Submission to the Oireachtas Committee on Health and Children

Heads of Children First Bill 2012

May 2012
The Children’s Rights Alliance is a coalition of over 100 non-governmental organisations (NGOs) working to secure the rights of children in Ireland, by campaigning for the full implementation of the UN Convention on the Rights of the Child. It aims to improve the lives of all children under 18, through securing the necessary changes in Ireland’s laws, policies and services.

Membership
The Alliance was formally established in March 1995. Many of its member organisations are prominent in the children’s sector – working directly with children on a daily basis across the country. The Alliance’s policies, projects and activities are developed through ongoing collaboration and consultation with its member organisations.

Vision
Ireland will be one of the best places in the world to be a child

Mission
To realise the rights of children in Ireland through securing the full implementation of the UN Convention on the Rights of the Child
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction .............................................................................................................................. 1</td>
</tr>
<tr>
<td>2. Children’s Rights Framwork for the Bill....................................................................................... 2</td>
</tr>
<tr>
<td>3. Objectives of the Legislation ...................................................................................................... 4</td>
</tr>
<tr>
<td>4. Sanctions for Non-Compliance ................................................................................................... 6</td>
</tr>
<tr>
<td>5. Measures to Achieve Compliance.................................................................................................. 8</td>
</tr>
<tr>
<td>6. Statutory Roles and Monitoring Implementation.......................................................................... 9</td>
</tr>
<tr>
<td>7. Exclusions and Omissions ........................................................................................................... 11</td>
</tr>
<tr>
<td>8. Clarifications ............................................................................................................................. 12</td>
</tr>
<tr>
<td>9. Aligning Legislation................................................................................................................... 14</td>
</tr>
<tr>
<td>10. Sexual Health Services ............................................................................................................. 15</td>
</tr>
</tbody>
</table>
1. Introduction

The Children’s Rights Alliance is a coalition of over 100 non-governmental organisations (NGOs) working to secure the rights of children in Ireland, by campaigning for the full implementation of the UN Convention on the Rights of the Child (UNCRC).\(^1\) It aims to improve the lives of all children under 18 years, through securing the necessary changes in Ireland’s laws, policies and services.

The Alliance welcomes the publication of the Heads of the Children First Bill 2012, the intention of the Minister for Children and Youth Affairs to give statutory effect to the *Children First Guidance*, and the opportunity to be consulted on them by the Oireachtas Committee on Health and Children.\(^2\) The Alliance wishes to thank its many member organisations who contributed significantly to the development of this submission. A full list of member organisations is included at the end of this submission.

In 1999 non-statutory guidelines on procedures for preventing child abuse and for responding to allegations and suspicions of abuse, *Children First: National Guidelines for the Protection and Welfare of Children*, were introduced.\(^3\) Difficulties relating to the implementation of the 1999 Guidelines have been identified by numerous expert reviews and reports.\(^4\) The 1999 Guidelines were replaced by the introduction in July 2011 of a revised and updated Guidance document – the *Children First: National Guidance for the Protection and Welfare of Children*.\(^5\) The Guidance has been adopted as national policy by the two statutory agencies with responsibility for child protection – the Health Service Executive (HSE) and An Garda Síochána. The HSE makes compliance with the Guidance a condition of contracting for services with others (including for services outside the child protection and welfare arena).

In 2006, the Alliance first called for the *Children First Guidelines* to be place on a statutory footing in our Shadow Report to the UN Committee on the Rights of the Child.\(^6\) The report highlighted the inadequate and inconsistent application of the Guidelines and the UN Committee subsequently called on the Government to consider putting the Guidelines on a statutory basis.\(^7\) In 2009, the Ryan Report recommended that *Children First* be uniformly and consistently implemented throughout the State.\(^8\) The subsequent Ryan Report Implementation Plan included a commitment that the Government would produce legislation by December 2010 to provide that all staff employed by the State and those in organisations in receipt of Exchequer funding will have a duty to:

1. Comply with the Children First national guidelines
2. Share relevant information in the best interests of the child
3. Co-operate with other relevant services in the best interests of the child.\(^9\)

The 2011 *Programme for Government* reiterated the commitment to implement the recommendations of the Ryan Report, including putting the *Children First Guidelines* on a statutory footing and legislating for the use of “soft information”.\(^10\)

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2. The Alliance provided its initial comments to the Oireachtas Committee on Health and Children at the oral hearing of 1 May 2012.
2. Children’s Rights Framework for the Bill

2.1 UN Convention on the Rights of the Child
Ireland signed the UN Convention on the Rights of the Child in 1990 and ratified it in 1992, and in so doing pledged that it would promote, protect and fulfil the rights of children. The UN Convention contains a number of relevant provisions in relation to protecting children from abuse. For example, Article 19 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 of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

In General Comment Number 13 on the Right of the Child to Freedom from all Forms of Violence, the UN Committee on the Rights of the Child outlines what States must do to fulfil their obligations under Article 19. Of particular relevance is the Committee’s recommendation that all State Parties review and amend domestic legislation in line with Article 19 and that States integrate a clear child rights approach into their national framework. The Committee strongly recommends that States develop comprehensive reporting mechanisms, including the provision of information to facilitate report making and the development of reporting protocols. In addition, the Committee calls for a range of accountability measures to be introduced to fulfil States’ obligations and commitments to protect children by ensuring that all relevant stakeholders proactively and cooperatively establish and apply standards, indicators, tools, and systems of monitoring, measurement and evaluation.

