for Justice [2011] IEHC 110.

concern. It is also accepted that a comprehensive definition may not be possible without introducing new words of equal abstraction.

It is recommended that, insofar as practicable, the Bill clarify what a reasonable excuse for not reporting is.

3.81. 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.

3.82. This Office would be concerned were the payment of compensation to be a reasonable excuse. 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.

4 Amendment of Protection for Persons Reporting Child Abuse Act, 1998

4.1 The Protection for Persons Reporting Child Abuse Act, 1998 was enacted in order to provide protection from civil liability to persons who report child abuse in good faith. As this is of central importance in supporting individuals to report concerns regarding child abuse in a responsible manner, it is opportune to consider whether the 1998 Act could itself be enhanced as the Oireachtas discusses proposals to place aspects of *Children First* on a statutory footing.

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 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.[71] 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 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.[72] 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."[73]

[71] See Children First 2011 at para 3.2.4.
[72] See Children First 2011 at para 3.4.2.
[73] The Ferns Report, chaired by Mr Justice Francis Murphy, October 2005, recommendation G.9 at page 265.

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 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.**

5. List of recommendations

General

5.1. **It is recommended that the Withholding Information Bill 2012 and the forthcoming Children First Bill 2012 be advanced through the Houses of the Oireachtas at the same time in order to ensure that both pieces of legislation cohere fully with each other.**

5.2. **This Office agrees with the general approach of the Children First Scheme and the Withholding Information Bill and the introduction of statutory obligations to report concerns or allegations of child abuse 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 Children First Scheme and the Withholding Information Bill;**
- **unnecessary multiple reporting of the same child protection incident should be prevented and, to that end, making a referral in accordance with *Children First* should obviate the need to make a separate report under the Withholding Information Bill 2012 where the threshold for referring under both has been met;**
- **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 legislation on child protection services; and**
- **the legislation underpinning *Children First* should include a requirement for the Minister for Children and Youth Affairs to review the effects of that legislation on child protection practice no later than three years after its commencement. The review should be considered by the Oireachtas Committee on Health and Children.**

Children First Scheme

5.3. **This Office recommends that the same definitions of abuse as found in *Children First: National Guidance for the Protection and Welfare of Children* (2011) be relied on in the Bill.**

5.4. **It should be clarified that professionals working with children under the age of consent who have engaged in non-abusive sexual relations should be able to use their discretion to decide whether, given the facts of the case and any risk factors present, a referral to the statutory authorities should be made.**

5.5. **It is recommended that any discrepancies between the Children First Scheme and the Scheme of the National Vetting Bureau Bill be addressed in the forthcoming National Vetting Bureau Bill.**

5.6. **It is recommended that Head 9 relating to the role of Designated Officers be amended in line with sections 2.13 – 2.22 above.**

5.7. **Although sanctions are an important element of creating a culture of compliance with *Children First*, this Office recommends that non-criminal sanctions be employed for failure to comply with *Children First* and that the criminal sanctions currently in the Scheme be removed.**

5.8. **There should be consistency between the Children First Scheme and the Withholding Information Bill with respect to what constitutes a reasonable excuse for not reporting concerns to the relevant authorities.**

5.9. **If the criminal offence of failing to report concerns under *Children First* is retained, it is recommended that the legislation include a defence for not referring a concern where the HSE has advised that the information provided does not meet the threshold for referral.**

5.10. **It is recommended that the powers of the HSE to monitor compliance with the legislation be enhanced and that the enforcement mechanisms under Head 14 be further clarified.**

5.11. **It is recommended that the provisions of the Scheme relating to HSE/Garda cooperation be clarified to ensure that the mutual reporting obligations reflect fully the requirements of the *Children First* guidance.**

The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012

5.12. **It is recommended that it only be an offence to withhold information where a person knows or believes <u>on reasonable grounds</u> that an arrestable offence has been committed and on reasonable grounds knows or believes that he or she has information of material assistance.**

5.13. **It is strongly recommended that the withholding of information by a child not be an offence.**

