NDA submission on the Law Reform Commission Issues Paper on a Regulatory Framework for Adult Safeguarding

May 2020

# Introduction

The National Disability Authority (NDA) is an independent statutory body with a duty to provide information and evidence-informed advice to Government and officials in the public sector on disability matters, and to promote Universal Design.

The NDA welcomes the publication of the Law Reform Commission’s Issues Paper on a Regulatory Framework for Adult Safeguarding. The NDA believes the Adult Safeguarding Bill 2017 is an important piece of legislation to progress, as it is a comprehensive document that answers questions and provides protections for adults at risk in a currently grey area. The NDA welcomes the opportunity to provide input into enhancing the protections it provides.

The NDA advises that persons with disabilities are an important cohort of people encompassed within this proposed legislation, as there is a considerable body of evidence that shows that violence and abuse are serious problems for persons with disabilities and that they are at greater risk than non-disabled persons. The 2016 Safeguarding Data Report[[1]](#footnote-1), published by the HSE’s National Safeguarding Office, provided data on the safeguarding concerns that had been reported to the Safeguarding and Protection Teams (SPTs) located in each of the nine community healthcare organisations (CHOs) across the HSE. SPTs are tasked with managing safeguarding concerns relating primarily to persons with a disability and/or over 65 years of age. Voluntary agencies are the main source of referrals into the SPTs and in 2016, 89% of all the concerns reported from the voluntary sector were within the disability sector. Of the 7,884 safeguarding concerns managed by the SPTs, 4,749 related to adults aged 18-64 years of age. We can surmise that many people in this age group who were the subject of reported safeguarding concerns were people with a disability.

The NDA believes that a safeguarding framework should be put in place against a wide range of abuse and violence, including physical abuse, psychological abuse, sexual abuse, financial abuse, coercive control, exploitation, deprivation of liberty and neglect. The framework should also recognise that such abuse and violence may be carried out by people close to the individual, including family, friends, carers and service providers.

As well as being more at risk, disclosure of abuse may be particularly difficult for persons with disabilities. Those in a position of care dependency may find it difficult to disclose abuse, particularly if they do not see they have any realistic care alternatives. Other reasons for non-disclosures may include persons with disabilities feeling disempowered from making complaints- perhaps because prior complaints they made were not addressed to their satisfaction, or because there is a lack of accessible information about how to make a complaint- having little contact with the outside world, finding it more difficult to communicate, or fears that their concerns may not be taken seriously if they do complain.

However, it is important to achieve the correct balance between promoting people with disabilities’ right to privacy, decision-making, positive risk-taking and having relationships against putting measures in place to protect them from abuse. This is in line with the HIQA/ Mental Health Commission Standards for Adult Safeguarding and the UN Convention on the Rights of Persons with Disabilities (Art 16 & 23). If the correct balance is not applied, then the risk is that there will be a reversal to erring on the side of caution and being overly protective in not allowing people to make decisions/have relationships/take reasonable amounts of risk, which will undo the progressive steps put forward in the Assisted Decision-Making (Capacity) Act 2015.

The Assisted Decision-Making (Capacity) Act 2015 is aligned with the spirit of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the purpose of which is

“to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.[[2]](#footnote-2)

The UNCRPD was ratified by Ireland in March 2018, and as a result of this, Ireland has committed itself to delivering civil and political rights to people with disabilities, and to the progressive realisation of social and economic rights. A State Party must submit its first State report to the Committee on the Rights of Persons with Disabilities within two years of ratification. Ireland’s first State report will be submitted at the end of July 2020. The Department of Justice and Equality has responsibility for drafting the State report and will seek input from a number of stakeholders in doing so, including other Government departments and persons with disabilities. Effective engagement and meaningful consultation with persons with disabilities is a cornerstone of the UNCRPD, and is explicitly noted in two UNCRPD articles: article 4(3) and article 33(3).

The NDA strongly advises that any regulatory framework for adult safeguarding has due regard to existing and pending legislation and policies, such as the Assisted Decision-Making (Capacity) Act 2015, protection of liberty safeguards, HSE policies and HIQA and Mental Health Commission standards, as well as the UNCRPD. The NDA strongly recommends that there is a consistency in all terminology used and messages perpetuated by these documents.

The NDA has approached this submission following the headings provided in the original Issues Paper. The input provided is based on the NDA’s particular areas of competency and expertise.

# Issue 1: Values and Principles Underpinning Adult Safeguarding

The NDA welcomes the inclusion of values and principles underpinning the proposed regulatory framework. It is important to set out the raison d’etre and spirit of the legislation from the very beginning of the process to enhance the Adult Safeguarding Bill 2017. The NDA also welcomes that the types of principles included are, for the most part, aligned with language used in other pieces of legislation that strive to achieve that same objectives of respect for human rights, empowerment and proportionality.

It is also important that values and principles reflect those contained in the UNCRPD, which includes, amongst others:

* Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
* Non-discrimination;
* Full and effective participation and inclusion in society.