In its Concluding Observations on Ireland in 1998, the UN Committee noted its concern about the wide existence of child abuse and lack of reporting mechanisms. It also called for better investigation and the application of sanctions in relation to child abuse cases. In its 2006 Concluding Observations on Ireland, the Committee recommended that Ireland develop a comprehensive child abuse prevention strategy. It recommended that such a strategy should include developing adequate responses to abuse, neglect and domestic violence; facilitating local, national, and regional coordination and conducting sensitisation, awareness-raising and educational activities. It also called on the Government to consider putting the Children First Guidelines on a statutory basis.

11 Relevant articles include Articles 2, 3, 6, 12, 16, 19, 20, 27, 34, 35, 36, 37 and 39 of the UN Convention on the Rights of the Child.
12 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).
13 Ibid., 41(d).
14 Ibid., 72 (a).
15 Ibid., 49 (a) (b) (c) (d) and (e).
16 Ibid., 72 (j).
18 Ibid., p. 6, paragraph 39.
2.2 **Lanzarote Convention**
In 2007, Ireland signed the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, known as the Lanzarote Convention.\(^{20}\) The Convention aims to prevent sexual exploitation and sexual abuse of children, protect child victims and prosecute perpetrators. Article 12 states that parties must ensure that professionals are not obstructed by laws of confidentiality from reporting a situation where they have reasonable grounds to believe that a child is the victim of sexual exploitation or abuse to child protection services.\(^{21}\) Given that Ireland has indicated its intention to ratify the Lanzarote Convention, it is important that attention is given to ensuring that the Children First Bill is in line with the provisions of the Convention.

2.3 **Best Interests of the Child**
The ‘best interests’ principle is one of four overarching principles of the UN Convention on the Rights of the Child (Article 3).\(^ {22}\) The principle of ‘best interests’ of the child represents a holistic view of what is best for children and, depending on the age and maturity of the child, should incorporate the child’s own views. Furthermore, it is the accepted criterion for any assessment of State intervention in family life under Article 8 (right to family and private life) of the European Convention on Human Rights.\(^ {23}\) It is disappointing that although the term ‘best interests’ appears in the explanatory text of the Heads it does not appear in the proposed legal text. It is preferable that this term, rather than the more narrow and limited concept of ‘welfare’, be used in legislation.

2.4 **Voice of the Child**
The ‘voice of the child’ principle is another of the four overarching principles of the UN Convention on the Rights of the Child (Article 12). There is no mention in the Heads of supporting and empowering children to prevent abuse, support to understand the dynamics of abuse, or information on how to report abuse. This is despite a focus in the Children First Practice Handbook on the need to take into account the views of the child.\(^ {24}\) It is important to remember that children often turn first to each other for protection.\(^ {25}\)

In December 2011, the UN General Assembly adopted the Third Optional Protocol to the UN Convention on the Rights of the Child (UNCRC) on a Communications Procedure for children’s rights violations. The Protocol was officially opened for signature in February 2012. The new Optional Protocol allows children and their representatives to bring complaints to the UN Committee on the Rights of the Child. Twenty States signed the new complaints mechanism at the Human Rights Council session in Geneva on 28 February: unfortunately, Ireland was not one of the initial signatory states.

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21 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. Each Party is responsible for determining the categories of professionals to which this provision applies. In addition, parties are required to encourage any person who has knowledge or suspicion of sexual exploitation or abuse of a child to report to the competent services, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007, Article 12, Sections 89, 90 and 91.
22 Several other articles in the Convention refer to the best interests of the child including Article 21 on adoption.
3. Objectives of the Legislation

This section explores how well the Bill has met the objectives of the legislation as contained in the Ryan Report Implementation Plan was to place a legal duty on individuals and organisations to:

1. Comply with the Children First national guidelines
2. Share relevant information in the best interests of the child
3. Co-operate with other relevant services in the best interests of the child.

3.1 Relationship between the Bill and Children First

The Bill places a number of aspects of the Children First Guidance on a statutory footing. It is understood that the intention is that the Guidance will exist alongside the Bill, as national policy. Head 5(2) provides that all those covered by the remit of the Bill “are to have due regard to Children First: National Guidance for the Protection and Welfare of Children.” Head 5(3) continues by stating that:

Nothing in this Bill is to interfere with or diminish in any way the duties and responsibilities of any person which arise under the Children First: National Guidance for the Protection and Welfare of Children.

It not clear from Head 5 what, if any, legal standing the aspects of the Guidance not on a statutory footing will have once the Bill is enacted. In the event of a dispute arising we understand that legislation will take precedence over non-statutory national policy.26 However, Head 5(3) may be read as providing that the Guidance will take precedence over the legislation. The legal relationship between the Guidance and the Bill as set out in Head 5 needs to be clarified. In addition, there is no mention in the Bill of the Children First Practice Handbook. Clarification on the status of the Practice Handbook would be desirable to avoid any misinterpretation.

Consideration should be given to providing that adherence to the Children First Guidance can be pleaded as a mitigating factor in a defence against non-compliance with the provisions of the Bill under Head 11(3).