5.14. **It is strongly recommended that the Withholding Information Bill be reconsidered in order to ensure that it is entirely consistent with the Children First Scheme and *Children First* guidance.**

5.15. **It is recommended that the Withholding Bill 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**

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

5.17. **In light of the proposals above regarding the need for consistency with the Children First Scheme, the availability of a reasonable excuse not to report in exceptional circumstances and the need to address the issue of non-abusive sexual relations between teenagers, it is recommended that the defences in section 4 of the Withholding Information Bill 2012 be removed**

5.18. **It is recommended that s.2 of the Withholding Bill should override legal professional privilege.**

5.19. **It is recommended that s.2 of the Withholding Bill should override the statutory privilege of mediators, 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 with the general principle in mind that s.2 of the Withholding Bill should apply and that privilege should not be a reasonable excuse.**

5.20. **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 and to provide information to the Garda Síochána and, further, to make clear that such statutory privileges are overridden by s.2 of the Withholding Bill.**

5.21. **It is recommended that it be clarified in the interests of certainty that marital privilege does not override the offence in s.2 of the Withholding Bill.**

5.22. **It is recommended that the Withholding Information Bill be amended so that sacerdotal and counsellor privilege are overridden by s.2 of the Withholding Bill, given the serious nature of arrestable offences against children.**

5.23. **It is recommended that the Withholding Information Bill be clarified so that it overrides in camera restrictions.**

5.24. **It is recommended that, insofar as practicable, the Bill clarify what a reasonable excuse for not reporting is**.

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

Amendments to the Protection for Persons Reporting Child Abuse Act 1998

5.26. **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.**

5.27. **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.**

5.28. **For the avoidance of doubt, it is recommended that it be clarified that a person should not be deemed 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.**

ANNEX 1

1. International Human Rights Standards

1.1. A number of international instruments address the welfare and protection of children and are of relevance to the Withholding Information Bill and to the Children First Scheme[74]. 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

1.2. 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.

1.3. 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 serious neglect and abuse[75]. A lack of investigation, communication and co-operation between relevant child

[74] 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),

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

protection authorities or a failure to manage their responsibilities effectively may also give rise to concerns regarding compliance with Article 3 of the Convention[76].

1.4. This positive obligation to prevent ill-treatment should be borne in mind in drafting legislation or framing policy in the area of child protection[77]. 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

1.5. 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[78].

1.6. Of most immediate relevance in the context of the Children First Scheme and the Withholding Information Bill 2012 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 follow-up of instances

[76] E. and Others v. the United Kingdom, no. 33218/96 para. 100
[77] The European Convention on Human Rights Act (No. 20 of 2003)
[78] These include articles 2, 3, 6, 12, 19, 20, 27, 34, 37 and 39 of the Convention.

of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

1.7. 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[79].

1.8. 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[80].

1.9. 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[81]. 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[82].

1.10. The Committee has strongly recommended that all States Parties develop safe, well-publicised, confidential and accessible support mechanisms for

[79]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)
[80] UN Committee on the Rights of the Child, General Comment No. 13, para. 46
[81] General Comment No. 13, para. 48
[82] See Department of Education and Skills, Circular 0065/2011 *Child Protection Procedures for Primary and Post-Primary schools* (30 September 2011)

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[83].

1.11. 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[84].

1.12. 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[85].

1.13. 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

[83] General Comment No. 13, para. 48
[84] General Comment No. 13. para. 50
[85] General Comment No. 13, para. 51

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[86].

1.14. 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[87]. 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)

1.15. 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[88]. 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.

1.16. Article 10 of the Lanzarote Convention provides that:

> 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

[86] General Comment No. 13, para. 52
[87] General Comment No. 13, para. 53
[88] 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

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.

1.17. 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[89].

1.18. 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 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

[89] See the explanatory report to the Convention, paras. 76-85

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.

1.19. 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[90]. 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[91]. 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[92].

1.20. 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[93].

Summary

1.21. 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.

[90] Explanatory report to the Convention, paras. 89-91
[91] Ibid.
[92] Ibid.
[93] Ibid.

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.