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Author(s)	Hanly, Conor
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The Reporting of Child Abuse and Neglect in Ireland in an International Context

Conor Hanly*

Abstract

Starting in the early 1990s, reports published over a quarter of a century detailed shocking levels of child abuse and child neglect in Ireland, along with failures by Church and State officials to take effective action. These revelations, supported by international research, made a compelling case for the introduction of some form of mandatory reporting. Yet until 2015, Ireland's child protection system relied upon the discretion of those who suspected incidents of child abuse. The Children First Act 2015 introduced a new system of mandatory reporting that applies to professionals working in the health, education, childcare and law enforcement fields, a system that became active at the end of 2017. This paper reviews the development of the reporting system in Ireland, and analyses the new obligations created by the 2015 Act. The paper also analyses some initial figures for 2018, which show a substantial increase in the number of reports of child abuse and neglect made in that year. Additionally, the paper argues for the insertion into the new system of some nuance in order that victim autonomy might be better respected.

Keywords

Child abuse; child neglect; mandatory reporting; Ireland; Children First Act 2015.

INTRODUCTION

Child abuse and neglect (hereafter child abuse) occurs in every country, and Ireland is no different. Over the last thirty years, a series of revelations and high profile cases has forced Irish society to acknowledge the extent of this issue in the country. Much of this abuse occurred in residential institutions, many under the control of religious organisations, while other abuse occurred at the hands of clerics, family members and sports coaches. Some of the revelations concerned physical abuse, but most involved sexual abuse. The only nationally representative prevalence study yet done in Ireland found that more than one in eight men and one in five women suffered some form of sexual abuse as children.¹ Extrapolating from these findings to the 2002 Census, the one closest in time to the *SAVI Study*, over three-quarters of a million Irish adults, or 26.5 percent of the adult population in Ireland at the time, had suffered sexual abuse as children.² This is in line with international estimates. For example, using data from 133 countries, the World Health Organisation estimated in 2014 that one-third of children have suffered emotional abuse, almost one-quarter have suffered physical abuse, and one in five girls and up to one in ten boys have suffered sexual abuse.³ The consequences of child abuse for its victims are substantial, in many cases compromising the victim's critical development

* School of Law, National University of Ireland Galway.

¹ H. McGee et al., *Sexual Abuse and Violence in Ireland* (Liffey Press and Dublin Rape Crisis Centre, 2002) (the *SAVI Report*), available online at <<http://www.drcc.ie/wp-content/uploads/2011/03/savi.pdf>> (accessed 30 September 2019). The study involved a telephone survey of 3,118 adults (18 years and upwards).

² The 2002 Census shows a total of 2,904,172 persons aged 18 and over in Ireland at that time, more or less evenly split between males and females. The Census figures are available at <www.cso.ie> (accessed 26 March 2020).

³ World Health Organisation, *Global Status Report on Violence Prevention*, 2014, (WHO 2014) 70. See B. Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal developments offer new ways to facilitate disclosure' (2019) 88 *Child Abuse & Neglect* 337, 337 (summarising other recent sources that support these estimates).

and persisting through his or her life.⁴ For as long as it remains hidden, child abuse is difficult to deal with. It is possible that the child victims themselves will report the abuse, but experience suggests that this is relatively unusual.⁵ Parents, responsible for a large proportion of substantiated incidents of abuse, rarely seek assistance.⁶ Thus, reliance must be placed on others with whom victims have interaction. Experience has shown, however, that many childcare and healthcare professionals have been reluctant to report suspected child abuse. For that reason, many countries have enacted so-called mandatory reporting laws. Ireland resisted enacting such laws until 2015, preferring instead a discretionary system that relied upon moral authority. With the enactment of the Children First Act 2015, however, Ireland adopted a mandatory reporting system, which came into effect on 11 December 2017.

The purpose of this paper is to review the new Irish reporting regime. Section I provides an overview of the development of the discretionary reporting system that existed in Ireland until 2017. Section II briefly explains the characteristics of mandatory reporting laws. Section III sets out an overview of the new mandatory reporting system in Ireland. Section IV provides an assessment of that new system; initial figures suggest some mixed results. It will also be argued that that some nuance should be introduced to allow a greater degree of respect for victim autonomy.

SECTION I – DISCRETIONARY REPORTING IN IRELAND

The Irish Department of Health published its first official guidelines to assist in the identification, investigation and management of the physical and sexual abuse of children in 1983.⁷ These *Guidelines* made no mention of any duty – legal, moral or otherwise – to report suspected child abuse. The Department revised the *Guidelines* in 1987,⁸ and in doing so expanded the notion of child abuse to include emotional abuse and severe neglect, in addition to physical and sexual abuse.⁹ The Department went on to state that ‘[a]ny person who knows or suspects that a child is being harmed or is at risk of harm, has a duty to convey his concern to the local health board’.¹⁰ This was the first time that any Irish State agency asserted the existence of a duty to report suspicions of child abuse. The duty was of moral authority only, however, and carried little direct legal significance.

This was the legal framework that existed in Ireland at the start of the 1990s. Over the next twenty-five years, a series of cases and official investigations forced Irish society to confront both the extent of child abuse in the country and the sheer inadequacy of the official response to it. In 1992, *X v. Attorney General* became perhaps the most controversial case heard in Ireland in decades. A fourteen-year old girl became pregnant when she suffered statutory rape at the hands of a neighbour, and was initially prevented from travelling to England for an

⁴ B. Mathews, ‘A Theoretical Framework for Designing and Evaluating Strategies to Identify Cases of Child Abuse and Neglect’, in B. Mathews and D.C. Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer 2015) 127, 134

⁵ B. Mathews & D.C. Bross, ‘Mandatory Reporting is Still a Policy with Reason: Empirical evidence and philosophical ground’ (2008) 32 *Child Abuse & Neglect* 511, 512.

⁶ *ibid.*

⁷ Department of Health, *Non-Accidental Injury to Children: Guidelines on Procedures for the Identification and Management of Non-Accidental Injury to Children* (Department of Health 1983). The Guidelines treated sexual abuse as a subset of physical abuse.

⁸ Department of Health, *Guidelines on Procedures for the Identification and Management of Child Abuse* (Department of Health 1987).

⁹ *ibid* para 1.2.

¹⁰ *ibid* para 3.1.

abortion.¹¹ The following year, in the *Kilkenny Incest Case*, a father faced a fifty-six count indictment in respect of sexual offences against his daughter, and pleaded guilty to six specimen counts of rape, incest and assault, and was sentenced to seven years imprisonment.¹² The daughter had suffered this abuse over a fifteen-year period, and it emerged that healthcare professionals and social workers had interacted with her during that period but none had intervened. Three years later, the *Kelly Fitzgerald Case*, involving a fifteen-year old girl who died from severe neglect and physical abuse at the hands of her parents, further illustrated the failure of health authorities to intervene to protect a child at risk.¹³

The Fr. Brendan Smyth case educated Irish society as to the reality of clerical sexual abuse. Smyth had been arrested in Northern Ireland in 1991 in connection with multiple counts of child sexual abuse stretching back to the 1970s.¹⁴ Evidence showed that the Church authorities had been aware of Smyth's activities for two decades, but had done no more than to move him between parishes, dioceses and even countries, thereby facilitating the abuse of a large number of children. The lessons from the Smyth case were cemented by an investigation into allegations of sexual and physical abuse at a large residential home called Madonna House, which was under the control of the Sisters of Charity.¹⁵ One staff member was convicted of sexual assaults, and the investigation found multiple deficiencies in the running of the institution.

Kilkenny Incest Investigation Report

The cases mentioned above all came to light between 1992 and 1996, and they pointed to a serious failure by the Irish State to protect children from abuse taking place in Irish homes and Church-run institutions. They provided the backdrop against which the Irish child protection system developed. The Law Reform Commission considered the issue of child sexual abuse in 1989-1990,¹⁶ and recommended the introduction of a mandatory reporting regime as a 'clear and unequivocal public statement that child sexual abuse is something that society will not tolerate'.¹⁷ It was the completion of the official investigation into the Kilkenny Incest Case in 1993, however, that drove efforts to reform the child protection system in Ireland.¹⁸ The investigation, chaired by a leading family lawyer, Catherine McGuinness, S.C., concluded that the health and social care professionals who had dealt with the victim in the case had each responded as best they could *as individuals*. However, the absence of a central recording system, and constraints deriving from the tradition of privacy, meant that no individual professional was in a position to see the full picture.¹⁹ To remedy this, the investigation team made multiple recommendations:

¹¹ [1992] 1 IR 1. The High Court issued an injunction against the girl travelling on the basis that the Irish Constitution recognised the unborn as a human being, and accordingly the possible harm to the mother through continuation of the pregnancy had to be balanced against the certainty of death to the unborn through an abortion. The Supreme Court reversed this decision, thereby establishing a constitutional right to travel to avail of services lawfully available in other jurisdictions.

