



**Protecting Children: RCNI Submission on the
Draft Heads and General Scheme
of the
Children First Bill 2012
May 2012**

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

Introduction

Rape Crisis Network Ireland

RCNI is the national representative body for the rape crisis sector. It is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, and using our expertise to influence national policy and social change. We are the representative, umbrella body for our member Rape Crisis Centres who provide free advice, counselling and support for survivors of sexual abuse in Ireland, **including a growing number between the ages of 14 and 18.**

RCNI and Children First legislation: While we welcome the advent of this Bill as an important part of an effective child protection strategy, we have some preliminary concerns about particular aspects of the Draft Heads of the Children First Bill, which we explain below. We will make further detailed submissions once the text of the Children First Bill 2012 itself appears.

1) Retrospective Disclosures of Abuse:

Under Head 2: Interpretation, a child is defined to mean “a person under the age of 18 years other than a person who is or has been married.” The same definition appears in the Children First Guidance (2011). Therefore, the obligation to report suspected abuse of a child contained in the Bill appears to apply only in respect of persons who are less than 18 years at the time of making the report.

However, the reporting obligations under the Children First National Guidance Policy 2011 are different. The obligation to report in cases where there is a risk to unidentifiable children Paragraph 3.2.4 refers to ‘risks to unidentifiable children’ and it states:

“A concern about a potential risk to children posed by a specific person, even if the children are unidentifiable, should also be communicated to the HSE Children and Family Services.”

This provision has been understood to mean that in situations where an adult discloses abuse that took place when that person was a child and there are still ongoing concerns about the perpetrator of that abuse, a report to the HSE is required to be made. This is confirmed by paragraphs 3.6.1 and 3.6.2 of the Guidance under the heading ‘Retrospective Disclosure by Adults’ where it provides:

“3.6.1 An increasing number of adults are disclosing abuse that took place during their childhoods. Such disclosures often come to light when adults attend counselling.

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

It is essential to establish whether there is any current risk to any child who may be in contact with the alleged abuser revealed in such disclosures.

3.6.2 If any risk is deemed to exist to a child who may be in contact with an alleged abuser, the counsellor/health professional should report the allegation to the HSE Children and Family Services without delay."

The above provision is based on the duty of the HSE to be proactive in respect of child protection issues which includes the prevention of future risk to children. It is clear that in any case where the perpetrator of child sexual abuse is at large, even if that person's whereabouts are now unknown, the risk to unidentifiable children remains. Paragraphs 7.16.7-7.16.8 of Children First: National Guidance also refer to the requirement on the HSE and An Garda Síochána to share information in cases of retrospective disclosures of child sexual abuse by adults where that disclosure indicates any current risk to children. It is further provided that both agencies collate all relevant information in relation to the disclosure carefully and that each agency informs the other of any such concerns during an investigation.

Therefore, Children First National Guidance 2011 applies to persons who are currently less than 18 years of age **and** to those who were under 18 years of age at the time the abuse took place, even in cases where the abuser no longer has access to children.

The perspective of the RCNI and its member Rape Crisis Centres is that its reporting obligations arise both in the context of adult and child survivors of sexual abuse. 60.2% of people who use the services of our member Rape Crisis Centres were abused during their childhood (RCNI National Rape Crisis Statistics 2010). The RCNI is concerned that the Children First Draft Heads of Bill and the Children First Guidance appear to make different requirements of designated officers in respect of the requirement to disclose, since the Bill simply refers to a child as a person under 18 years of age who has not been married and does not refer to retrospective disclosures of childhood abuse in the body of the Bill. The Explanation of the Heads of Bill specifically states that it is to be read in light of the Children First National Guidance which remains in place in addition to the Bill.

RCNI submits that it is essential that the issue of **retrospective disclosures by adults** of child sexual abuse be incorporated into the Bill since RCNI regards this as an essential feature of an effective child protection strategy. Furthermore, any legislation must clarify which agency should undertake the role of assessing whether there is an on-going risk to children, for example, would be it permissible for the designated officer to conclude that there is no on-going risk to children and choose not to make a report or should it be the case that the designated officer is obliged to make the report and the HSE then assesses and investigates whether there is a potential or actual ongoing risk to children? It seems to us that it would be preferable for the designated officer to remain obliged to make the report wherever it

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

seems that there might be a possibility of a current risk to children, and have the HSE assess and investigate this risk, under the new legislation.