Within the proposed human rights principles, the NDA advises that due and explicit regard should be given to autonomy. The Law Reform Commission has previously referred to ‘autonomy’ in its Report on Vulnerable Adults and the Law, and it is also included in the Guiding Principles of the Assisted Decision-Making (Capacity) Act 2015.

While there is consistency between most of the human rights specified in section 1.14 and those contained in the Guiding Principles of the Assisted Decision-Making (Capacity) Act 2015 in respect of an intervention (for example, the rights to dignity, bodily integrity and privacy), the right to ‘respect for culture and beliefs’ does not appear in the 2015 Act. In order to achieve consistency in similar legislative provisions and policies, the NDA recommends that ‘culture and beliefs’ be changed to ‘beliefs and values’, in order to align the language with that of the 2015 Act. If culture and beliefs, or beliefs and values are included in the proposed principles, respect for will and preferences should also be included.

For further alignment with the 2015 Act, the definition of ‘proportionality’ in section 1.14 should include “any interventions… be as limited in duration in so far as is practicable.”

In section 1.14, definitions should be provided for ‘informed capacity’ and ‘independent advocacy’. In the NDA’s draft Code of Practice for Advocates, under the 2015 Act, an independent advocate is

“A person who works with and for a relevant person, around a specific issue or issues which have arisen, where they have difficulty voicing their will and preferences. An Independent Advocate is employed or engaged by an advocacy organisation, is free from conflict of interest and is independent of family and service providers.“

In section 1.14, ‘Empowerment’ includes the presumption of decision-making capacity. The NDA advises that it also include supporting decision-making.

The NDA also advises that person-centredness be included as a principle to underpin the statutory regulatory framework for adult safeguarding. Person-centredness means that the adult at risk is placed at the centre of everything that a body does to protect them from harm and promote their rights and wellbeing. The individual needs of each person determine the nature of any safeguarding measures to be put in place. This includes how a person is communicated with, to ensure they are well informed, involved and supported throughout any safeguarding process. This is of particular importance for persons with disabilities, who may need accessible information and communication supports.

In the context of safeguarding, a person-centred approach includes promoting people’s rights, allowing people to make meaningful choices, supporting them to participate in decisions about their lives, recognising their will and preferences and ensuring that their rights are upheld and promoted. We note that person-centredness is a key theme in the National Standards for Adult Safeguarding 2019, developed by HIQA and the Mental Health Commission.

To summarise, the NDA advises that:

* Due and explicit regard should be given to autonomy
* ‘Culture and beliefs’ be changed to ‘beliefs and values’, which encompasses culture, in order to align the language with that of existing legislation
* The definition of ‘proportionality’ include a limit in duration of an intervention
* Definitions be included for ‘informed capacity’ and ‘independent advocacy’
* The definition of ‘empowerment’ include supporting decision-making
* ‘Person-centredness’ be included as a principle.

# Issue 2: Defining Key Terms for Adult Safeguarding

## ‘Adult at risk’

The NDA advises that the term ‘adult at risk’ should be used, and should be defined. ‘Vulnerable person’ is a term that is not in line with language used in the 2015 Act or the UNCRPD, nor is it a term agreed upon by stakeholders and persons with disabilities, due to the paternalistic idea that all persons with disabilities are intrinsically vulnerable and in need of help. The idea of ‘vulnerability’ is driven by context, and therefore, ‘adult at risk’ is more appropriate, as it reflects this idea. ‘Adult at risk’ also suggests a move towards a right-based model.

If ‘adult at risk’ is not defined there may be difficulties determining what constitutes an adult at risk and lead to consequent difficulties in reporting. However, as any person can find themselves at risk at certain stages of their life depending on their personal circumstances, defining individual categories of adults at risk is not appropriate. Therefore, the NDA does not recommend enumerating categories of persons who may be at risk, as it could not be exhaustive, and may lead to the exclusion of some people.

As reflected in definitions used in Northern Ireland and Scotland, the NDA believes that the term ‘at greater risk’ should be included in any definition adopted. For instance, a definition of “adult at risk” along the lines of that contained in the HSE’s Final Draft 2019 Adult Safeguarding Policy would read as follows: “A person over 18 years of age who is at **greater** risk of…” This implies that by reason of a person’s personal circumstances, they are at increased risk of abuse / harm / neglect.

If the definition of ‘adult at risk’ contained in the HIQA/MHC Standards (“a person who is aged 18 years or older who needs help to protect themselves from harm at a particular time. A distinction should be made between an adult who is unable to safeguard him or herself, and one who is deemed to have the skill, means or opportunity to keep him or herself safe, but chooses not to do so”) is to be used, the NDA recommends that the word ‘help’ be amended to ‘support’, as this language is more in line with the 2015 Act and the UNCRPD. However, the NDA believes that this definition is too broad and would present several reporting difficulties.

The NDA queries whether a definition of “adult at risk” which refers solely to a person lacking physical or mental capacity (as included in the Final Draft HSE Adult Safeguarding Policy (2019)) could be too narrow. It is important to apply a functional test; that a person with a physical or mental capacity may be at risk in some, and not all, situations, depending on the context of the situation. Each situation must be looked at on a case-by-case basis, to determine whether a person may be at risk. Also, it may be possible that persons may be at greater risk of harm and abuse due to situations or circumstances such as, for example, addiction, poverty or living with an abusive family member.