¹² Kilkenny Incest Investigation, *Report* (Department of Health 1993).

¹³ Joint Oireachtas Committee on the Family, *Interim Report: Kelly – A Child is Dead* (Oireachtas 1996).

¹⁴ See C. Moore, *Betrayal of Trust: The Fr. Brendan Smyth Affair and the Catholic Church* (Marino Press 1995).

¹⁵ Department of Health, *Report of Inquiry into the Operation of Madonna House* (Department of Health 1996).

¹⁶ Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (Law Reform Commission 1989); Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990) (Law Reform Commission 1990).

¹⁷ Law Reform Commission, *Consultation Paper* (n 16) para 2.04. The Commission went on to argue that the need to protect children should override the usual obligation of confidentiality observed by healthcare professionals. The Commission maintained its recommendation in its subsequent report.

¹⁸ Kilkenny Incest Investigation (n 12).

¹⁹ *ibid* 87-89.

- The introduction of a system of mandatory reporting, but only in respect of designated persons who interact with, or have responsibility for, children.
- Anyone making a report in good faith, whether mandated or not, should be immune from legal proceedings in respect of that report.
- The development of a standardised reporting system, and written protocols on inter-professional and inter-agency collaboration.
- The introduction of guidelines as to case management.
- Abuse should be clearly defined in the official Guidelines.²⁰

The Irish Government moved relatively quickly to implement some of these recommendations. In 1995, the Garda Síochána (the Irish police) and the Department of Health agreed a protocol to systematise the flow of information between the two agencies.²¹ In 1997, the Irish government committed to revising the *Guidelines*,²² which they did in 1999.²³ These new *Guidelines* contained detailed definitions of the four kinds of abuse, along with a list of indicators for each kind. The *Guidelines* also set out the procedures to be followed upon receiving a report. Finally, the Oireachtas enacted the Protections for Persons Reporting Child Abuse Act 1998, which provides protection from civil liability for anyone making such a report reasonably and in good faith, and prohibits an employer from imposing any penalty upon an employee who makes such a report.²⁴

The Cloyne Report

Pressure for the introduction of mandatory reporting in Ireland increased as further revelations of child abuse continued throughout the first decade of the twenty-first century. The *Ferns Report* in 2005 uncovered evidence of clear failures by Church authorities to deal with allegations against twenty-one priests in the Diocese of Ferns over a forty-year period.²⁵ The *Murphy Report* in 2009 detailed failures by the Church authorities in the Dublin Archdiocese in dealing with allegations against priests over a thirty-year period.²⁶ The *Ryan Report*, published in 2009, uncovered physical and sexual abuse over many years in reformatory and industrial schools run by the Church.²⁷ The publication in 2011 of the *Cloyne Report*, however, proved to be the tipping point.²⁸ All the previous reports had looked at historical allegations of abuse, and in 1996 the Church had developed a set of procedures to deal with new allegations of child sexual abuse.²⁹ The *Cloyne Report* looked into allegations made against nineteen priests in the Cloyne Diocese since 1996, and found that the diocesan authorities had failed to

²⁰ *ibid* 97, 99-101.

²¹ An Garda Síochána and Department of Health, *Notification of Suspected Cases of Child Abuse between Health Boards and Gardai* (Department of Health 1995).

²² Department of Health, *Putting Children First: Promoting and Protecting the Rights of Children* (Department of Health 1997) 14.

²³ Department of Health and Children, *Children First: National Guidelines for the Protection and Welfare of Children* (Government of Ireland 1999).

²⁴ Sections 3 and 4, respectively.

²⁵ Murphy et al., *The Ferns Report* (Department of Health 2005).

²⁶ Commission of Investigation into the Dublin Archdiocese, *Report* (Department of Justice and Equality 2009).

²⁷ Commission to Inquire into Child Abuse, *Report* (five vols.) (Department of Health 2009).

²⁸ Commission of Investigation into the Dublin Archdiocese, *The Cloyne Report* (Dublin: Department of Justice and Equality, 2011). The same team that investigated the Dublin Archdiocese investigated the Cloyne Diocese. Buckley and Buckley point out that public anger on publication of the Dublin and Cloyne diocesan reports also assisted in the introduction of a system of mandatory reporting. H. Buckley and R. Buckley, 'The Sins of the (Irish) Fathers: Is Mandatory reporting the Best Response?', in B. Mathews and D.C. Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer 2015) 275, 278.

²⁹ Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious, *Report on Child Sexual Abuse: Framework for a Church Response* (Veritas 1996).

take steps to protect children. In particular, contrary to the Church's own guidelines, allegations of child sexual abuse were not reported to the Gardaí, and there was evidence of active attempts to coverup allegations. Thus, it became apparent that a discretionary system of reporting could no longer be relied upon. The Government immediately committed itself to introduce a suite of legislation and policies to strengthen child protection.³⁰ The Criminal Justice (Withholding Information on Offences against Children and Vulnerable Persons) Act 2012 makes it an offence, punishable by up to ten years' imprisonment, for a person who knows or believes that a scheduled offence has been committed against a child or vulnerable person, to fail without reasonable excuse to disclose to the Garda Síochána information he or she believes might be materially useful in prosecuting the offender.³¹ Simultaneously, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 established a national vetting system in respect of organisations involved in work or activities relating to children or vulnerable persons. Also in 2012, the Government successfully introduced a constitutional amendment to enshrine children's rights into the Irish Constitution.³² In 2014, the Government amalgamated several child protection functions into a new Child and Family Agency, better known as *Tusla*.³³ Finally, the Government committed itself to introducing a system of mandatory reporting.

SECTION II – MANDATORY REPORTING LAWS³⁴

A mandatory reporting law is one that imposes a legal obligation on specified groups to report known or suspected cases of child abuse to specified State agencies. Mathews describes mandatory reporting laws as 'heterogeneous, organic, flexible mechanism[s] enabling social intervention where otherwise such intervention is severely compromised or impossible'.³⁵ Mandatory reporting began in the United States, and is usually attributed to the work of Henry Kempe who, in 1962, published work on 'battered-child syndrome', or the intentional infliction of serious injuries upon young children.³⁶ Kempe noted that medical professionals were

³⁰ *Joint Statement by the Minister for Justice, Equality and Defence, Mr. Alan Shatter, T.D., and the Minister for Children and Youth Affairs, Ms. Frances Fitzgerald, T.D., on the publication of the Commission of Investigation Report into the Catholic Diocese of Cloyne*, 13 July 2011, available online at <<http://www.justice.ie/en/JELR/Pages/Cloyne-Joint-Statement>> (accessed 4 October 2019).

³¹ Sections 3 and 4 (information about offences against children and other vulnerable persons, respectively). The scheduled offences are set out in Schedules One and Two, and include homicide, most sexual offences, pornography and human trafficking, and most non-fatal offences against the person. It might be noted that section 8 of the Criminal Law Act 1997, as amended, contains a general offence of concealing information that might be of material assistance in the prosecution or conviction of the perpetrator of an arrestable offence in return for any consideration other than compensation for the loss or injury involved. The Criminal Law Act 1997, in section 2(1), defines an arrestable offence as one that attracts a sentence of imprisonment for at least five years, or an attempt to commit such an offence. By implication, therefore, most serious forms of child abuse will constitute an arrestable offence. For discussion of the different forms of reporting obligations, see Mathews (3).

³² Thirty-First Amendment of the Constitution (Children) Act 2012, accepted by fifty-eight percent of the electorate in a referendum.

³³ Tusla came into being on 1 January 2014 by virtue of the Child and Family Agency Act 2013. The agency's primary functions, set out in section 8 of the Act, are to support and promote the development, welfare and protection of children, to support families, and to offer a range of services in respect of domestic, sexual or gender-based violence.

³⁴ For an overview, see B. Mathews, 'Mandatory Reporting Laws: Their Origin, Nature and Development over Time', in B. Mathews and D.C. Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer 2015) 3.

³⁵ *ibid* 4.