2) Draft Heads of Children First Bill and the Criminal Law (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012 - A possible conflict in circumstances where any child protection concerns would have to be reported to An Garda Siochana:

It seems to us that a designated officer facing criminal prosecution for failure to disclose under Children First legislation where the abused person states that the information should not be reported **and** the circumstances dictate that the report would have had to be made to An Garda Siochana, would have no defence under that legislation but would appear to have a full defence under Withholding Information legislation. While we understand of course that the nature of the information required to be reported, and the agency receiving it, are not the same across the two pieces of legislation, nevertheless Children First Guidance 2011 child protection concerns **do include** situations where a crime is known or believed to have been committed and the information received might be "of material assistance in the apprehension, prosecution and conviction" of the person alleged to be responsible for that crime, as set out in the Withholding Information Bill.

Suppose that a child over the age of 14 tells the person receiving the information that he/she has been the victim of rape, he/she knows the identity of the perpetrator, but also has the capacity to form the view that he/she does not want it to be reported to the Guards. This is a situation where the Withholding Information provisions would come into play, under which the person receiving the information is under no obligation to make a report to the Guards if he/she is aware that the victim has formed the view that the rape should not be disclosed. However, it seems to us that there would still be an obligation on a designated officer under the proposed Children First legislation to disclose this information to the HSE, regardless of the wishes of the victim. The HSE under current guidance are obliged to relay this information to the Guards, so that the net result is that the Guards do receive a report in these circumstances despite the defence provided in Withholding Information. We submit that this is difficult for a child in this situation to understand, and difficult to explain for the person receiving the information, and most likely also counseling or otherwise supporting the child.

We also suggest that the Children First Bill should clarify that reports of child protection concerns made first to An Garda Siochana should then be reported to the HSE, by An Garda Siochana themselves (as at present under both CFG 2011 and the 2010 Garda Policy on Sexual Crime, Crimes against Children and Child Welfare).

3) Draft Heads of Children First Bill and the Criminal Law (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012 - Another possible conflict in

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

circumstances where any child protection concerns would have to be reported to An Garda Siochana:

Parents or guardians of children may form the view, on behalf of their child over 14 at least, that the information should not be reported to the Gardaí in their child's best interests, under the proposed defence for persons who fail to report certain arrestable crimes under the Withholding Information Bill. However, no such provision is included in the Children First Bill, although child protection concerns **do include** situations where a relevant crime is known or believed to have been committed. Furthermore, Children First National Guidance 2011 provides that any person/professional who suspects abuse/neglect must inform the parents/carers of the child if a report is being made to HSE or the Gardaí unless doing so would endanger the child. Again, there is nothing in the Children First legislation or guidance that allows a parent or carer to tell the designated officer **not** to report the abuse. The danger that is sought to be addressed by the Children First Bill is that parents or carers may have a vested interest in ensuring that the abuse is not reported, which we understand of course. However, as the subject matter of these two pieces of legislation may **overlap** as outlined above, in our view the potential for conflict between the two Bills remains and should be resolved, so that it is absolutely clear what the obligations of the designated officer are under the Children First legislation.

3) Liability under Children First Bill 2012 – Protocols: Head 9 of the Children First Bill considers the duty of the designated officer to create **protocols** for making reports of abuse. It sets out the matters that should be included in a report including in paragraphs (viii) and (ix) which state

“(viii) Whether the parent/guardian knows of the report;

(ix) Whether the child knows of the report ; Whether the parents or guardians, the child or any of them is in agreement that the report is being made;”

The Bill does not refer to a requirement to inform the parent/carer that the report is being made but the Guidance requires it. This is another important feature that must be addressed by the legislation. We suggest that the legislation retains the wording contained in the present Children First Guidance 2011.