## ‘Safeguarding’

Again, the NDA believes that consistency is paramount when defining terms already used in other legislative provisions, policies and standards. It would be important to include a definition of ‘safeguarding’ in a new adult safeguarding framework.

All of the definitions of safeguarding discussed in the Issues Paper refer to the protection of the human rights of adults at risk. The NDA agrees that a right-based approach to safeguarding is the appropriate approach. Safeguarding should be considered as more than protecting a person from harm; it also includes measures to promote and protect people’s human rights and their health and wellbeing, and empowering people to protect themselves. This approach to safeguarding is in line with the HIQA/MHC Standards for Adult Safeguarding.

As suggested in paragraph 2.23, if the definition of ‘Safeguarding’ is to expressly refer to ‘human rights’, the NDA advises that “human rights” be defined. This is to ensure there is no confusion regarding the rights that are protected. For instance, will the definition refer to rights conferred by the Constitution, the European Convention on Human Rights and other international instruments that have been incorporated into national law? Or will it also include rights guaranteed by international agreements Ireland has ratified, such as the UN Convention on the Rights of Persons with Disabilities? The latter definition would be much broader.

The NDA notes that there are two definitions of “human rights” in the Irish Human Rights and Equality Commission Act 2014, as set out in both section 2 and section 29, and advises that they may be instructive to the Law Reform Commission in its consideration of this matter.

## ‘Abuse’ and ‘harm’

The NDA recommends that ‘abuse’ and ‘harm’ be separately defined, with ‘abuse’ referring to the actions or conduct or omission, and ‘harm’ referring to the adverse impact that results from the actions or conduct or omission.

## ‘Capacity’

While the NDA appreciates that the definition of capacity included is in line with the Assisted Decision-Making (Capacity) Act 2015, it is important to not exclude adults who may be at risk because they lack a different type of capacity to decision-making capacity. There are many types of capacity that, if lacking, an adult may find themselves at risk, such as decision-making capacity, physical capacity, or financial capacity. For example, a person may have capacity to make his or her own decisions without any support, but may lack physical capacity to protect himself/herself against physical abuse. The NDA advises that the legislation makes it clear to the reader that adults may lack different types of capacity, and are at risk as a result of lacking that capacity in a particular situation (i.e. the functional test). If not clarified, the reader may assume this means ‘mental capacity’ which is both inaccurate and conflicting with the 2015 Act.

To summarise, the NDA advises that:

* Any language used should be in line with existing definitions
* The term ‘adult at risk’ is used and defined
* The terms ‘abuse’ and ‘harm’ be separately defined
* ‘Capacity’ be more broadly defined.

# Issue 3: Physical, Sexual, Discriminatory and Psychological Abuse, Neglect and Deprivation of Liberty

The NDA welcomes the inclusion and enumeration of the different forms of abuse an adult may be at risk of, including the relatively new term of ‘coercive control’, and the recognition that many of these forms of abuse can overlap.

The NDA believes that a proposal to introduce care plans in relation to safeguarding needs to be considered in relation to other plans that may be in place for an individual, such as personal plans in disability services and care plans in residential services for older persons. The NDA advises that it may be more appropriate to integrate safeguarding measures into a person’s existing personal plan or care plan, rather than having an additional plan in relation to safeguarding.

While individuals who are already in receipt of health and social care services may have an existing personal plan or care plan, safeguarding concerns may also arise in relation to individuals who are not in receipt of any such services. Such a proposal to create care plans for individual not in receipt of safeguarding services may need further consideration in light of existing difficulties with Assessment of Need and service statements under the Disability Act 2005.

We note that Standard 2.1 of the National Standards for Adult Safeguarding requires that a ‘service effectively plans and delivers care and support to reduce the risk of harm and promote each person’s rights, health and wellbeing.’ However, it is not specified how safeguarding measures are documented or that a person must have a safeguarding plan. A person-centred approach, based on a person’s individual circumstances, may be more appropriate in this regard.

In order to propose any such ‘safeguarding plans’, there is a need to define who/what an ‘adult safeguarding service provider’ is. This term only appears in questions, and is not explored in the main Issues Paper. Therefore, it is difficult to comprehend who might be responsible for creating any safeguarding plans. The legislation and policy being referred to in the UK in the text in this section is referring to a scenario where the legal obligations around safeguarding are on the local authorities (for example, the Social Services and Well-being (Wales) Act 2014 provides that where a local authority is required to meet the needs of a person under sections 35 or 37 of the Act, it must prepare and maintain a care and support plan in relation to that person). In that jurisdiction, the legal obligation is on the statutory body / commissioner, not the provider.

The NDA recommends that clarity be provided in the situation where the HSE (as the adult safeguarding service provider) becomes aware of an adult at risk, does it have an obligation to safeguard that person whether or not that person was receiving a HSE service when the HSE became aware of the risk?