3.2 Reporting Criteria

The Bill does not contain criteria to guide the decision of an individual/organisation as to whether or not they should make a report. Such criteria are to be provided for in proposed non-statutory Guidance for the Reporting of Abuse (Head 16). Furthermore, Head 2 defines ‘concerns’ as ‘information that would lead a person to suspect that a child is being abused’; but no further definition is given.

The Alliance believes that a set of criteria comprising core requirements must be inserted into the Bill. It must be clear that if these criteria are met then the legal requirement to report is triggered. The objective of the statutory criteria would be to guide an individual/organisation in deciding whether or not a level of risk/threshold has been reached to merit making a report to the HSE.

Without such criteria it would not be clear what level of information merits the making of a report and thus what constitutes a statutory obligation. Without criteria clearly set out in legislation the sanctions may be vulnerable to challenge by someone accused of non-compliance. The legislative set of criteria can be further elaborated on in Guidance if needed.

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26 For example, different definitions exist in the Children First Bill 9Head 6 (1) and (2) and Head 11) and the Children First Guidance (Appendix 10: List of HSE Designated Officers – Protections for Persons Reporting Child Abuse Act 1998) on who must adhere to the remit of the legislation/national policy.
Establishing criteria for reporting is of the utmost importance. If the threshold for reporting is set too low, the system will be overwhelmed with reports. In addition, it may negatively impact on the trust between children and service providers. Adults may feel compelled to report to avoid sanction, and children and adults may feel reluctant to voice any concern or suspicion for fear of it resulting in a report.

3.3 Guidance and Information Sources
The Bill provides for the development of two new guidance and information sources:

- **Guidance for the Reporting of Abuse** (Head 15) – to be developed by the Department of Children and Youth Affairs
- **Safeguarding Guidance for Organisations** (Head 12) – to be developed by the HSE to provide advice, information, and promote awareness and best practice

There are already in existence two documents which set out the duties of individuals and organisation in relation to child protection policy, procedure and practice.

- **Children First: National Guidance for the Protection and Welfare of Children** (Department of Children and Youth Affairs, 2011)

The rationale for the development of two new guidance documents proposed in the Bill is not clear. The Alliance is concerned that the existence of multiple documents in this area risks duplication and confusion as to which document takes precedence. It would suggest that consideration be given to simply updating both Children First Guidance and the accompanying Practice Handbook to reflect new information and new requirements resulting from the passage of the legislation, rather than the production of two new guidance documents as proposed in the Bill. Consultation with key stakeholders should inform the development or updating of any materials.

In a parallel development, a set of national standards is currently being developed by HIQA on the ‘Protection and Welfare of Children’ within the HSE Children and Family Services. The Bill also provides that organisations are to develop a tailored Keeping Children Safe Plan (Head 7). This is a welcome development.

3.4. Interagency Co-operation and Sharing of Information
As noted above, the second and third objectives of this legislative reform are to share relevant information in the best interests of the child and co-operate with other relevant services in the best interests of the child.

Head 17 provides for co-operation and information sharing between the HSE and An Garda Síochána. In addition, Head 9(3) provides that the Designated Officer will “where required, co-operate with other Designated Officers and with the HSE” and will “assist the HSE and participate, when required” in the risk assessment and any HSE investigation.

Given the important role of inter-agency and inter-professional cooperation in preventive work and child safeguarding, the Alliance is disappointed that the Bill does not extend Head 17 to other statutory agencies and non-statutory bodies and Mandated Professionals.

Consideration should be given to including a specific reference in the Bill to the Children’s Services Committees and placing a statutory obligation on key statutory and voluntary agencies to cooperate locally to improve outcomes for children and families.

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28 Head 7(3) provides that the Plan be based on Safeguarding Guidance for Organisations and Guidance for the Reporting of Abuse.
29 Children’s Services Committees (CSCs) bring together a diverse group of agencies in local county areas to jointly plan services for children. Department of Children and Youth Affairs web site http://www.dcya.gov.ie/viewdoc.asp?DocID=1394 [accessed 9 May 2012].
4. Sanctions for Non-Compliance

The Bill provides for a range of sanctions for non-compliance with the provisions of the proposed legislation:

- Prohibition on volunteers from volunteering
- Serving of an Improvement or Prohibition Notice on specific organisational activities
- Criminal prosecution of Mandated Professionals and Designated Officers.

The sanctions focus on penalising individual omission (failure to act). The Alliance believes that while sanctions are necessary the Bill should place more of an emphasis on how the HSE and other Statutory Agencies can support organisations and individuals to fulfil their duties under the Act.

Furthermore, the Alliance fears that the sanctions may prove unworkable in practice and thus recommends that they be revisited.

4.1 Prohibition on volunteers

Under Head 10(4), volunteers may be penalised by being “prohibited from working as a volunteer in that organisation by the Designated Officer, following an enquiry and where the volunteer is afforded fair procedures.” Such a prohibition would likely meet the criteria to be classed as ‘soft information’ under the proposed National Vetting Bureau Bill 2011 and thus the organisation would be obliged to communicate the incident to the National Vetting Bureau.30 This penalty and associated registration with the Bureau has potential implications for future access to employment (and volunteering opportunities) and damage to ones’ good name31 – both constitutionally protected rights.32 Appropriate safeguards and an appeal mechanism will be necessary to protect the legislation against a constitutional challenge.