³⁶ C.H. Kempe et al., 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Assoc.* 17. This work is 'commonly considered the genesis of contemporary efforts to upgrade child protection programs'. D.J. Besharov, 'Although there were nearly a million reported cases of child abuse last year, our justice system fails to protect our most helpless victims of violence: Behind Closed Doors' (1980) 3(2) *Family Advocate* 2 and 29, 3.

reluctant to report such cases. The first mandatory reporting law was therefore focused on physicians and the physical abuse of children,³⁷ and Kempe's efforts were highly successful: Between 1963 and 1967, every U.S. State introduced a mandatory reporting statute that required physicians to report suspicions of physical child abuse to the authorities.³⁸ From this beginning, mandatory reporting laws in various forms have spread to many other countries, especially Australia and Canada.³⁹ These laws form part of a broader child protection system, and in their modern guise they allow for what has come to be known as a *differential response* which allows for flexibility in child protection.⁴⁰ This evolution came about through recognition that children in different adverse circumstances require different responses:

[A]n otherwise happy and healthy 8 year old who sometimes does not have appropriate clothing or food due solely to his single mother's poverty requires a far different response to a 3-week old neonate whose drug-addicted parents beat him severely, and will not engage with support.⁴¹

McTavish et al. note that mandatory reporting laws 'may be broad or narrow depending on a number of factors, such as the types of reportable child maltreatment, the degree of harm deemed to be reportable, the source of maltreatment and the persons who are required to file a report'.⁴² Nevertheless, there are usually at least three core elements:

1. Mandated Persons

All mandatory reporting laws impose a reporting obligation upon specified groups of individuals. These mandated persons are 'sentinels for the child's welfare'.⁴³ Eighteen American States have enacted a *Universal Mandated Reporting Law* that requires anyone who suspects child abuse to make a report.⁴⁴ The Northern Territory in Australia has a similarly broad statute.⁴⁵ Other jurisdictions are more focused, limiting the obligation to specified groups of professionals. Western Australia has enacted one of the most focused statutes, which limits the reporting obligation to teachers and boarding school supervisors, police and medical personnel.⁴⁶ Most other jurisdictions impose the obligation upon a wider variety of professionals involved in healthcare, education and law enforcement.

³⁷ L. Bell and P. Tooman, 'Mandatory Reporting Laws: A Critical Overview' (1994) 8 *International Journal of Law & Family* 337; G.B. Melton, 'Mandated Reporting: A Policy Without Reasons' (2005) 29(1) *Child Abuse & Neglect* 9, 9-10.

³⁸ E. Hutchison, 'Mandatory Reporting Laws: Child Protective Case Finding Gone Awry?' (1993) 38(1) *Social Work* 56, 56-7.

³⁹ B. Mathews and M. Kenny, "Mandatory Reporting Legislation in the USA, Canada and Australia: A cross-jurisdictional review of key features, differences and issues" (2008) 13(1) *Child Maltreatment* 50-63. See also Mathews (n 3), at 342 (noting the jurisdictions in which some form of mandatory reporting now exist).

⁴⁰ See, for example, H. Buckley, 'Differential Responses to Child Protection Responses' (2007) 10(3) *Irish Journal of Family Law*, 3; G. Shannon, *Third Report of the Special Rapporteur on Child Protection* (Oireachtas 2009) 17-21.

⁴¹ Mathews (n 34) 12.

⁴² J. McTavish et al., 'Children's and caregivers' perspectives about mandatory reporting of child maltreatment: a meta-synthesis of qualitative studies' (2019) 9 *British Medical Journal Open* e025741, 1-2.

⁴³ Mathews (n 4) 137.

⁴⁴ K.S. Krase and T.A. DeLong-Hamilton, 'Comparing reports of suspected child maltreatment in states with and without Universal Mandated Reporting' (2015) 50 *Children & Youth Service Rev.* 96, 96.

⁴⁵ Care and Protection of Children Act 2007, section 26.

⁴⁶ Children and Community Services Act 2004, section 124B, amended by the Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008.

2. Abuse to be Reported

As noted above, the original mandatory reporting laws in the United States focused on the physical abuse of children, but most modern statutes take a more expansive view of child abuse and include emotional and sexual abuse and neglect. Some jurisdictions, however, are more limited; Western Australia, for example, limits its obligation to the reporting of child sexual abuse.

3. Sanctions

In most jurisdictions, the obligation to report is backed by the threat of criminal liabilities, most of which are relatively minor. In New York, a wilful failure to report suspected child abuse is classified as a Class A misdemeanour, punishable by up to a year in jail or a fine of US\$1,000, or both.⁴⁷ In California, the penalty is up to six months in jail and/or a fine of up to US\$1,000.⁴⁸ In Australia, Western Australia has set a maximum fine of AUD\$6,000 (US\$4,000).⁴⁹ In the Northern Territory, by contrast, the maximum penalty is a fine of up to 200 penalty units, which in 2018-19 was worth AUD\$31,500 (about US\$23,600).⁵⁰ It is worth noting that, unusually, New South Wales has removed the threat of criminal sanction (previously set at 200 penalty points) from its mandatory reporting regime.⁵¹

SECTION III – MANDATORY REPORTING IN IRELAND

The Irish Government introduced the Children First Act 2015 expressly to ‘[move] from a culture of “should report” to one of “must report”’.⁵² This Act was signed into law on 19 November 2015, but the mandatory reporting system only came into effect on 11 December 2017, and was backed by a revised set of *Guidelines* published at the same time.⁵³ In essence, the 2015 Act inserted a new reporting track into the child protection system that applies to mandated persons. This track runs in parallel with the pre-existing discretionary scheme that continues to apply to non-mandated persons.

1. Mandated Persons

The 2015 Act imposes a reporting obligation only upon specified groups, a list of which is contained in Schedule 2 of the Act. These groups are found mainly in the health, education,

⁴⁷ New York Social Services Law, Article 6, Title 6, §420(1).

⁴⁸ California Penal Code, 11166(c).

⁴⁹ Children and Community Services Act 2004, section 124B.

⁵⁰ Care and Protection of Children Act 2007, s.26. Penalty units are index-linked penalties set annually; for 2018-2019, each unit was set at AUD\$155. See the Northern Territory government website at <https://nt.gov.au/employ/money-and-taxes/taxes,-royalties-and-grants/territory-revenue-office/penalty-units> (accessed 26 September 2019).

⁵¹ The Wood Commission, which reviewed the child protection system in New South Wales in 2008, accepted that the possibility of being prosecuted might have encouraged defensive reporting, even though no prosecutions had ever been brought. On that basis, the Commission recommended the removal of the penalty. See Special Commission of Inquiry into Child Protection Services in New South Wales, *Report, Volume 1* (2008) para 6.142, available at <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Child-Protection-Services-in-New-South-Wales-listing-438/cf8f20dbaf/Volume-1-Special-Commission-of-Inquiry-into-Child-Protection-Services-in-NSW.pdf> (accessed 10 March 2020). The New South Wales legislature enacted this recommendation in the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009.

⁵² Minister for Youth and Children Affairs, Frances Fitzgerald, T.D., Dáil Deb 30 April 2014, vol 839 (No 1).

⁵³ Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (Department of Children and Youth Affairs 2017).

youth welfare and law enforcement fields. It is apparent that Ireland has eschewed the universal mandated reporting approach set out in some American and Australian states. Doing so helps to avoid an avalanche of reports that might overwhelm the child protection system: the Law Reform Commission,⁵⁴ Tusla itself,⁵⁵ social workers⁵⁶ and the judiciary had expressed such concerns,⁵⁷ as did some legislators as well.⁵⁸ More positively, however, experience has shown that professionals involved in health, education and law enforcement are most likely to uncover incidents of child abuse, and their experience and expertise makes them more likely to recognise the signs of child abuse.⁵⁹ Such factors should reduce the number of unwarranted reports.

2. Obligations under the Act

Sections 14 and 16 set out the primary obligations arising under the 2015 Act. Section 14(1) provides as follows

[Where] a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that a child⁶⁰ –

- (a) has been harmed,
- (b) is being harmed, or
- (c) is at risk of being harmed

he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to [Tusla].

This obligation applies only when the knowledge, belief or suspicion arises in the course of the mandated person's employment or profession. So, if a mandated person learns of possible child abuse outside of his or her employment – from speaking to other parents at a parent/teacher meeting, for example – no legal obligation arises. Nor will any obligation arise in respect of

⁵⁴ Law Reform Commission *Report* (n 16) paras 1.04 and 1.07.

⁵⁵ '1,100 reports of suspected abuse since mandatory reporting', *Irish Examiner* (Cork, 26 January 2018) (reporting that Tusla expressed concern about a 150 percent increase in referrals).

⁵⁶ 'Will mandatory reporting of suspected child abuse improve or harm child protection?', *Irish Examiner* (Cork, 27 October 2017) (reporting on the views expressed by social workers expressed at the Sixth National Protection and Welfare Conference at UCC in October 2017). See also Buckley and Buckley (n 28) 289 (referring to an Irish doctoral study of 156 now mandated professionals, in which the fear of swamping the child protection system with inconsequential and unsubstantiated reports figured prominently).

⁵⁷ See *PO'T v. Child and Family Agency* [2016] 2 IR 300 (HC) (the High Court noting the new obligations on thousands of professionals, and wondering whether Tusla was in a position to carry out its expanded functions under the 2015 Act. The Court also noted the possible impact on the courts with a 'potentially commensurate increase in applications for judicial review').