UK local authorities have an obligation to make enquiries, investigate, conduct assessments and gather data on adult safeguarding issues. Furthermore, UK local authorities also have to provide social care to those who require it (there are prioritisation processes in place, where those at risk are in the highest priority group). This raises a point about the adequacy of Ireland’s social care legislation (the Health Acts).

By contrast to the UK, entitlement to many social care supports are not on a statutory footing in the Irish context. There is a statutory Assessment of Need process for children born after the 1st of June 2002 under Part 2 of the Disability Act 2005, however these requirements have yet to be extended to adults. Under Part 2 of the Disability Act 2005, people who are of the opinion that they might have a disability (or certain others on their behalf) have the right to:

* Apply for an assessment of individual needs, which is carried out without regard to the cost of or the capacity to provide service identified in the assessment
* A related service statement
* Access to an independent redress and enforcement process.

The Disability Act 2005 does not confer any right to health or social care services and furthermore, there is no legal entitlement to such services, including home care or personal assistance services, in Irish law. The NDA notes the practice in other jurisdictions where safeguarding incorporates situations where an individual does not have access to supports or services deemed necessary. The Disability Act provides for an assessment process for children, but does not grant a statutory entitlement to the services identified through such a process. This would need to be considered further in the context of any safeguarding legislation.

The NDA is also aware of significant unmet need in terms of social services. Research undertaken by the Economic and Social Research Institute (ESRI), entitled a “**Technical Paper on Social Inclusion and Access to Care Services in Ireland**”,found that among working-age adults who need professional home care, 83% have an unmet need. Unmet home care needs were greatest among working-age families with an adult who has a disability and the most commonly reported reason for unmet home care needs was lack of availability of services. The NDA notes also that the Sláintecare Implementation Strategy commits to reviewing eligibility of many community services.

In light of the foregoing, the NDA advises that this is an area requiring further examination, in light of a potential disconnect between imposing a statutory obligation on an adult safeguarding service to investigate safeguarding concerns, without a corresponding statutory obligation to provide the necessary supports to mitigate or contribute to the mitigation of the identified risk.

In relation to Question 3.5 (criminal liability of an adult safeguarding service provider), in the 2015 Act, if a decision-making supporter uses fraud, coercion or influence in respect of a relevant person, or who ill-treats or wilfully neglects is subject to a Class A fine and imprisonment. It would be important to align any offences in an adult safeguarding regulatory framework with the offences in that legislation.

To summarise, the NDA advises that:

* Any care plan in relation to safeguarding needs to be considered in relation to other plans that may be in place for an individual
* Who or what an ‘adult safeguarding service provider’ is should be defined
* The imposition of a statutory obligation to investigate safeguarding concerns on an adult safeguarding service, and the necessary resources associated with such an obligation be explored further
* Any offences in an adult safeguarding regulatory framework, and the repercussions for same are aligned with similar offences in other relevant legislation.

# Issue 4: Financial Abuse

The NDA is aware that financial abuse remains a prevalent risk for older persons as well as persons with disabilities. In research commissioned by the Banking and Payments Federation Ireland (BPFI) in 2019, results showed that 20% of adults had experience of financial abuse. Examples of such abuse highlighted in the survey include using property or possessions without permission, adult children refusing to contribute to household bills, making decisions about an individual’s money without consulting them and taking or using money from a joint account without the individual’s agreement. Efforts to combat this type of abuse seems to have garnered widespread support across the relevant sectors, for example the work of the BPFI and Safeguarding Ireland in creating a guide to “Safeguarding your Money now and in the Future” and the work of UCD and five retail banks on capturing bank staff’s experiences of financial abuse of vulnerable adults. The NDA welcomes efforts to bolster it further by including it in Adult Safeguarding legislation.

During the drafting of 11 non-healthcare Codes of Practice under the Assisted Decision-Making (Capacity) Act 2015, the NDA became aware of a potential conflict between decision-making supporters under the 2015 Act and Type 1 and Type 2 agents under the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007. The conflict arises where some decision-making supporters would be tasked, in a legal support arrangement, with handling the money of an individual. They may be requested to report on carrying out this task (amongst other tasks stipulated in the legal support arrangement) and would be subject to the oversight of the Director of the Decision Support Service. This is at odds with the much more informal arrangement of the Type 1 and Type 2 agents, who are subject to no reporting obligations nor oversight. The Department of Employment Affairs and Social Protection has agreed that this conflict would need to be explored. A discussion occurred around the duplication of roles and the introduction of more regulation around the handling of people’s money. The NDA believes that by restricting the number of people allowed to handle another person’s money to just legally authorised decision-making supporters, the prominence of financial abuse of welfare payments may decrease. This is a timely consideration in light of recent Covid-19-related accommodations made by An Post in respect of cocooning older people who may fill in a form to allow other people to collect their pension.

In the recent Person-Centred Planning demonstration project, it was noted that some families manage the person’s finances, including their Disability Allowance. A number of services reported difficulties accessing money for the individual so they could work on their goals. For example, families may not wish to pay for courses, travel, lunches, outings. It is very important that the person has some control over their finances if they are to make their own decisions and live the life they want to live.