In addition, there is a concern that this penalty (and the significant increase in the duties of volunteers) will dissuade people from volunteering in activities that fall within the remit of the Bill. The legal sanction on volunteers should be reconfigured and the onus placed on organisations to inform and train volunteers [in line with provisions in Head 7 (9)(11)(12)]. For example, the Bill could place a mandatory requirement on organisations that all volunteers must attend a training course.

4.2 Improvement or Prohibition Notice

Under Head 14 where the HSE is of the opinion that the “organisation is in contravention of the provisions of this Bill” (2) it can prohibit specific organisational activities by serving the Designated Officer with an Improvement Notice (5) or Prohibition Notice (17). This sanction needs to be reframed. The Improvement or Prohibition Notice should be served on the organisation not on an individual employee or volunteer (the Designated Officer). We understand that the issuing of an Improvement or Prohibition Notice constitutes a criminal sanction. The criteria under which one can serve such a Notice need to be clearly outlined in the Bill and an appeal mechanism set out, in order to comply with fair procedures under the Constitution.

4.3 Criminal Prosecution

Under Heads 11(3) and 20, Mandated Professionals and Designated Officers may face a criminal prosecution with a potential penalty of a Class A fine and/or imprisonment for up to one year (summary conviction) or five years (conviction on indictment).

30 The Minister for Justice and Equality published the Scheme of the National Vetting Bureau Bill in July 2011.
31 Article 40.3.2 guarantees that the State will protect “from unjust attack … [the] good name of every citizen”.
32 Relevant articles of the European Convention on Human Rights will also apply including Article 6 (determination of civil rights), Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property – in this case, it may be relevant in terms of the individual’s capacity to continue to work in a certain profession).
Criminal prosecution of Designated Officers

Given the potential criminal liability that attaches to the role of the Designated Officer, individuals may be reticent to agree to take on this role. In particular, reluctance may arise where the individual is an unpaid non-professional volunteer or a staff member within an organisation with no experience or knowledge of child protection.

For those who are employees, adopting the role of Designated Officer will need to be negotiated into the individual’s employment contract. Head 9(1)(a) provides that in the event of non-appointment of a Designated Officer, the responsibility will fall to the “most senior person employed by the organisation”. It is not clear what will happen in circumstances where the organisation has no employees.

Defence against criminal prosecution

Mandated Professionals and Designated Officers can plead “reasonable excuse” [Head 11(3)] as a defence against their prosecution. However, the draft Bill does not provide clarity as to what constitutes a “reasonable excuse”. Clarity is needed on whether a possible defence could be that a report was not made as this action would likely lead to a child disengaging from a service where he or she was receiving support. Clarity is also needed on whether a possible defence could be that a child made known his or her view (provided that he or she was capable of forming a view on the matter) that the concern or allegation should not be disclosed. Such a defence exists under Section 4(1)(a) of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012.

Under Head 12(1(f)), the HSE is to provide advice to Designated Officers and Mandated Professionals to allow the individual to make a decision as to whether a report is required to be made under this Bill. However, Head 12(4) provides that such advice given by the HSE cannot be used as a defence for not reporting concerns or allegations of abuse which meet the criteria provide for in Head 15. This provision may lead to over-reporting and/or disengagement from using the HSE as a resource – and is arguably inherently unfair.

The Alliance believes the criminal prosecution sanction, as constructed, is unworkable in practice and should be reconsidered. A more appropriate mechanism may be the imposition of a civil offence with a larger fine. This would have the advantage of requiring a lower evidential threshold to prove a breach of the Bill. The responsibility for the sanction could thus be shared between the organisation (the corporate entity) and the individual as appropriate: for example, a sanction could be placed on:

- an organisation where the Designated Officer is a volunteer
- an organisation where the Designated Officer is an employee in a non-child protection role (ie where the organisation’s core work is not child protection focused).
- an organisation and on an individual where the employee is both a Designated Officer and a Mandated Professional.
5. Measures to Achieve Compliance

5.1 Capacity Building and Training

Heads 7 and 8 place a duty on mandated organisations to provide training to Designated Officers, employees and volunteers and require them to make available to the HSE information regarding its training arrangements. The Bill provides that the HSE can provide advice to Designated Officers and Mandated Professionals (Head 12) but it does include a duty on the State to support training or capacity building.

The training of Designated Officers and Mandated Professional will be necessary to ensure that they will have the capacity to carry out their legal duties effectively and comprehensively. This will be of particular importance where the individual is in a voluntary position and/or in an organisation where child protection is not its core area of work. The natural turnover of personnel means many Designated Officers will have no opportunity to build up skills or experience in reporting. Particularly important in the training will be to ensure relevant staff understand the reporting criteria.

To build up capacity among individuals and organisation to comply with the provisions of the Bill, a positive duty should be placed on the State to provide training – either directly or by supporting such activities – within statutory and voluntary organisations.

The Bill places a significant administrative burden, a high level of responsibility, and potential criminal penalties on individuals irrespective of their size and/or capacity to engage. Some smaller and/or volunteer only organisations may find their duties onerous and will need support and time to comply with the legislation.