⁵⁸ See, for example, Dáil Deb, 30 April 2014 vol 839 (No 1); Dáil Deb, 1 May 204, vol 839 (No 2); and Dáil Deb, 7 May 2014, vol 840 (No 2). Deputy Jeremy Buttimer, Chairman of the Oireachtas Joint Committee on Health and Children, noted that several contributors to pre-legislative Committee hearings had expressed concern that the new regime would 'cause defensive over-reporting, placing undue burdens on organisations, possibly overwhelming the State's child protection services and diverting resources from support and intervention services'. Dáil Deb, 1 May 204, vol 839 (No 2).

⁵⁹ See comments from Minister for Children and Youth Affairs, Dr. James Reilly, T.D., Dáil Deb, 30 April 2014, vol 839 (No 1). Palusci and Vandervoort found that large counties with universal reporting schemes had higher report rates, but that most of the additional confirmed reports were for neglect rather than for physical or sexual abuse. V.J. Palusci and F.E. Vandervoort, 'Effects of clergy reporting laws on child maltreatment report rates' (2014) 26(1) APSAC Advisor 16.

⁶⁰ Children First Act 2015, section 2(1) (adopting the definition of a child in section 2 of the Child Care Act 1991 – a person aged under eighteen excluding one who is or has been married).

consensual sexual activity between children, providing certain conditions are met.⁶¹ This exception was born from a concern not to “compromise the provision of services to the young people involved, [who] would not be willing to engage with services that would require a report to [Tusla]”.⁶²

Buckley argues that there is a ‘clear will on the part of professionals working with children to protect them from abuse where it is blatant’.⁶³ The Act does not limit the obligation to report to such cases, however; the threshold for reporting is reached when the mandated person ‘has reasonable grounds to suspect’ child abuse. But what constitutes reasonable grounds? The Act offers no definition, but research indicates that many professionals will require objective evidence of abuse before reaching this threshold. In their meta-synthesis of qualitative studies, McTavish et al note that mandated reporters prefer to make a report ‘only when they found physical evidence of abuse, such as physical injuries, bruises, broken bones, caries (and corresponding lack of treatment), or “total” changes in behavior’.⁶⁴ In a survey of over two hundred Canadian teachers, sixteen percent admitted to not reporting suspected cases of child abuse, with lack of evidence overwhelmingly the most frequently stated reason.⁶⁵ Kalichman and Brosig found that only fifteen percent of psychologists were willing to make a report based solely upon a subjective suspicion.⁶⁶ The majority of respondents believed they had a responsibility to find supportive evidence before making a report. A statement from a child that he or she had been abused, or especially physical signs of abuse, were the most frequently cited examples of factors constituting reasonable suspicion of abuse.⁶⁷ Other studies confirm that the absence of physical evidence is one of the principal barriers to reporting.⁶⁸ It seems likely, therefore, that many Irish mandated persons will require some form of objective evidence before being comfortable making a report to Tusla.

Section 14(2) of the Act obliges mandated persons to make a report as soon as practicable when a child discloses his or her belief that he or she has been, is being or is at risk of being harmed. Thus, the mandated person must report the child’s disclosure regardless of any verification. Indeed, the mandated person should make a report even if he or she disbelieves the child. Again, the obligation arises only when the child makes his or her disclosure to the mandated person during the latter’s employment or profession. Also, the obligations under sections 14(1)

⁶¹ Section 14(3). The child in question should be aged at least fifteen, there should be no more than two years between the parties’ ages and no material difference in the parties’ capacity and maturity, the relationship should not be intimidatory or exploitative, and the child should have indicated that he or she does not wish a report to be made. The mandated person is obligated to satisfy himself or herself that these conditions exist.

⁶² Minister for Children and Youth Affairs, Dr. James Reilly, Dáil Deb, 30 April 2015.

⁶³ R. Buckley, ‘The Children First Bill 2014: A Step in the Right Direction?’ (2015) 18(2) *Irish Journal of Family Law* 34, 38.

⁶⁴ J.R. McTavish et al., ‘Mandated reporters’ experiences with reporting child maltreatment: a meta-synthesis of qualitative studies’ (2017) 7 *British Medical Journal Open* e13942, at 5.

⁶⁵ K.A. Beck et al., ‘Knowledge, Compliance and Attitudes of Teachers towards Mandatory Child Abuse Reporting in British Columbia’ (1994) 19(1) *Canadian Journal of Education* 15. See also J.K. Bryant, ‘School Counselors and Child Abuse Reporting: A National Survey’ (2009) 12(5) *Professional School Counselling* 333.

⁶⁶ S.C. Kalichman and C.L. Brosig, ‘Practising Psychologists’ Interpretations of and Compliance with Child Abuse Reporting Laws’ (1993) 17(1) *Law & Human Behaviour* 83, 87.

⁶⁷ *ibid* 89, Table 3.

⁶⁸ See, for example, R. Hawkins and C. McCallum, ‘Effects of Mandatory Notification Training on the Tendency to Report Hypothetical Cases of Child Abuse and Neglect’ (2001) 10 *Child Abuse Review* 301; M.C. Kenny and A.G. McEachern, ‘Reporting Suspected Child Abuse: A Pilot Comparison of Middle and High School Counsellors and Principals’ (2002) 11(2) *Journal of Child Sexual Abuse* 59; A.D. Theodore and D.K. Runyan, ‘A survey of pediatricians’ attitudes and experiences with court in cases of child maltreatment’ (2006) 30 *Child Abuse & Neglect* 1353-63.

and (2) apply only in respect of information acquired or received after 11 December 2017.⁶⁹ That information might, however, relate to incidents of abuse that occurred prior to the Act coming into force. It is not clear, however, whether the obligations in section 14 apply in respect of an adult who discloses historic incidents of abuse that occurred during his or her childhood. Such a disclosure clearly falls outside the section 14(2) obligation; this provision states, ‘Where a child believes ... and discloses ...’ The use of the present tense indicates that the reporting obligation applies only to disclosures by persons who are children at the time the disclosure is made. Section 14(1) is less clear cut (see the wording, reproduced above). Arguably, a disclosure to a mandated person by an adult of abuse he or she suffered as a child constitutes information that a child has been harmed (albeit a long time ago), and therefore comes within the wording of the provision. Mandated persons should perhaps adopt such an expansive interpretation until the courts have had a chance to rule definitively on the matter.

On receipt of a report from a mandated person, section 16(1) empowers Tusla to ‘take such steps as it considers requisite’. There is no obligation to take any steps: it is open to Tusla to conclude without further investigation that the report is without merit. However, Tusla also has the power to request assistance from any mandated person that it reasonably believes is in a position to assist or to give information, providing that such a request is necessary and proportionate. Tusla can make this request of any mandated person, not just the one who made the report. By virtue of section 16(2), the mandated person is legally obliged to render the assistance requested. That assistance then becomes privileged – any information, document or thing handed over cannot give rise to any civil liability, nor can it be admissible in any proceedings.⁷⁰

It should not be assumed that only mandated persons acting in the course of their employment should report suspected child abuse. The pre-existing moral obligation on non-mandated persons was restated in the 2017 *National Guidance*: ‘society ... has a duty to promote the welfare and safety of children’, and that ‘[a]cting sensitively but responsibly is a universal duty’.⁷¹ Further, the Department of Children and Youth Affairs has pointed out that ‘a failure to act when abuse or neglect is occurring can result in children being left in harmful situations, and could potentially result in long term damage to their well-being’.⁷² Thus, mandated persons have both a moral and a legal duty to report abuse; everyone else has only a moral duty to do so.

3. What must be reported

The obligations under sections 14 and 16 arise when a mandated person reasonably suspects that a child has been, is being or is at risk of being harmed. Section 2 of the Act defines harm to consist of ‘(a) assault, ill-treatment or neglect of the child in a manner that seriously affects or is likely to seriously affect the child’s health, development or welfare, or (b) sexual abuse’. For the purposes of the obligation to report, it is irrelevant that the harm was caused by a single act or omission, or a series of acts or omissions. Thus, a mandated person must make a report even if the child was harmed in a one-off incident that is unlikely to be repeated.

The 2015 Act does not define assault, but presumably it will follow the definition of an assault in the general criminal law – essentially, non-consensual contact or an act that gives rise to a

⁶⁹ Children First Act 2015, section 14(5).

⁷⁰ *ibid* section 16(3).

⁷¹ Department of Children and Youth Affairs, *Children First: National Guidance* (n 53) 2.