In the context of its work to draft Codes of Practice under the 2015 Act, and specifically in the context of the drafting of the Code of Practice for Financial Professionals, the NDA has previous advised the importance of the Central Bank’s Consumer Protection Code (CPC) being aligned with the assisted decision-making legislation. This would include further protections in respect of financial abuse of ‘adults at risk’. Currently, the CPC includes a short paragraph on ‘vulnerable customers’ which is neither sufficient in providing guidance for consumers and/or financial institutions, nor does it use language that is in line with the 2015 Act or the UNCRPD. At the beginning of the drafting process, the NDA’s Code of Practice Writing Group identified conflicts between the draft Code of Practice for Financial Professionals and the CPC. For example, the CPC includes General Principles to which regulated entities must adhere including ensuring that a regulated entity “acts…. in the best interests of its customers”. This conflicts with the 2015 Act, which encourages financial professionals and financial service providers to “give effect, in so far as is practicable, to the past will and preferences of the relevant person…..” The 2015 Act also deals with “the unwise decision” and provides that making an unwise decision shall not be a basis upon which to consider a relevant person unable to make a decision. Also, the CPC deals with requirements for “a vulnerable consumer”. The NDA advised that this also be reviewed, given the functional approach which will have to be applied under the 2015 Act and the requirements of the UNCRPD. It is important to note that the draft Code of Practice for Financial Professionals was drafted on the premise that the CPC would be reviewed and radically amended to comply with the provisions of the 2015 Act and the UNCRPD. The NDA advises that Adult Safeguarding legislation be amended and enhanced on the same premise.

To summarise, the NDA advises that:

* Concerns about financial abuse identified in other policies and practices are taken into account
* The drafters of Adult Safeguarding legislation work with those responsible for reviewing and revising the Consumer Protection Code in order to create cohesive guidance.

# Issue 5: What Body or Bodies should have Responsibility for the Regulation of Adult Safeguarding

Prior to establishing a regulatory framework, there is the question of who is responsible for making enquiries, and conducting investigations around safeguarding concerns for those in the community.

Article 16 of the UNCRPD is instructive, providing that “In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities”.

The NDA believes that it would be inappropriate for the HSE (option (a)) to investigate allegations in relation to adults who are in receipt of HSE-funded services, because of the potential conflicts of interest and difficulties in assuring independence. It would also appear to be incompatible with the UNCRPD’s call for monitoring by independent authorities.

The NDA believes that both the option of a new independent agency and the option of granting additional powers to existing agencies- for example, HIQA or the Decision Support Service- could work. However, in the interest of coordination and avoiding duplication, an independent agency may be the better option, unless a seamless insertion of new functions to the remit of an existing agency can be guaranteed.

To summarise, the NDA advises that:

* The body responsible for making enquiries and conducting investigations around safeguarding concerns for those in the community is identified
* That body works in a coordinated and independent manner
* There is potential for a conflict interest if the HSE takes on this role
* The most appropriate options are either for a new independent agency to be established or for an existing agency, such as HIQA or the Decision Support Service, to be granted additional powers.

# Issue 6: Powers of Entry and Inspection

As outlined in the Issues Paper, there may be cases of suspected abuse or neglect of an adult at risk (with or without decision-making capacity) in which safeguarding practitioners are unable to gain entry to the person’s dwelling or to access the person in another private dwelling. In this regard, the NDA notes that powers of entry and inspection are afforded to regulators and authorised officers under various pieces of legislation, including to HIQA in respect of designated centres under the Health Act 2007. The NDA notes that powers of entry can include entry into a private dwelling where a certain person is at risk, for instance under the Mental Health Act 2001 and the Domestic Violence Act 2018.

However, concerns remain that existing legislation may not cover the spectrum of safeguarding concerns which may require a power of entry and inspection.

The NDA therefore recommends that there should be a power of entry and inspection where there are immediate concerns regarding the safety or welfare of an adult at risk. That power must be cognisant of constitutional rights, in particular property rights, and appropriate safeguards must be put in place to ensure that it is exercised in an appropriate manner (e.g. warrants etc.). In the absence of such a power, professionals or Gardaí could neither enter nor inspect a private dwelling in circumstances where they have reasonable cause to believe that a person is at immediate risk of abuse or neglect, and where they are denied access to the premises by a third party. A legal basis, through a new power of entry and inspection, should be provided to certain professionals where there are immediate safeguarding concerns.

In the context of child safeguarding, An Garda Síochána has the power, under section 12 of the Child Care Act 1991, to remove a child urgently from a situation for his or her safety and welfare. This includes a power to enter any premises without a warrant under certain conditions and the child, once removed, is to be delivered to Tusla.

The NDA notes that the former Special Rapporteur on child protection, Professor Geoffrey Shannon, undertook an **Audit of the exercise by An Garda Síochána of the provisions of section 12 of the Child Care Act 1991**, which was published in 2018. In the overwhelming majority of cases, the audit found that members of An Garda Síochána exercised their powers following a period of careful consideration of the circumstances and available evidence. The evidence from each stage of the audit suggested that exercising section 12 removal of children was a rare occurrence for the average member of An Garda Síochána.