5.1 Audit commencement

It is likely that the introduction of the Bill will, in the short-term, result in an increase in reporting of concerns or allegations of child abuse. An audit of the HSE’s Children and Family Services capacity should be undertaken to assess how the Service is currently managing the reports it receives – what are the waiting times across the country before the reports can be assessed and follow up action taken where appropriate. The audit should assess the impact on the system of the introduction of this legislation – how the system would cope with an increase in reporting, including how a filter or triage system would operate to identify priority cases and ensure they are investigated and acted on appropriately. The audit should also review where the need is most pressing – for example, there may be concern that there is a weakness in reporting from specific Mandated Professionals or in a particular area of the country. The duty of the State to appropriately manage and respond to reports is not included in the Bill. This omission should be addressed.

5.2 Staggered Commencement

Consideration should be given to the staggered commencement of the legal duties and sanctions contained in the Bill. This approach would allow for the HSE to invest in its capacity to deal with an expected rise in reports. This would also allow for training and capacity building to be completed prior to the introduction of legal duties on specific individuals/organisations. Head 7 implies that all employees and volunteers must be vetted, a lead in time will be needed to enable organisations to comply with this provision. The provisions of the Bill which relate to individual/organisations working directly with vulnerable children could be commenced first and then gradually built up to include the full cohort of individuals and organisation which fall under the Bill’s remit. A plan for the phased commencement of the Bill should be published alongside the Bill and should contain clear and realistic timelines and associated costings.
6. Statutory Roles and Monitoring Implementation

6.1 Role of the HSE
The Heads of Children First Bill currently provides that:

- The HSE itself constitutes an organisation under the legislation (Head 6 and Schedule II)
- The HSE will
  - provide best practice information [12(1)(a-d)];
  - provide information and advisory services and advice to Designated Officers and Mandated Professional on their compliance with the legislation [12(e-f)]; and
  - maintain a register of organisations [12(g)];
- The HSE is to examine organisations where a breach of the Bill is suspected by the HSE or is brought to its attention [Head 12(2)] and invoke powers to remedy non-compliance among organisations [Head 12(3)].

In addition to the roles above, the HSE Children and Family Services currently assess the risk posed by the concerns and allegations communicated to it and provide an appropriate follow up interventions.

The Alliance is concerned that the carrying out of these duties by the HSE may pose a conflict of interest. A key issue which is not address is to identify who will provide oversight to ensure that the HSE as a designated organisation under Head 6 will comply with the legislation. The Alliance recommends that the regulatory/inspector function be assigned to the Health Information and Quality Authority (HIQA). The development of outcome-based standards for child protection services is an agreed action in the Ryan Report Implementation Plan. HIQA has drawn up a set of Draft National Standards for the Protection and Welfare of Children – For HSE Children and Family Services, on which it is currently consulting. Using these Standards, HIQA will monitor compliance with Children First among the HSE Children and Family Services (social worker teams). Consideration could be given to expanding HIQA’s role to include Mandated Professionals or organisations where there is a concern that the individual or organisation is not complying with the provisions of the Bill. The Office of the Ombudsman for Children will continue to provide an important independent ‘last port of call’ for complaints of maladministration.

6.2 Implementation by Government Departments and Agencies
Head 19 provides that the Minister for Children and Youth Affairs can request information from eight named Ministers in relation to the implementation of the Bill by their Departments and Agencies under the aegis of their Departments. The remaining Cabinet Ministers are not covered by this Head. The Alliance recommends that the Bill should:

- Clarify that Head 19 is in addition to, and does not replace, the provisions in the Bill which classify the Departments and Agencies as ‘organisations’ within the remit of the Bill, in particular Head 12(2)(3).
- Clarify who will monitor the Department of Children and Youth Affairs and its Agencies. The Government is in the process of creating a dedicated Child and Family Support Agency which is due to be operational in 2013; this new Agency will assume the work of the HSE Children and Family Services. The Agency will be under the aegis of the Minister for Children and Youth Affairs.

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35 For more information see http://www.oco.ie/
36 The Bill specifically names the Ministers for Health; Education and Skills; Justice and Equality; Arts, Heritage and Gaeltacht Affairs; Environment, Community and Local Government; Social Protection; Transport, Tourism and Sport.
37 These would include: Agriculture, Food and the Marine; Communications, Energy and Natural Resources; Defence; Finance; Foreign Affairs and Trade; Jobs, Enterprise and Innovation; and Public Expenditure and Reform.
– Reframe the Head to enable the Minister to request information from any Minister, to allow for flexibility if circumstances change, resulting in a department or one of its agencies beginning to work in the children area.
– Place on a statutory footing the existing Inter-Departmental Committee which drives consistent implementation of Children First across all sectors involved in the provision of services to children. This Committee should be mandated to provide an annual report to the Oireachtas on progress in the implementation of the legislation and the Guidance.

6.3 Review
Head 15(2) provides for an annual review of the Guidance for the Reporting of Abuse. The Bill should specify who will undertake the review and that key stakeholders will be consulted.