4) Liability under Children First Bill 2012 - Definition of 'Abuse'

In order to ensure that reports of abuse are made in appropriate circumstances, RCNI considers that clarification is needed as to the types of abuse that are subject to the requirements in the Bill. RCNI notes that Children First National Guidance 2011 includes 'emotional abuse' as one of the forms of abuse that must be reported however this has been excluded from the Bill. RCNI submits that the new legislation should also include explicit reference to "grooming" activities as a form of emotional abuse which is likely to lead to sexual abuse, and can also constitute sexual abuse itself (as where for example,

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

pornographic pictures are shown to young people in the hope of inducing them to participate in sexual activity). We would also submit that “grooming” activities should be given more emphasis in the next edition of the Children First Guidance itself. (They are mentioned briefly at paragraph 2.5.1(v) of the 2011 edition).

In order to achieve the best level of child protection and in order to meet requirements under the CF National Guidance, which is going to remain in place in addition to the legislation, it is vital that all types of abuse are included in both. RCNI further notes that in paragraph 2.1.2 of the Children First Handbook, under the heading “Practice Note: Staff working in Adult Services”, emphasis is placed on the association between parental problems (such as poor mental health, domestic violence and substance misuse) and child abuse and neglect. It states that adult services are therefore vital in recognising the possible impact that such problems may be having on children and whether these impact negatively on the care, safety and well-being of the child. From the perspective of RCNI and its member Rape Crisis Centres which provide support services to survivors of abuse, it is vital that counselors and support workers are aware of the types of behaviour that could be considered abuse and are therefore required to be disclosed under the Bill.

Paragraph 2.5 of the Children First Guidance 2011 provides, under the heading ‘Definition of sexual abuse’ that sexual abuse occurs when a child is used by another person for his or her gratification or sexual arousal, or for that of others. It goes on to set out a number of examples of what amounts to sexual abuse. Sexual abuse is defined in Head 2 of the Children First Bill and sets out a number of circumstances or activities that come within the definition of sexual abuse.

RCNI notes that the legislation does not provided any guidance for designated person as to the types of behaviour or information that should be reported. While this is contained in the CF National Guidance, it is important that the legislation be as clear as possible on the issue of when the designated officer should act. This is vital as subjective interpretations of how bad the abuse needs to be or how serious or reliable the complaint is should not differ from person to person or agency to agency. In order to ensure the highest level of child protection, a statutory guide must be in place so that designated officers and other responsible persons know when they are obliged to act under the legislation.

5) Liability for Designated Officers – definition of “reasonable excuse”

Heads 11 and 20 of the proposed Bill create criminal liability for designated officers (or employees or volunteers) who do not meet the requirement to disclose under the proposed legislation. However, liability exists for failure to disclose ‘without reasonable excuse’ but no definition of ‘reasonable excuse’ is provided in the Bill. The Bill also provides that making a report of the abuse to the Gardaí excuses the designated officer from liability but it does not prescribe the form of the report to the Gardaí. RCNI submits in the first instance that a definition of ‘reasonable excuse’ is necessary in order to create some level of certainty as to

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

the practical duties of a designated officer. Secondly, the legislation must set out in greater detail when it is appropriate to disclose the abuse to the Gardaí rather than the HSE in order to avoid duplication and to ensure that vital information in respect of risks to children is not lost in the process. The Children First National Guidance 2011 states that a report must be made to the HSE in the first instance and should only be made directly to the Gardaí where the HSE is unavailable or in emergency circumstances.

Penalties: In terms of the criminal penalties that apply to persons who fail to disclose, RCNI notes that the penalties are significantly less than those created by the Withholding Information legislation which provides for graduated penalties depending on the nature of the offence committed in respect of the child. RCNI is concerned that the same action or inaction by a designated person could lead to very different penalties depending on whether the person is convicted under CF legislation or Withholding Information. RCNI respectfully submits that this amounts to sending mixed messages as to the seriousness of failing to report suspected abuse of children.

6) HSE liability

RCNI notes that the only liability created by the proposed legislation is for designated officers but none exists for relevant persons within the HSE who fail to act on reports of abuse. It is respectfully submitted that reporting abuse to the HSE is only the first step in safeguarding children and that the Children First legislation presents an opportunity to ensure that all agencies with responsibility for child protection, including governmental agencies should have equal levels of responsibility for children at risk. Given that the types of agencies contemplated as being bound by the proposed legislation includes both public and private initiatives, including those which receive HSE funding, it seems arbitrary to impose criminal liability on designated persons within those agencies and none on persons working within the HSE directly. RCNI respectfully submits that in the absence of liability for state agents who fail in their child protection duties, the legislation cannot achieve its full potential.