However, the audit highlights challenges in some areas, including lack of training for members of An Garda Síochána on child protection and shortcomings in the PULSE system. While focused on child protection, the NDA advises that the audit offers much by way of learning on the exercise of powers of entry and inspection to a private dwelling where concerns exist about the safety and welfare of adults at risk. This includes the need for clear Garda guidelines on the use of such powers, the importance of an independent risk assessment and the provision of relevant training to members of An Garda Síochána. The NDA therefore advises that the findings of Professor Shannon’s audit be taken into consideration when deciding whether adult safeguarding legislation should include a statutory power of entry and inspection of premises, including a private dwelling.

Reasonable cause seems to be an appropriate standard in this case. Reasonable cause is the relevant standard where a Garda wishes to enter a private premises for the purpose of effecting an arrest.

The NDA believes that who should be afforded powers of entry and inspection is very much dependent on the safeguarding structure which is adopted. However, the NDA advises that powers of entry could be provided to a member of An Garda Síochána, and if a power of entry is afforded to another type of professional, they should be accompanied by a member of An Garda Síochána when seeking entry and inspection of a private dwelling.

Different considerations are at play where private dwellings are concerned given the protections afforded to property rights in the Constitution. An application for a warrant would not seem necessary in cases other than a private dwelling.

To summarise, the NDA advises that:

* Existing legislation may not cover the spectrum of safeguarding concerns which may require a power of entry and inspection
* There should be a power of entry and inspection- that is cognisant of constitutional rights and is exercised in an appropriate manner- where there are immediate concerns regarding the safety or welfare of an adult at risk
* If a power of entry is afforded to a safeguarding professional, they should be accompanied by a member of An Garda Síochána.

# Issue 7: Safeguarding Investigative Powers

The NDA is of the view that a power of entry and inspection may not be effective without additional safeguarding powers, such as a power to apply for a court order for the removal of a person or for a safety order, barring order or protection order. Also, as outlined in the Issues Paper, research from Scotland indicates that investigative powers had a positive impact, and that such powers were used sparingly and proportionately. Given the gravity of these powers, the NDA underlines that they should only be utilised in an Irish context where they are proportionate and strictly necessary.

The NDA advises that any proposed legislation afford the chosen adult safeguarding regulatory body the authority to apply for court orders. It is the NDA’s understanding, on the basis of the Issues Paper published, that it is not envisioned that the Child and Family Agency would have a role in relation to adult safeguarding. Article 16 of the UNCRPD states that all measures taken to prevent exploitation, abuse and violence should be age-sensitive. It would not be appropriate to name the Child and Family Agency as the body with responsibility for seeking court orders in relation to adults at risk.

In respect of situations outside of the circumstances set out in the Domestic Violence Act 2018 or section 10 of the Non-Fatal Offences Against the Person Act 1997, the NDA advises that this matter must be given due consideration. Safeguarding concerns could exist in situations where domestic violence orders are not currently available. For instance, safeguarding issues could arise between a formal carer and an adult at risk, or an adult sibling and an adult at risk who do not reside together – barring or safety orders are not currently available in such scenarios.

To summarise, the NDA advises that:

* Any powers afforded to safeguarding professionals should only be used where they are proportionate and necessary
* The adult safeguarding regulatory body should have the power to apply for court orders
* The Child and Family Agency should not be named as the body with responsibility for seeking court orders in relation to adults as risk, as this is not an ‘age-appropriate’ measure.

# Issue 8: Reporting

The NDA notes that the Children First Act 2015, which was commenced in December 2017, introduced mandatory reporting of child abuse by certain professionals. After two and half years of operation, the NDA advises that it may be useful to reflect on the successes and challenges of mandatory reporting in the child protection context when considering whether such a reporting regime should be introduced for adult safeguarding concerns.

Is it important to ensure that any reporting introduced under a safeguarding framework be aligned with reporting processes that are already in place in respect of the individual. From speaking with various stakeholders, the NDA understands that reporting obligations are more readily undertaken where one reporting process serves different purposes. When a service provider is tasked with carrying out numerous reporting processes, they often feel as though their time is taken up with reporting and they do not have sufficient time to undertake the task they are reporting on. The Assisted Decision-Making (Capacity) Act 2015 obliges particular decision-making supporters to report to the Director of the Decision Support Service on an annual basis (and sometimes more frequently). The NDA is also aware of various reporting processes for day services for people with disabilities under New Directions.

The NDA recommends aligning all reporting processes, or complementing existing processes with safeguarding aspects, in order to create a streamlined and efficient approach, which will benefit both the person undertaking the reporting and the adult at risk.

The NDA also recommends that a standardised reporting process across services and sectors would be of great help in respect of transparency, data and indicators of progress. The NDA has created indicators in order to track the impact of actions contained in the National Disability Inclusion Strategy. There is a limited number of indicators of abuse in this piece of work and those that are included refer to HSE Confidential Recipient reports. This work would certainly benefit from comprehensive reporting and the collection of relevant data. .