⁷² *ibid*.

reasonable fear of imminent unwanted contact.⁷³ Ill-treatment is defined as abandoning or cruelly treating the child, or causing, procuring or allowing the child to be abandoned or cruelly treated. It is not clear to what extent this concept may cover emotional abuse, which is not directly mentioned in the Act even though it has been recognised as a form of child abuse in all official Guidelines published since 1987, including the 2017 revised Guidelines.⁷⁴ This latter document explains that emotional abuse arises when a ‘child’s basic need for attention, affection, approval, consistency and security are not met due to incapacity or indifference from their parent or caregiver.’⁷⁵ Some forms of severe emotional abuse will reach the level of cruelty, and therefore will come within the definition of ill-treatment.⁷⁶ As we will see later, reports of emotional abuse form a substantial proportion of the total number of child abuse reports to Tusla since the new regime came into force.

Neglect means depriving the child of adequate food, warmth, clothing, hygiene, supervision, safety or medical care. The Department of Children and Youth Affairs sets out a list of indicators of child neglect, including a child being left alone without adequate care and supervision, malnourishment, a lack of adequate clothing, an inattention to basic hygiene, a persistent failure to attend school, or abandonment or desertion.⁷⁷ Assault, ill-treatment and neglect must *seriously* affect, or be likely to *seriously* affect, the child’s health, development of welfare before qualifying as harm for the purposes of the 2015 Act.⁷⁸ In other words, there is a *de minimis* level, below which the legal obligation to report will not arise. However, the point at which a child has been *seriously* affected, as opposed to having been *merely* affected, is unclear, so a mandated person who suspects that a child has suffered any level of harm as a result of assault, ill-treatment or neglect would be better advised to make a report.

For the purposes of the 2015 Act, sexual abuse means the wilful exposure of the child to pornography, wilful sexual activity in the presence of the child, or an offence set out in Schedule 3 to the Act. Schedule 3, amended by the Criminal Law (Sexual Offences) Act 2017, contains a long list of sexual offences: rape, sexual assault and aggravated sexual assault, incest, solicitation, statutory rape, a person in authority offence,⁷⁹ child trafficking for sexual exploitation, allowing a child to be used for child pornography, organising child prostitution or child pornography, child participation in pornography, human trafficking, endangerment of a child, causing or encouraging a sexual offence against a child, or sexual exploitation of a child. Other forms of harm – assault, ill-treatment or neglect – must be reported if they seriously affect or are likely to seriously affect the child’s health, development or welfare, but no such limitation applies in respect of sexual abuse. The Oireachtas clearly took the view that any form of sexual abuse will inherently seriously affect a child’s development, but such an assumption cannot be made in respect of the other forms of abuse.

⁷³ Non-Fatal Offences against the Person Act 1997, section 2. Section 28 of the 2015 Act abolished the common law defence of reasonable chastisement – a parent who assaults a child for disciplinary reasons now commits the offence of assault.

⁷⁴ Department of Children and Youth Affairs, *Children First: National Guidance* (n 53) 8-9.

⁷⁵ *ibid* 8.

⁷⁶ It is noteworthy that in their published definitions of the forms of abuse, Tusla specifically links emotional neglect and ill-treatment. *ibid*.

⁷⁷ *ibid*.

⁷⁸ Welfare is defined by section 2 to mean the moral, intellectual, physical, emotional and social welfare of the child.

⁷⁹ This offence arises when a person in authority engages in sexual activity with a person aged between 17 and 18. Criminal Law (Sexual Offences) Act 2006, section 3A, inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017.

4. Penalties

One of the usual core elements of a mandatory reporting regime is that non-compliance can lead to state-imposed punishment. Some of these penalties can be substantial – up to AUD\$31,500 in the Northern Territory of Australia, for example. The Irish regime is unusual in that it carries no penalty for violations.⁸⁰ The Heads of Bill, published in 2012, had indicated that a breach should result in an indictable prosecution and up to five years' imprisonment and an unlimited fine,⁸¹ but when published as a Bill, this provision had been dropped. Various parties criticised this development. The principal spokesperson for the parliamentary Opposition, Robert Troy, T.D., labelled the Bill as toothless.⁸² The Saving Childhood group, which includes several organisations that provide services to children who have been abused, expressed their concern at the absence of a penalties provision: The CEO of One in Four, for example, said that '[w]ithout any clear sanctions for failure to comply included in the legislation, it is hard to see how a completely consistent approach from all will result'.⁸³ The Minister argued, however, that violations of the 2015 Act could result in punishment under the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 (see above). However, the 2012 Act is rather more narrow than the obligation imposed by the 2015 Act. The 2012 offence applies only in respect of information that the individual knew or believed would be of material assistance to the punishment of a person who had harmed a child. The 2015 Act, however, requires a mandated person to make a report when he or she knows, believes or reasonably suspects that a child has been harmed, or whenever a child discloses harm. Second, the 2012 Act allows for two defences:

- a) that the individual had a reasonable excuse for withholding the information;⁸⁴ or,
- b) in some circumstances, the child or his or her parent or guardian did not wish a report to be made to Gardaí.⁸⁵

These defences have no mirror in the 2015 Act. Thus, if a mandated person fails to make a report out of respect for the victim's wishes, he or she breaches the mandatory reporting requirement under the 2015 Act but may have a defence under the 2012 Act.

Second, the Minister noted that '[t]he option to report a person to the relevant fitness to practice committee of his or her regulatory body remains open to [Tusla]'.⁸⁶ The Minister was satisfied that 'there may be implications for a person's employment if he or she is clearly seen not to have reported something they should have reported'.⁸⁷ The Minister's successor similarly indicated that mandated persons who fail to report child abuse 'will be reported to their professional bodies and there will be consequences from the professional body. Getting struck off as a doctor is pretty catastrophic'.⁸⁸ The Wood Commission in New South Wales took a similar view, arguing that 'the key agencies which employ mandatory reporters should have adequate systems in place to ensure compliance with the terms of the legislation'.⁸⁹ It seems

⁸⁰ As noted earlier, New South Wales has removed the criminal penalty from its mandatory reporting scheme.

⁸¹ Children First Heads of Bill 2012, Head 20.

⁸² See Dáil Deb, 30 April 2014, vol 839 (No 1).

⁸³ Press Release, 14 April 2014, available at <<https://www.childrensrights.ie/resources/saving-childhood-group-welcomes>> (accessed 10 March 2020). The Saving Childhood group comprises Barnados, CARI, Children's Rights Alliance, Dublin Rape Crisis Centre, Empowering People in Care (EPIC), ISPCC, and One in Four.

⁸⁴ Section 2(1).

⁸⁵ Section 4. This provision contains some complex limitations on these defences that are not relevant for present purposes.

⁸⁶ Minister for Children and Youth Affairs, Frances Fitzgerald, T.D., Dáil Deb, 7 May 2014, vol 840 (No 2).

⁸⁷ *ibid.*

⁸⁸ Minister for Children and Youth Affairs, Dr. James O'Reilly, Dáil Debates, T.D., 30 April 2015.

⁸⁹ Wood Commission (n 51) para 6.139.

wrong in principle, however, to leave the enforcement of a public duty to a private regulatory body. In any case, there is no guarantee that the body in question will take action against the mandated person. Indeed, the body might find that the person had reasonable grounds for his or her action, or that his or her failure to make a report fitted within his or her professional ethical duties.

It is not clear whether enforcement of the 2015 Act through a civil action for breach of a statutory duty will be possible.⁹⁰ Regrettably, the Act itself makes no provision for such a case, so whether such a remedy exists will be a matter of interpretation in each case.⁹¹ The approach of the Irish courts has been inconsistent but they have ruled in the past that a duty imposed for the benefit of the public will not necessarily be enforceable by an individual even if the individual in question is a member of the class intended to benefit directly from the imposition of the statutory duty.⁹²

5. Procedures

The Law Reform Commission noted that a report of suspected child abuse is only that – a report.⁹³ On its own, a report makes little difference, and for this reason, the Special Rapporteur on Child Protection observed that a mandatory reporting regime of itself is neither good nor bad. What matters is the larger system into which the reporting regime is embedded.⁹⁴ The updated *National Guidance* sets out the process that Tusla follows upon receipt of a report of suspected child abuse.⁹⁵ The first step is a preliminary enquiry, at which Tusla’s social workers will collect the relevant information to determine the immediate safety of the child, and to decide whether the threshold for harm has been met. This step should be completed within five days of receiving the report. From this first step, the social workers will decide whether the case can be closed with no further action, whether the case is appropriate for family support, or whether the second step – an Initial Assessment – should be conducted. The Initial Assessment is to determine whether a formal intervention is required, and should be conducted within forty days of receipt of the report. If a child abuse concern is identified, Tusla can initiate an intervention that may involve a Child Protection Conference, a report to the Garda Síochána,⁹⁶ and the listing of the child on the Child Protection Notification System.⁹⁷

⁹⁰ See B. McMahon & W. Binchy, *Law of Torts* (4 edn) (Bloomsbury Professional 2013) ch 21.

⁹¹ See judgment of Clarke J. (as he then was) in *Atlantic Marine Supplies Ltd. v. Minister for Transport* [2010] IEHC 104 (HC).