The Alliance further recommends that a periodic review clause be added to the Bill to allow for the future appraisal of the legislation in accordance with international developments and best practice and to reflect learning from the experience of its implementation in Ireland. This process would allow for a review of Schedule I which lists those professionals statutorily charged with reporting child abuse. There is precedence for such a review clause in the Mental Health Act 2001 (Section 75): a review of the operation of the Act commenced in 2011.
7. Exclusions and Omissions

There are a number of exclusions and omissions from the Bill which need to be addressed:

7.1 Emotional abuse
The Bill omits emotional abuse from its definition of abuse (Head 2): the Alliance believes emotional abuse should be included. Emotional abuse is included in the definition of abuse in the Children First Guidance\(^{38}\) and its accompanying Practice Handbook\(^{39}\) which categorises four types of abuse – neglect, emotional abuse, physical abuse and sexual abuse. The Protections for Persons Reporting Child Abuse Act, 1998 also includes emotional abuse in its definition.\(^{40}\) The Children First Guidance outlines a clear definition and examples of emotional abuse,\(^{41}\) contains an appendix on the signs and symptoms,\(^{42}\) and includes a tick box for emotional abuse within the Standard Notification Forms between the HSE and An Garda Síochána.\(^{43}\) The Alliance is concerned that by omitting emotional abuse, the Bill will signal that such abuse is not of importance.

Furthermore, the Bill should streamline its definitions of sexual abuse, physical abuse and neglect with the definitions of abuse that are outlined in the Children First Guidance.\(^{44}\)

7.2 Child Care Staff and Child Minders

Child Care Staff: The Bill includes pre-school or crèche staff with a Fetac Level 7 Award as Mandated Professionals in Schedule I. If the intention is to mandate crèche manager or leaders this may not be an appropriate route as Fetac Level 7 is not a required or uniform qualification across senior posts within schools and crèches, so it may prove to be an arbitrary cut off point. Given these difficulties it may be best to leave pre-school or crèche staff out of Schedule I, this decision could be reviewed at a later point. Removing pre-school or crèche staff from Schedule I will not leave a gap as crèches and pre-schools will be covered as organisations under Schedule II.

Child-minders: Some child-minders (‘notified child-minders’) will come under the remit of the Bill under Head 6(2)(i) as they provide services under Part 7 of the Child Care Act 1991. However, the majority of child-minders (including those who care for three or fewer pre-school children) will not be covered by this provision and hence a category is needed to capture them.

Agencies who supply child minders and nannies should be brought under the definition of ‘organisations’ within the Bill (under Head 6, 8, Schedule II).


\(^{40}\) Protections for Persons Reporting Child Abuse Act, 1998, Section 1.1 defines the welfare of the child as comprising of “the moral, intellectual, physical, emotional and social [welfare of the child].”


\(^{42}\) Ibid., Appendix 1.3, p. 71.

\(^{43}\) Ibid., Appendix 4 and 5, pp. 81-82.

\(^{44}\) Department of Children and Youth Affairs (2011) Children First: National Guidance for the Protection and Welfare of Children, Dublin: Department of Children and Youth Affairs, Section 2, pp. 8-12 and Appendix 1, pp. 70-74.
8. Clarifications

8.1 Terminology
There is inconsistency in the terminology used in this Bill in relation to child abuse, protection and welfare. The terminology should be standardised and should provide the greatest level of protection for the rights of the child.

Head 5(1) provides that:

*All persons who are involved in any matter or in any capacity which relates to the operation of this Bill is to have regard to the welfare and protection of the child and this is to be the first and paramount concern.*

This language is reiterated in Head 17(2). However, Head 18(2) provides that nothing in the Data Protection Acts “will prevent the exchange of information under this Bill which is exchanged for the purpose of protecting a child.” Similarly, Head 16(2) provides that “Where An Garda Síochána receives a report of child abuse and has concerns for the well-being of a child, An Garda Síochána will disclose, as soon as practicable, those concerns to the HSE.” As stated in Section 2 above, the Alliance would prefer the use of the phrase ‘best interests’ of the child in place of current terminology used.

8.2 Disclosures by adults
It is not clear if reports of child abuse disclosed by adults will come within the provisions of the Bill. The phrase “concerns or allegations of child abuse” is used throughout the report. It is not clear from this phrase if the abuse relates only to someone who is currently a child or includes also someone who is now an adult but who was abused as a child. The Bill defines “concern” in the present tense as “information which would lead a person to suspect that a child is being abused” (Head 2) and “sexual abuse” as including activity where “a child is used exploitatively by another person” (Head 2 (i)).

In relation to disclosures by adults, the *Children First Guidance* states that:

*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. 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 inclusion of disclosures by adults in the legislation raises complex issues, touching not only on child protection but the need for persons who have been abused in childhood to feel free to seek therapeutic help, and so rigorous analysis and in-depth consultation with relevant groups should be undertaken before such a legislative provision is framed.

8.3 Definitions in Schedules I and II
*Religious:* Further consideration should be given to the phrasing of “Pastoral and administrative member of churches and other religious communities” in Schedule I and “Churches, religious orders and registered charities providing educational pastoral and administrative services for children” in Schedule II. Neither of these definitions is clear. No rationale is given for the inclusion of administrative staff here – but not elsewhere in the Bill.

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Federations and Large Organisations: Clarity is also needed on how the requirement for each organisation to appoint a Designated Officer will work in federations and national governing bodies with affiliated organisations that fall under Schedule II. Will one Designated Officer operate for the whole organisation or will the Designated Officers be appointed at local, branch or club level? This issue is also linked to the requirement to conduct an annual audit under Head 7(14).