To summarise, the NDA advises that:

* Any reporting introduced under a safeguarding framework be aligned with existing reporting obligations
* The collection of data be included in the reporting process.

# Issue 9: Independent Advocacy

The NDA believes that access to independent advocacy would be an important provision to include in a regulatory framework. As stated in the Report of the Commission on the Status of People with Disabilities, “advocacy is concerned with getting one’s need, wants, opinions and hopes taken seriously and acted upon… advocacy is essential because it allows people to participate more fully in society by expressing their own viewpoints, by participating in management and decision making and by availing of the rights to which they are entitled.”[[3]](#footnote-3)

Currently, barriers exist to adults at risk accessing independent advocacy. The NDA notes that the National Advocacy Service has a function to provide independent advocacy to persons with disabilities, recognising that there are limits to the numbers of cases it has capacity to take on. Other organisations also operate in the advocacy space, and the NDA advises that it would be useful to consider the definition and standards that would apply to an independent advocate, in order to increase the capacity in this space and to provide consistency in the quality of available advocacy. The Joint Oireachtas Committee on Health & Children has underlined the importance of an independent advocacy service to people with disabilities. It has stated that:

‘The lack of statutory powers for advocacy are considered to be a barrier which can prevent advocacy services from accessing or acting on behalf of people with disabilities.[[4]](#footnote-4)

While access to independent advocacy should be included in the Adult Safeguarding Bill, it is also important to include a focus on building the capacity of adults at risk to advocate for themselves. A range of organisations already provide this support, for example Inclusion Ireland and the National Platform for Self Advocates. This approach is in line with the UNCRPD.

The NDA advises that a panel of independent advocates be established within the Decision Support Service (DSS). The NDA has taken this position previously, in respect of the Assisted Decision-Making (Capacity) Act 2015 and Deprivation of Liberty legislation. The 2015 Act provides for a statutory Code of Practice for advocates, although it does not define ‘advocate’. The Code of Practice, upon direction from the Department of Justice and Equality, interprets an advocate as being an independent advocate linked to an organisation and free from conflict of interest with the relevant person. An independent advocate would work with the relevant person to help them voice their will and preferences about their proposed care and where possible, to support them to make the decision. In many cases, the NDA envisages that independent advocates working with and supporting relevant persons will result in a significant number of people being able to make the decision themselves. This would mean that there would be no requirement for someone else to make the decision on admission to or leaving a relevant facility on their behalf, such as the court.

The NDA believes that one panel of independent advocates be established, with multiple roles in respect of the 2015 Act, protection of liberty safeguards and adult safeguarding. The NDA believes that this would be the most efficient use of resources, as the skills needed to act as an independent advocate in any of the three context outlined above are similar, and the concern is that one independent advocate could end up sitting on all three panels. This may lead to a cumbersome and inefficient advocate system. A streamlined system, whereby independent advocates could be found in one place, and be called upon depending on the situation and their specific skills would be more efficient. Close collaboration would be required between the DSS, any adult safeguarding regulator that may be established and whichever body is given responsibility for overseeing the protection of liberty.

Section 9.1 of the Issues Paper implies that a panel of independent advocates will be established by the Director of the DSS under section 101 of the Assisted Decision-Making (Capacity) Act 2015. This section of the 2015 Act does not refer to the establishment of a panel of advocates, but a panel of Court Friends. This is a new role created by the 2015 Act, and it is envisaged that independent advocates may act as Court Friends, however it is inaccurate to refer to that panel as a panel of independent advocates.

Whether a panel of independent advocates is established under the Adult Safeguarding Bill, the Assisted Decision-Making (Capacity) Act 2015 or Protection of Liberty Safeguards, or whether the relevant provision in the Citizen’s Information 2007 is commenced, the NDA emphasises the need to adequately resource whichever approach is agreed upon.

To summarise, the NDA advises that:

* The importance of access to independent advocacy be enumerated in this legislation
* A definition of independent advocacy be agreed, to make clear the expectations in this space and to allow advocates across a range of organisations to meet the definition, thus increasing the capacity and number of available advocates, as well as ensuring consistency in the quality of their services
* Barriers to accessing independent advocacy be removed by continuing to explore options with regard to resourcing and supporting existing advocacy services that would be aligned with this legislation
* A panel of advocates be established under the Decision Support Services, and will retain advocates who can provide services in a number of areas, such as supporting decision-making, protection of liberty safeguards and adult safeguarding
* The capacity of ‘adults at risk’ to advocate for themselves be built up

# Issue 10: Access to Sensitive Data and Information Sharing

The NDA notes that Professor Shannon’s audit on the use of section 12 of the Child Care Act 1991 by An Garda Síochána underscored the importance of agencies dealing with child protection sharing information. In this regard, the section 12 audit recommends that the Data Protection Acts be reviewed to ensure that no legislative roadblock impedes child protection services sharing information relating to vulnerable children and their families.

The NDA further notes that the audit also highlighted concerns regarding lack of information-sharing between Tusla and An Garda Síochána after the invocation of section 12.