⁹² See, for example, *Doherty v. South County Dublin County Council* [2007] IEHC 4 (HC); *Siney v. Dublin Corporation* [1980] IR 400 (SC).

⁹³ Law Reform Commission, *Report* (n 16) para 1.06.

⁹⁴ Shannon (n 40) para 1.9.

⁹⁵ Department of Children and Youth Affairs, *Children First: National Guidance* (n 53) ch 5. Since 2017, however, ‘Tusla introduced a new national approach to practice (Signs of Safety) on the 5th February 2018. This new approach introduced some new changes to the preliminary enquiry and initial assessment steps of the referral process.’ Tusla, *Quarterly Service Performance and Activity Report, Quarter 1 2019* (Tusla 2019) 13.

⁹⁶ The relationship between Tusla and An Garda Síochána regarding child protection is now governed by *Children First – Joint Working Protocol for An Garda Síochána/Tusla – Child and Family Agency Liaison* (Tusla and An Garda Síochána 2017).

⁹⁷ The Child Protection Notification System (CPNS) records the names of children who have been made the subject of a Child Protection Plan at a Child Protection Conference. The CPNS can be accessed only by a small group of people such as doctors and Gardaí who might have to make decisions about the safety of a child. See Tusla leaflet, *Child Protection Conferences – Information for Parents*, available at <https://www.tusla.ie/uploads/content/Parent_leaflet_-_Final.pdf> (accessed 30 December 2019).

6. Immunity

The Kilkenny Incest investigation recommended that those who report suspected cases of child abuse receive legal immunity. In a recent study by Walsh and Jones of 556 childcare professionals, thirty-one percent of respondents cited fear of legal ramifications for accusations that proved false as a barrier to reporting.⁹⁸ To address such concerns, the Protections for Persons Reporting Child Abuse Act 1998 provides protection from civil liability for anyone making such a report reasonably and in good faith, and prohibits an employer from imposing any penalty upon an employee who makes such a report.⁹⁹ These are statutory defences, however, and must be asserted in court. In 2018, a childcare worker was awarded compensation under the 1998 Act in respect of actions taken against her as a result of her raising child abuse concerns with management.¹⁰⁰ This case illustrates the kind of personal consequences that can follow the making of a report of child abuse. That the reporter ultimately was vindicated does not remove the legitimacy of a professional's concern of legal retaliation. And such vindication is time-consuming and expensive, and is never guaranteed. For these reasons, Sippel and Guardia have argued that protective legislation for child abuse reporters has given rise to an 'immunity myth'.¹⁰¹

IV. DISCUSSION

International experience and research make a compelling case for the introduction of some form of mandatory reporting in Ireland. The 2015 Act inserted into the child protection system a new mandatory track of reporting that runs parallel to the pre-existing discretionary reporting track. But the system enacted ignores the autonomy of victims of child abuse. The Act requires mandated persons to make a report to Tusla once the threshold has been reached, regardless of the victim's wishes.¹⁰² Indeed, there is no requirement that the mandated person even ask the victim for an opinion, much less that his or her opinion be taken into account in making the report. Somewhat ironically, when performing its child protection functions, Tusla (the receiver of the report) is obligated to 'ensure that the views of [an] individual child where that child is capable of forming and expressing his or her own views, be ascertained and given due weight having regard to the age and maturity of the child'.¹⁰³

In most cases, victims will want a report to be made: An independent inquiry into child abuse in Britain collated the views of 130 victims, and found that eighty-eight percent of respondents supported the introduction of mandatory reporting in that jurisdiction.¹⁰⁴ Thus, in the majority of cases, there will likely be no conflict between the victim's wishes and the mandated person's legal obligation to report. However, the minority in the British study indicated a preference for

⁹⁸ W. Walsh and L. Jones, 'Factors that influence child abuse reporting: A survey of child-serving professionals' (2015), cited by F. Franne and N. Guardia, 'At issue: child abuse reporters and the immunity myth' (2019) 31(1) APSAC Advisor 4, 6.

⁹⁹ Sections 3 and 4, respectively.

¹⁰⁰ See *A Care Worker v. A State Agency*, unrep. Workplace Relations Commission (Irl), 19 November 2018. The complainant had been placed on long-term administrative leave having been subjected to bullying and intimidation by co-workers.

¹⁰¹ Franne and Guardia (n 98).

¹⁰² As noted above, under certain conditions, consensual sexual activity between children does not have to be reported to Tusla. Children First Act 2015, section 14(3).

¹⁰³ Child and Family Agency Act 2013, section 9(4), as amended by Children First Act 2015, section 19.

¹⁰⁴ Independent Inquiry into Child Sexual Abuse, *Mandatory Reporting of Child Sexual Abuse: A Survey of the Victims and Survivors Forum*, April 2019, available at <<https://www.iicsa.org.uk/key-documents/10597/view/mandatory-reporting-child-sexual-abuse-a-survey-victims-survivors-forum.pdf>> (accessed 30 December 2019).

a system which would empower victims to make disclosures at their own pace.¹⁰⁵ This sense of empowerment is important; by definition, a victim of child abuse has already been disempowered at the hands of his or her abuser. The only real power that a victim has at that point is the decision whether or not to engage with the State. This is especially the case in a criminal context. The criminologist Nils Christie once described the victim of a crime as the ‘triggerer-off’ of the criminal justice system – he or she gets to decide whether or not to invoke the criminal justice system.¹⁰⁶ A large proportion of the reports made to Tusla involve acts that constitute criminal offences (see Table 2 below).¹⁰⁷ Tusla is obliged to report to the Gardaí without delay if they suspect that a crime has been committed.¹⁰⁸ This will result in an investigation, and possibly a criminal prosecution, that the victim might not want but has little power to control.

Christie’s point has similar application with respect to the State’s child protection and family support systems. Whether civil or criminal, once engagement has been initiated, the victim becomes relegated largely to the role of a passive observer. The State has appropriated the only decision that truly belongs to a victim, and has effectively compelled an engagement that the victim himself or herself may not have wanted.¹⁰⁹ Even if we view the issue of child abuse through the lens of a public health response, as some commentators do,¹¹⁰ a blanket appropriation seems unjustified. Even within a public health framework, the autonomy of an individual has some standing and should not be simply ignored. Dealing with child abuse is not the same as dealing with a communicable disease. Overriding the autonomy of infected patients’ in order to prevent a viral or bacterial epidemic is justified in the interest of the community as a whole: An infected person is an active danger to other members of the community. Child abuse, however, is not transmissible, and therefore will not sweep through a community. There will be occasions – many occasions, perhaps – when the victim’s wish to keep matters confidential must be overridden. A child victim’s knowledge and experience of the world is such that he or she may not be best placed to judge their own best interests, although their ability to do so increases as they get older – a greater degree of respect for autonomy therefore should be accorded to a seventeen-year old than to a ten-year old. Further, it is not uncommon for child victims of abuse to not recognise what is happening to them as abuse, again due to their limited knowledge of the world. Most importantly, a victim’s wishes must be overridden if it is apparent that someone else might be at risk of abuse: whatever autonomy a victim may have cannot justify endangering another person. But recognising these situations hardly justifies a blanket requirement to override a victim’s wishes in all cases regardless of the circumstances. In the event that a court interprets section 14 to include adult disclosures of historic cases of child abuse, the argument against a blanket disregard of victim autonomy would be even stronger (see discussion above).

¹⁰⁵ *ibid* 7.

¹⁰⁶ N. Christie, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1.

¹⁰⁷ About forty percent of reports made in 2018 concerned either physical or sexual abuse, all of which would constitute criminal acts. Many instances of neglect might also constitute offences such as the endangerment of children (Criminal Justice Act 2006, section 176) or child neglect (Children Act 2001, section 246).

¹⁰⁸ An Garda Síochána and Tusla *Joint Working Protocol* (n 96) 4; Department of Children and Youth Affairs, *Children First: National Guidance* (n 53) 42.

¹⁰⁹ R. McElvaney, ‘Disclosure of Child Sexual Abuse: Delays, Non-disclosure and Partial Disclose. What the Research tells us and Implications for Practice’ (2015) 24 *Child Abuse Review* 159, 166 (noting that young people’s fears of the consequences of disclosure may well be justified).

¹¹⁰ See, for example, B. Mathews, ‘The Nature of a Mandatory Reporting Law: What it is, and What it is Not’, in B. Mathews and D.C. Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 3; B. Mathews, *New International Frontiers in Child Sexual Abuse* (Springer, 2019).