Additionally, it is important to consider that liability could exist for HSE personnel for failure to report child abuse under the Withholding Information Bill if the failure to report is not based on a professional opinion, properly formed and recorded that reporting the abuse at that time would not be in the best interests of the child. In cases where HSE personnel fail to act through negligence or some factor other than professional judgment, RCNI respectfully submits that such persons should be subject to the same criminal sanction as designated officers. It follows that as in certain circumstances, An Garda Síochána will be the first agency to receive a report of concerns under this legislation, the possibility of imposing a similar liability on them for failure to investigate potential or actual child abuse should be given consideration.

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

Head 13 of the Bill refers to the responsibilities of the HSE in relation to monitoring and dealing with reports of concerns or allegations of abuse it receives. The section provides that the duty of the HSE is that which exists under the *Child Care Act 1991* in relation to children at risk. It is respectfully submitted that this section should set out in detail what is required of the HSE once a child protection report is made to it. RCNI submits that the failure to include specific duties on the part of the HSE is a significant oversight considering that that agency arguably has the most significant role in the entire child protection process. The emphasis placed on the role of the HSE in the Bill appears to be that of ensuring that designated officers and their organisations are meeting requirements under the Act whereas the RCNI submits that child protection would be best achieved by ensuring that all key agencies with responsibility for child protection have statutory duties.

7) Excluded categories of persons/agencies

Head 6 sets out the services which are excluded from the meaning of the Bill, including those which have general public access, such as shops and cinemas; services provided to a child by a person directly employed by the child's parent or guardian; services provided by a person employed in the child's own home; services provided by an organisation which employs children, such as an organisation employing apprentices, unless it is an organisation included under the legislation; and services provided by gyms, beauty and leisure facilities which cater for adults but allow children to use their facilities.

RCNI considers that some of the exclusion from the scope of the legislation are unwarranted and potentially will create significant gaps in child protection strategy. For example, services provided by an organisation that employs children are excluded. RCNI considers this to be a significant omission since children in the workplace are particularly vulnerable to abuse by employers or fellow employees. There is ample scope in the employment relationship for the exploitation of children, especially in terms of sexual exploitation. RCNI is of the view that every organisation that employs children regardless of the service provided by that organisation should be bound by Children First requirements.

8) Internet Service Providers and mobile phone providers would also appear to be excluded from the scope of the legislation under services which have general public access however RCNI respectfully submits that serious consideration should be given to placing specific duties on such services. RCNI is aware of the increasing scope for abuse of children via social media and mobile communications and in particular for making contact and grooming with children without the supervisions of their parents. Indeed the Children First Handbook (at paragraph 1.4.2) contains a specific Practice Note on Online safety and online exploitation of children which recognises that abuse is increasingly taking place via electronic means. RCNI considers that a significant gap would exist in child protection measures if organisations that provide services and products for children have no legal obligation to protect those children.

RCNI Submission to the Joint Oireachtas Committee on Health and Children on the Draft Heads of the Children First Bill 2012

9) Information sharing

Head 17 refers to information sharing between the HSE and the Gardaí and it requires that those agencies develop protocols in that regards. Two matters are worthy of comment in this context: first the comments of Kathleen O'Toole of the Garda Inspectorate in its recent report on the failures in information sharing by the HSE and the Gardaí. As it seems that this is an ongoing issue, RCNI suggests that Children First legislation should set out in detail what the duty of each agency is in that regard. Second, consideration should be given to including the National Vetting Bureau under this head as it would seem appropriate that information should be shared with the agency that will be gather 'soft information' under its proposed statutory remit. It would appear to be an essential element of child protection strategies that the national agency charged with vetting should be in possession of information that raises child protection concerns.

Conclusion

While RCNI welcomes the forthcoming Children First Bill, there are a number of significant issues which remain to be addressed.

Rape Crisis Network Ireland

The Halls, Quay Street

Galway

Tel: 091 563 676

Website: www.rcni.ie

May 2012