Such information sharing could provide valuable learning for both Gardaí and social workers from relevant cases. The NDA advises that the learnings from Professor Shannon’s audit are taken into account in considering how to improve access to sensitive data and information sharing in the context of adult safeguarding.

While it seems as though there are existing legislative provisions under the Data Protection Act 1988 to allow for the sharing of data where it is required for “the purpose of preventing, detecting or investigating offences…” the NDA advises that it experienced difficulties when drafting statutory Codes of Practice under the Assisted Decision-Making (Capacity) Act 2015, in respect of the sharing of sensitive data, especially amongst financial and legal professionals. The NDA advises that any adult safeguarding legislation provides very clear guidance on what information may be shared, with whom it may be shared and in what circumstances is it permissible and appropriate to share. The NDA also advises that any such guidance be underpinned by supporting data protection legislation and clearly sets out what that legislation says and why safeguarding legislation is relying on it.

It is important that the Guiding Principles of the Assisted Decision-Making (Capacity) Act 2015 are invoked when seeking an individual’s consent to share sensitive information. It should be noted that, under the 2015 Act, decision-making supporters with legal authority have the right to access sensitive data (for example, financial records, health records and legal documents) of the relevant person.

The sharing of sensitive data will be crucial to the effectiveness of the multi-agency collaboration discussed in Issue 11.

To summarise, the NDA advises that:

* While relevant legislation providing for the sharing of sensitive information in certain circumstances exists, it will be necessary to clearly set out the parameters of sharing that information
* Stakeholders will be nervous about the sharing of certain information, so it is important to set out clear guidance underpinned by legislation
* The learnings from Professor Shannon’s audit are taken into account in considering how to improve access to sensitive data and information sharing in the context of adult safeguarding..

# Issue 11: Multi-Agency Collaboration

As the statutory agency responsible for assisting the Minister for Justice and Equality in the coordination of disability policy, the NDA is well aware that effective multi-agency coordination and collaboration is essential to meeting the needs of persons with disabilities across a range of areas, including education, employment and healthcare. Strong collaboration and joined-up thinking between government departments and agencies has been instrumental to the effective delivery of a range of policies, programmes and services, including the Access and Inclusion Model in the early learning and care context, and the Individual Placement Service model in the employment context. The NDA notes that such multiagency collaboration will be crucial in a safeguarding context, where responsibility for the safeguarding of adults spans across a number of sectors and bodies from health to social protection, justice and finance.

Multi-agency collaboration is referred to in Standard 2.2 of the HIQA/MHC National Standards for Adult Safeguarding which envisages that

“Each person experiences integrated care and support which is coordinated effectively within and between services to reduce the risk of harm and to promote their rights, health and wellbeing.”

However, the NDA acknowledges that bringing together separate agencies with distinct roles, cultures and structures can also prove a challenging task. In the NDA’s experience, shared principles and service delivery objectives set out in a formalised collaborative structure is key to effective multi-agency collaboration. This structure can include clear protocols, policies and procedures to guide and underpin collaboration, and the full and effective implementation of same.

The Section 12 audit carried out by Professor Geoffrey Shannon found challenges to inter-agency cooperation and coordination between An Garda Síochána, Tusla, and other agencies within the broader child protection infrastructure in Ireland during and after the invocation of section 12 of the Child Care Act 1991. The audit identified low levels of provision for joint training programmes on child protection between Garda members and Tusla social workers. Evidence from the audit indicated that good inter-agency cooperation and coordination was often dependent on the organic development of good, informal, personal relationships with individuals within agencies with child protection functions and responsibilities.

The NDA notes that the audit found little evidence of formal structures to foster good inter-agency cooperation. In this regard, Professor Shannon recommended that clear guidelines be drafted on how cooperation should work in practice between An Garda Síochána and other State agencies. The NDA advises that the findings from the section 12 audit be taken into consideration in deciding how best to ensure effective multiagency cooperation in the context of adult safeguarding, particularly the importance of building local connections, for example through joint training.

To summarise, the NDA advises that:

* Comprehensive multi-agency coordination and collaboration is essential, and joined-up thinking has led to the effective delivery of a range of policies, programmes and services
* As the responsibility for the safeguarding of adults spans a number of sectors and bodies, multi-agency collaboration will be crucial to its success
* Shared principles and service delivery objectives set out in a formalised collaborative structure is key to effective multi-agency collaboration
* The findings from the section 12 audit be taken into consideration in deciding how best to ensure effective multiagency cooperation in the context of adult safeguarding.

1. The National Safeguarding Office (2016) Safeguarding Data Report <https://www.hse.ie/eng/services/news/media/pressrel/hses-national-safeguarding-office-publishes-2016-safeguarding-data-report.html> [↑](#footnote-ref-1)
2. UN Convention on the Rights of Persons with Disabilities, Article 1. [↑](#footnote-ref-2)
3. Commission on the Status of People with Disabilities (1996), **Report of the Commission on the Status of People with Disabilities**, page 106. [↑](#footnote-ref-3)
4. Joint Oireachtas Committee on Health & Children (2016), **Report on the Role of Advocacy in Health and Social Care Services in Ireland**, January, page8. [↑](#footnote-ref-4)