8.4 Direct Provision Centres
The Alliance believes that direct provision centres for asylum seekers which accommodate children should be included under the Bill’s definition of organisation. Head 6(2)(iii) provides that services with a residential component be included. Over the past number of years, many concerns have been raised in relation to child welfare and protection practices in direct provision centres: it is imperative that these centres are covered by the Bill.46

8.5 Irish based organisation with operations outside of Ireland
Clarity is needed as to how the Bill will impact on Irish-based organisations who work outside of Ireland, such as development organisations and charities. We do not propose that the staff or volunteers of Irish based organisations would be required to report concerns or allegations of abuse that occurs oversees to the Irish authorities. However, we consider it important that the organisation operates best practice, that its staff and volunteers are vetted (where appropriate), that it has in place a child protection policy and has a mechanism to receive complaints against its own staff or volunteers.

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9. Aligning Legislation

Greater consideration must be given to ensuring coherence between the provisions of the Children First Bill with other relevant pieces of legislation, in particular the Protections for Persons Reporting Child Abuse Act 1998\(^{47}\), the Criminal Justice Act 2006 (in relation to the offence of reckless endangerment of children)\(^{48}\) and the two proposed new laws – the National Vetting Bureau Bill 2011 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012.

9.1 Relationship between the Bill and the National Vetting Bureau Bill 2011

The Minister for Justice and Equality published the Scheme of the National Vetting Bureau Bill in July 2011. The Bill proposes to place the vetting of personnel working with children and vulnerable adults on a statutory basis and allow for the exchange of ‘relevant’ or ‘soft’ information between the National Vetting Bureau and a registered organisation. Consideration should be given as to how the proposed under the Children First Bill and the National Vetting Bureau Bill could be aligned and, if appropriate, integrated to ensure a coherent legal approach and to provide clarity for service providers.

Each Bill places a duty on organisations to register with a statutory body and nominate a contact person to these bodies. The Children First Bill requires registration with the HSE and the appointment of a Designated Officer. The National Vetting Bureau Bill requires registration with the National Vetting Bureau and the appointment of a Liaison Person.\(^{49}\) The HSE and the Bureau will maintain separate registers of organisations and details of contact people (who may in practice be the same person). The Bureau’s compliance officers and HSE officials will each be empowered to act to ensure that organisations are complying with their respective legal obligations and investigate any offences.

The definition of ‘organisations’ covered by the Children First Bill is wider than that found in the National Vetting Bureau Bill 2011. However, Head 7 places a duty on organisations to vet all volunteers and employees. The relationship between the definitions used, and thus the scope of these two Bill, should be closely examined.

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\(^{47}\) Section 3 (1) (b) of Protections for Persons Reporting Child Abuse Act 1998 provides a protection from civil liability of persons who have reported child abuse “unless it is proved that he or she has not acted reasonably and in good faith in forming that opinion and communicating it to the appropriate person.”

\(^{48}\) The offence of reckless endangerment of children may be committed by a person who has authority or control over a child or an abuser and who intentionally or recklessly endangers a child by causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse or failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation. The penalty is a fine (no upper limit) and/or a maximum of 10 years imprisonment.

\(^{49}\) A Liaison Person will submit vetting requests and receive vetting disclosures on behalf of the registered organisation [Part 4, Section 13(1)]
10. Sexual Health Services

The Alliance is of the view that the Bill when read alongside the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012 has the potential to negatively impact on children accessing services and advice in the area of sexual health and teen pregnancy.

The Criminal Law (Sexual Offences) Act 2006 creates two offences in relation to engaging or attempting to engage in a sexual act with a child, one offence relates to the defilement of a child under 15 years of age and second to defilement of a child under the age of 17 years.\(^{50}\) The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012 creates an offence of withholding information on certain offences against children; the Bill explicitly includes the two offences of defilement of a child.\(^{51}\)

Neither the 2006 Act or the 2012 Bill makes a distinction between underage consensual peer sexual activity and child sexual abuse. The 2006 Act does, however, provide that a girl under 17 years of age “shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse” (Section 5).

The Children First Guidance and this Bill take a different approach. They make a distinction between consensual peer sexual activity and child sexual abuse. Head 2 of this Bill defines “sexual abuse” in the context of (i) exploitation, (ii) coercion, (iii) trafficking and pornography. The explanatory text states that:

For the purposes of this definition, sexual abuse between children is considered to have occurred; where by reason of the differences in age or status between the two children, one child exercises sufficient authority or power over the other child to coerce or induce that other child to engage in sexual activity; or where one of the children is deemed by reason of their age or maturity, to have insufficient capacity to have consented to the activity.

Head 2 also states that consensual sexual activity which is permitted by law (involving those over the age of 17 years) is presumed not to be sexual abuse but this presumption may be rebutted.

The Children First Guidance notes that a sexual relationship between two 16-year-olds who are boyfriend and girlfriend is illegal but “it might not be regarded as constituting ‘child sexual abuse’” and that “investigations should be sensitive to the needs of the child”.\(^{52}\) In circumstances where child sexual abuse is suspected or alleged, the case must be referred to the HSE.\(^{53}\) The Guidance holds that “in cases where abuse is not suspected or alleged” but the young person is underage, consultation must be held between the HSE and An Garda Síochána, and all aspects of the case will be examined. It continues: “Both agencies must acknowledge the sensitivity required in order to facilitate vulnerable young people in availing of all necessary services while at the same time satisfying relevant legal requirements”.\(^{54}\) The Children First Practice Handbook does not give guidance on how to handle issues of underage sexual activity or pregnancy.