It is true that removing discretion is ‘the very aim of mandatory reporting legislation’.¹¹¹ The history of reporting child abuse in Ireland provides ample justification for reducing the discretion accorded to those who become aware of children who have suffered harm. Nevertheless, a small degree of flexibility could be injected into the 2015 to give some recognition to the victim’s autonomy without fatally undermining the purpose of the 2015 Act. In all cases, reporting should be the default position. In the relatively rare cases in which victims prefer confidentiality, the mandated person should encourage the victim to allow a full report to be made, pointing to the benefits that flow from doing so. If the victim remains adamant about maintaining confidentiality, and the mandated person is satisfied that the abuse has stopped and that no other child is at risk, then his or her wishes should be respected. If the report is made anyway and discloses criminal acts, Tusla must inform the Gardaí who must commence an investigation. The victim may refuse to cooperate or to give a statement, in which case the investigation will go nowhere. A similar refusal to cooperate with Tusla will undermine their response as well. So what will have been gained by compelling the report in the first place? Instead, the mandated person could be permitted to make a partial report, disclosing the fact and nature of the abuse but withholding identifying details such as name and address. The mandated person might also be required to detail the steps being taken to deal with the disclosure of abuse and to assist the victim’s recovery. The mandated person therefore would remain under an obligation to make a report, but the level of detail in the report would be at the discretion of the victim (as opposed to that of the reporter). This flexibility would allow a level of official oversight while also respecting and promoting the victim’s autonomy.

Impact of Mandatory Reporting

The system created by the 2015 Act was enacted with near-unanimous political support, and had the support of various children’s rights non-governmental organisations.¹¹² The clear motivation behind the introduction of the Act was to compel anyone who suspected a case of child abuse to report those suspicions to Tusla. The *Cloyne Report* had shown that discretionary guidelines were insufficient to achieve this objective. International experience has shown that an increase in the number of reports is the invariable consequence of the introduction of mandatory reporting: any other result would be surprising.¹¹³ Australia provides an excellent example: all Australian states have enacted mandatory reporting in respect of at least some forms of child abuse. All states have seen the number of reports rise dramatically – quadrupling in Western Australia between 2006-08 and 2009-12,¹¹⁴ and in Queensland between 2001-02

¹¹¹ A. Takis, ‘The Mandatory Reporting Debate’ (2008) 8 *Macquarie Law Journal* 125, 126.

¹¹² N. McElwee, ‘Mandatory Reporting of Child Abuse in Ireland: Some Cautionary Comments’ (2000) 2(2) *Irish Journal of Applied Social Studies* 10 and 17 (noting that the Dublin Rape Crisis Centre, Barnados and the Irish Society for the Prevention of Cruelty to Children all endorsed mandatory reporting); H. Buckley, ‘Reforming the Child Protection System: Why we need to be careful what we wish for’ (2009) 12(2) *Irish Journal of Family Law* 27 (noting that child advocacy groups such as the ISPC, Barnados and the Children’s Rights Alliance have pushed for the introduction of mandatory reporting).

¹¹³ R. Best, “The New Mandatory Reporting Requirements” (2010), at <https://www.emilford.com.au/imagesDB/wysiwyg/NewMandatoryReportingRequirements_1.pdf> (accessed 1 March 2020).

¹¹⁴ B. Mathews et al., ‘Impact of a New Mandatory Reporting Law on Reporting and Identification of Child Sexual Abuse: A seven year time trend analysis’ (2016) 56 *Child Abuse & Neglect* 62.

and 2011-12,¹¹⁵ and doubling in New South Wales (NSW) between 2001-02 and 2007-08.¹¹⁶ More tellingly, Ben Mathews drew a direct comparison between the reporting of child sexual abuse in the Australian State of Victoria with that in Ireland in 2010.¹¹⁷ At that time, Victoria had a long-standing system of mandatory reporting, while Ireland still operated a fully discretionary system. These two jurisdictions are good comparators in terms of child populations, general wealth and estimated extent of child sexual abuse.¹¹⁸

Table 1: Reports Received and Substantiated in Ireland and Victoria

The Victorian authorities received almost twice as many reports as did the Irish authorities. The Victorian rate of substantiation (16.8 percent) was more than double that of Ireland (7.1 percent), but the actual numbers of substantiated cases in Victoria (989) was almost four times greater than in Ireland (209). As noted, prevalence studies suggest a comparable level of child sexual abuse in the two jurisdictions; the fact that Victoria uncovered four times as many confirmed cases as did Ireland suggests that the former was making greater progress in dealing with the issue than the latter. While causation is impossible to prove, it is inconceivable that the system of mandatory reporting in Victoria had not been a major factor in this success.

Australia also provides evidence of the direct effect of introducing a mandatory reporting regime. On 1 January 2009, a new law came into effect in Western Australia that requires specified groups (doctors, nurses, midwives, teachers and police) to report suspected cases of child sexual abuse.¹¹⁹ The number of reports made in 2009-2010, the first year of operation for their mandatory reporting law, was almost double that of the previous year – 1,676 to 3,149, with the largest increase coming from mandated groups (733 to 1,995).¹²⁰ The following year, the number of reports increased again by just over a fifth, and thereafter the number of reports plateaued.¹²¹

Early indications suggest that the Australian experience is being replicated in Ireland, although only figures for 2018 have been published:¹²²

Table 2: Reports of Child Abuse Received by Tusla, 2014-18¹²³

¹¹⁵ Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Queensland Child Protection Commission of Inquiry, 2013) para 2.4, available at <<https://www.cabinet.qld.gov.au/documents/2013/dec/response%20cpcqi/Attachments/report%202.pdf>> (accessed 30 September 2019).

¹¹⁶ Special Commission of Inquiry into Child Protection Services in NSW, *Report* (Special Commission of Inquiry into Child Protection Services in NSW, 2008) para 5.3, available at <<https://apo.org.au/sites/default/files/resource-files/2008/11/apo-nid2851-1183596.pdf>> (accessed 30 September 2019).

¹¹⁷ B. Mathews, 'Mandatory Reporting Laws and Identification of Child Abuse and Neglect: Consideration of differential maltreatment types, and a cross-jurisdictional analysis of child sexual abuse reports' (2014) 3 *Social Science* 460.

¹¹⁸ *ibid* 471-72.

¹¹⁹ Children and Community Services Act 2004, as amended by the Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008.

¹²⁰ Mathews et al. (n 114) 68 (Table 1).

¹²¹ *ibid*.

¹²² Tusla (n 95) 10.

¹²³ Data drawn from Tusla's *Quarterly Performance and Activity Data* and *Quarterly Management Data Activity Reports*, 2014-2018, available at <www.tusla.ie/data-figures> (accessed 7 September 2019).

These figures show a generally upward trajectory in child abuse reports across several years, but in 2018 the reports increased by some twenty-one percent, a substantially greater increase than in previous years. The Central Statistics Office estimates that the Irish population increased by a little over one percent between 2017 and 2018,¹²⁴ so the 2018 increase in reporting was almost certainly down to the 2015 Act. It remains to be seen whether the plateau in the number of reports evident in the Western Australian figures will also be replicated here.

While reports of all forms of abuse increased, they did not increase at a uniform rate. Reports of emotional abuse increased by a third, while reports of physical abuse increased by a quarter. The abuse of children has been kept to the forefront of the public mind in Ireland for the last three decades, but usually in the context of sexual abuse. This focus may have had the effect of obscuring these other forms of abuse, resulting in fewer reports being made prior to 2017. Reports of neglect barely increased at all; indeed, they have been fairly stable across the five years shown. It is not clear why this might be so: perhaps the difficulty in recognising neglect makes reporters less able (or willing) to identify it. Reports of sexual abuse increased by around twelve percent. This increase was not as marked as has been the case in some Australian jurisdictions: in Western Australia, for example, the number of reports of sexual abuse nearly doubled in the first year of its new mandatory reporting regime. As noted earlier, there has been a three-decade focus in Ireland on child sexual abuse, and this experience meant that Ireland began its mandatory reporting regime from a relatively high point. In 1982, the health boards received some 400 reports of child sexual abuse.¹²⁵ By 1995, that figure had risen to 2,441,¹²⁶ while in 2010, the number had risen again to 2,962.¹²⁷ Thus, in less than three decades, the number of reports of child sexual abuse had risen more than seven-fold, which suggested a degree of vitality in the discretionary system. This remained true even after the advent of mandatory reporting. Tusla's figures show that mandated reports accounted for 12,610 of the total number of reports – about fifty-one percent of the total.¹²⁸ Nearly half of 2018's reports, therefore, came from persons who had no legal obligation to approach Tusla. Nevertheless, there was a substantial increase in reporting in 2018, and by this metric, the 2015 Act can be judged a success.

System Overload?

The parliamentary debates show that lawmakers were keenly aware of the principal danger pointed to by opponents of mandatory reporting – that Tusla would receive so many unsubstantiated reports that the child protection system would be overwhelmed. There are in fact two issues here – the child protection system being overwhelmed by increases in reporting, and scarce resources being expended on investigating unfounded reports. As to the first, lawmakers tried to reduce this possibility by limiting the range of mandated persons to those professionals most likely to have expertise in childcare issues. A twenty-one percent increase in the number of reports should not be too overwhelming, which could be seen as a vindication of the lawmakers' approach. This is only the first year of the new system's operation, however; continual increases of that magnitude would very quickly overwhelm any child protection

¹²⁴ Central Statistics Office, *Annual Population Estimates*, available at <https://www.cso.ie/en/statistics/population/populationandmigrationestimates/> (accessed 30 December 2019).

¹²⁵ N. McElwee (n 112) 13.

¹²⁶ H. Buckley et al., *Child Protection Practices in Ireland* (Oak Tree Press 1997) 23, Figure 1.2.

¹²⁷ B. Mathews (n 117) 471-72.

¹²⁸ Tusla, *National Performance and Activity Dashboard, December 2018*, at Tables 1 and 2, available at https://www.tusla.ie/uploads/content/National_Performance_Activity_Dashboard_December_2018_V1.0.pdf (accessed 30 December 2019). This is not unusual as mandated reporters typically account for 50-60 percent of all reports. See Mathews (n 34) 7.

system. As noted above, the experience in other jurisdictions has been a large jump in the number of reports in the first couple of years of mandatory reporting, with relatively stable reporting figures from then on. It seems likely, therefore, that the number of reports will not keep rising, and certainly not to the extent seen in 2018. Nevertheless, even with only one year's figures, there are indications that Tusla might be struggling to meet its obligations.¹²⁹ As noted earlier, a report of suspected child abuse should receive a preliminary enquiry within five days, and if necessary an initial assessment within forty days. Tusla's initial figures for 2018 show that ninety-one percent of reports received a preliminary enquiry, compared with ninety-eight percent in 2017. Only one-third of the 2018 enquiries were completed within the five-day window, compared with two-thirds the previous year. The number of cases that proceeded to an initial assessment fell from one-third in 2017 to one-quarter in 2018. The number of such assessments being completed within forty days, however, increased to twenty percent in 2018 from sixteen percent in 2017. It remains to be seen whether the 2018 figures reflect the caveats mentioned earlier (see n 128), but these figures are troubling. This is not an argument against mandatory reporting, however, but rather an indication that Tusla's resources may be insufficient to meet their obligations.

The second issue concerns the substantiation rate, and the resources that are expended investigating unfounded cases. Melton, for example, criticises the effect that mandatory reporting has had in the United States, arguing that massive resources have been required for the investigation of allegations.¹³⁰ Opponents of mandatory reporting frequently cite Frank Ainsworth's critique of the reporting regimes in Australia.¹³¹ Ainsworth compared the reports received by authorities in New South Wales (NSW) and Western Australia in 1999-2000. The former had a long-standing mandatory reporting law, whereas the latter at the time operated a discretionary regime. As expected, there were far more reports made in NSW than in Western Australia – 30,398 as opposed to 2,645. However, the authorities in NSW substantiated only 21.3 percent of their reports, whereas the authorities in Western Australia substantiated 44.2 percent of theirs. Ainsworth concluded that NSW expended a greater degree of effort on fruitless investigation than did Western Australia. In Ireland, Tusla's initial figures for 2018 seem to show a similarly high level of unsubstantiated reports: fully one-half of such cases were closed with no further action, and only a quarter of reports even proceeded to initial assessment.¹³² But it does not follow that the number or proportion of unsubstantiated cases indicate wasted resources.¹³³ Mathews points out that there are many reasons for a report not being substantiated: there might be duplicate reports in respect of the same child; the evidence might indicate some maltreatment but not enough to reach the required level of harm; or the

¹²⁹ Tusla, *Quarterly Performance* (n 95), at 10. In February 2018, Tusla implemented a new practice model and a new information system, both of which may have impacted the performance figures for 2018. Tusla warns, therefore, that the figures should be treated with caution. *ibid* 14. Also, many of the figures presented amalgamated child abuse and child welfare reports.

¹³⁰ Melton (n 37) 12 (citing US Advisory Board on Child Abuse and Neglect, *Child Abuse and Neglect: Critical first steps in response to a national emergency*, US Government Printing Office 1990)

¹³¹ F. Ainsworth, 'Mandatory reporting of child abuse and neglect: does it really make a difference?' (2002) 7(1) *Child & Family Social Work* 57. See also F. Ainsworth and P. Hansen, 'Five Tumultuous Years in Australian Child Protection: Little Progress' (2006) 11 *Child & Family Social Work* 33.

¹³² Tusla, *Quarterly Service* (n 95) 18 (first pie chart).

¹³³ See, for example, B. Drake and M. Jonson-Reid, 'A Response to Melton based on the best available data' (2007) 31 *Child Abuse & Neglect* 343; K. Dalziel and L. Segal, 'Analysis and Interpretation of Child Protection Data: A comment on Ainsworth and Hansen' (2007) 12 *Child & Family Social Work* 434-35; B. Mathews, 'Exploring the contested role of mandatory reporting in the identification of severe child abuse and neglect', in M. Freeman (ed), *Current Legal Issues, Volume 14: Law and Childhood Studies* (Oxford University Press 2012), 302.

report might be dealt with outside child protection procedures.¹³⁴ Furthermore, Drake and Jonson-Reid have shown that child protection agencies typically expend relatively few of their resources on investigation of reports – ‘most likely below 10 percent, and possibly below 5 percent’.¹³⁵ By contrast, these agencies spend about half of their resources on foster and residential care.¹³⁶ Furthermore, time and money spent on unsubstantiated reports of child abuse are not wasted: an early report might help to prevent a mild situation from becoming worse.¹³⁷ Additionally, as the Law Reform Commission commented thirty years ago, ‘it is not in our view a rational policy to attempt to contain expense in the area of child protection by relying on a defective system of reporting’.¹³⁸ And there can be no doubt that the purely discretionary system that operated in Ireland prior to 2017 was deficient. To borrow from a recent paper from Kohl et al., it is time to leave the concern with substantiation behind.¹³⁹

V. CONCLUSION

Ireland was slow to recognise the reality of child abuse occurring in Irish families and institutions. Over the past thirty years, the extent of this abuse has become apparent, and Irish law has gradually strengthened the child protection system in the country. Irish lawmakers resisted introducing a system of mandatory reporting until 2015, when they introduced a system that regrettably makes no allowance for the victim’s wishes. As has been argued, this could be fixed easily while doing little violence to the policy considerations that underlie mandatory reporting.

Given the absence of penalties for breaching the new legislation, in what way does the new reporting track differ from the older discretionary one? In practical terms, mandated and non-mandated persons face an equal threat of sanction in respect of a failure to report. Both groups are equally subject to the 2012 Withholding of Certain Information Act. Beyond the relatively narrow circumstances in which this statute applies, neither group faces any real prospect of punishment for failing to report suspected child abuse: the 2015 Act does not allow for any such punishment, and equally no punishment is relevant to the discretionary track. Both mandated and non-mandated persons receive the same immunity for making a good faith report. Mandated persons certainly operate under an enhanced norm of behaviour, but in practical terms the mandated and non-mandated tracks are functionally identical. Nevertheless, initial figures suggest that the new system has led to a significant increase in the number of reports being made to the Irish authorities. This in turn suggests that the absence of penalties has not undermined the operation of the Act. Those same initial figures, however, also portend difficulties in those authorities being able to discharge their obligations. Time will tell.

¹³⁴ Mathews (n 34) 18-19.

¹³⁵ B. Drake and M. Jonson-Reid, ‘Competing Values and Evidence: How do we evaluate mandated reporting and CPS response?’, in B. Mathews and D.C. Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer 2015) 33, 41.

¹³⁶ *ibid*

¹³⁷ Mathews (n 34) 19.

¹³⁸ Law Reform Commission, *Report* (n 16) para 1.04.

¹³⁹ P.Kohl et al., ‘Time to Leave Substantiation Behind: Findings from a national probability study’ (2009) 14(1) *Child Maltreatment* 17.

Tables

Table 1: Reports Received and Substantiated in Ireland and Victoria

	Ireland	Victoria
Total Reports Received	2,962	5,870
Mandated Reports	n/a	3,113
Non-Mandated Reports	2,962	2,757
Substantiated Reports	209	989

Table 2: Reports of Child Abuse Received by Tusla, 2014-18

	2014	2015	2016	2017	2018
Physical Abuse	4,066	3,991	4,450	4,942	6,137
Emotional Abuse	6,233	6,535	6,871	7,651	10,130
Sexual Abuse	3,114	2,940	3,042	3,170	3,548
Neglect	5,263	4,769	4,724	4,810	5,000
Totals	18,676	18,235	19,087	20,537	24,815
Difference (%)		-2.4	+4.7	+7.6	+20.8