The approach adopted by the Criminal Justice 2006 Act and proposed in the Criminal Justice 2012 Bill is at odds with the approach of Children First Guidance and the proposed Children First Bill. It is likely that the Criminal Justice Act legislation will be seen to take precedence over the provisions of the Children First Bill (if enacted). It is, therefore, critically important that this issue is resolved in the

\(^{50}\) Section 2(1) and (2) and Section 3(1) and (2)).

\(^{51}\) Schedule 1, Sections 11 and 12, Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012.


\(^{53}\) Ibid., Section 7.16.4, p. 52

\(^{54}\) Ibid., Sections 7.16.3 and 7.16.6, p. 51 and 52.
There is no clarity at present as to whether services are legally required to report underage sexual activity where there is no child protection issue, and who is to determine if activity falls into the category of peer consensual sexual activity or child sexual abuse. As a result, mixed messages and practice abound: some report to the HSE and others do not. Clarity is urgently needed to ensure a consistent approach among practitioners and within the HSE as to how they deal with issues of underage sexual activity, pregnancy and teenager parenthood.55

It is clearly important that all cases where child sexual abuse is suspected or alleged cases are reported appropriately. However, it is also important that proposed legislation does not hinder the right of a young person (under 18 years) to access sexual health services, advice and information due to a fear of investigation and possible criminalisation. Services must be enabled to continue the important work of supporting young people and reducing crisis pregnancies and sexual transmitted infections. It is feared that the reporting of non-abusive (consensual peer) sexual activity between minors to the HSE (and on to the Gardaí) may result in concealed pregnancies; a delay in accessing or withdrawal from support, crisis pregnancy and ante-natal services. Furthermore, there is also anecdotal evidence that some young fathers have been advised by solicitors not to enter their names on the Register of Births or apply to become the child’s legal guardian, for fear of prosecution. In such cases, children may be deprived of their right to identity, to have a relationship with their father, and the family life of the young couple may be discouraged.

We understand that the Gardaí and the Director of Public Prosecutions use their discretion and tend to look at the overall circumstances of a relationship before deciding whether or not to prosecute.56 The Alliance believes the discretionary powers of the Director of Public Prosecutions (DPP) in relation to such decisions should be placed on a statutory footing – no prosecution of a child under 17 years should proceed without the consent of the DPP.

55 For further discussion see Treoir, Issues for those working with Underage Parents Briefing Paper, Dublin: Treoir, and Crisis Pregnancy Programme, Briefing Paper to Inform Developments in Relation to Mandatory Reporting of Under Age Sexual Behaviour.

Member Organisations

Alcohol Action Ireland
Amnesty International Ireland
Ana Liffey Drug Project
Arc Adoption
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Barnardos
Barretstown Camp
Belong To Youth Services
Bessborough Centre
Border Counties Childcare Network
Catholic Guides of Ireland
Catholic Youth Care
Child and Family Research Centre, NUI Galway
Childminding Ireland
Children in Hospital Ireland
City of Dublin YMCA
COPE Galway
Crosscare Drug and Alcohol Programme
Crosscare Teen Counselling
DIT – School of Social Sciences & Legal Studies
Doras Luimn
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
School of Education UCD
Enable Ireland
EPIC (formerly IAYPIC)
Focus Ireland
Forbairt Naionraí Teoranta
Foróige
GLEN - Gay and Lesbian Equality Network
Headstrong - The National Centre for Youth Mental Health
Home-Start National Office Ireland
Inclusion Ireland
Inspire Ireland
International Adoption Association
Irish Association of Social Care Workers (IASCW)
Irish Association of Social Workers
Irish Association of Suicidology
Irish Autism Action
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Refugee Council
Irish Second Level Students’ Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jesuit Centre for Faith and Justice
Junglebox Childcare Centre F.D.Y.S.
Kids’ Own Publishing Partnership
Kilbarrack Youth Project
Lifestart National Office
Marriage Equality – Civil Marriage for Gay and Lesbian People
Mary Immaculate College
Matt Talbot Community Trust
Miss Carr’s Children’s Services
Mothers’ Union of Ireland
Mounttown Neighbourhood Youth and Family Project
Mymind
National Association for Parent Support
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
OPEN
Parentline
Pavee Point
Peter McVerry Trust
Psychological Society of Ireland
Rape Crisis Network Ireland (RCNI)
Saoirse Housing Association
SAOL Beag Children’s Centre
Sevenoaks Early Education Centre
Society of St. Vincent de Paul
Spunout.ie
St. Nicholas Montessori College
St. Nicholas Montessori Society
St. Patrick’s University Hospital
Start Strong
Step by Step Child & Family Project
Sugradh
The Ark, A Cultural Centre for Children
The CARI Foundation
The Childhood Development Initiative
The Integration Centre
The Jack & Jill Children’s Foundation
The Unmarried and Separated Families of Ireland
Treoir
UNICEF Ireland
Young Ballymun
Youth Advocate Programme Ireland (YAP)
Youth Aftercare Support Service (YASS)
Youth Work Ireland