

Protecting Vulnerable Children: Children First

This factsheet aims to highlight and explain the professional and statutory obligations / responsibilities placed on all doctors as mandated persons under the Children First Act 2015.

Paragraph 26 of the Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (available on the Medical Council website) provides:-

You must be aware of and comply with the national guidelines and legislation for the protection of children, which state that the welfare of the child is of paramount importance.

If you believe or have reasonable grounds for suspecting that a child is being harmed, has been harmed, or is at risk of harm through sexual, physical, emotional abuse or neglect, you must report this to the appropriate authorities and/or the relevant agency without delay. You should inform the child's parents or guardians of your intention to report your concerns taking into account that this may endanger you or the patient. Giving relevant information to appropriate authorities or statutory body for the protection of a child is a justifiable breach of confidentiality, provided that you follow the guidance in paragraph 31.2. (which refers to disclosure required by law).

Children First

The term "Children First" refers to a Guide entitled *Children First: National Guidelines for the Protection and Welfare of Children*, first published in 1999. Since the enactment of the Children First Act 2015 ("the Act"), the term is now a generic term used to encompass both the guidance and the legislation that relates to the recognition of child abuse and neglect, the reporting of this to Tusla and the best practice for organisations to ensure children availing of their services are kept safe. Non statutory obligations for all persons coming into contact with children are set out in the Guidelines. The Act sets out additional statutory obligations for defined categories of persons, to include registered medical practitioners, and for organisations providing relevant services to children.

Mandated Persons

Mandated persons are people who have contact with children and / or families and who, by virtue of their qualifications, training and experience, are in a key position to help protect children from harm. Schedule 2 of the Act provides a full list of people who are classified as mandated persons, with registered medical practitioners appearing at the top of the list, other examples include a registered nurse or midwife, teacher and member of An Garda Síochána.

As a mandated person, doctors have two main legal obligations under the Act:-

1. To report harm of children, above a defined threshold, to Tusla; and,
2. To assist Tusla, if requested, in assessing a concern which has been the subject of a mandated report.

Mandated Reporting

As a mandated person, you are required to report any knowledge, belief or reasonable suspicion that a child has been harmed, is being harmed or is at risk of being harmed. The Act defines harm as assault, ill-treatment, neglect or sexual abuse, and covers single and multiple instances.

In determining whether to make a mandated report, a helpful question to ask may be:-

- Has the child's health, development or welfare been affected, is being affected or is likely to be affected by the harm?

The safety of the child is paramount and at no stage should a child's safety be compromised. If you are in any doubt as to whether your concerns reach the legal definition of harm for making a mandated report, you should contact Tusla on a no-names basis for guidance.

As all sexual abuse falls within the category of seriously affecting a child's health, development or welfare, you must submit all concerns about sexual abuse as a mandated report to Tusla.

There is however, one statutory exception which deals with certain consensual sexual activity between teenagers, which is discussed further below.

There are situations where an adult patient may for example, disclose allegations of historical sexual abuse from when they were a child. In 2022, the High Court clarified that there is a reporting obligation on a mandated person to notify Tusla where an adult discloses past harm suffered as a child. However, if you are unsure of how best to manage such a disclosure, please do contact Medisec or Tusla for further guidance.

Making a Mandated Report

Section 14 of the Act requires mandated persons to report a concern to Tusla "as soon as practicable". When making a report, you should include as much information as possible to assist Tusla in their investigation.

A report made in good faith detailing your reasonable concerns will not amount to a breach of patient confidentiality and you will be protected from civil liability. An authorised person within Tusla will acknowledge in writing all mandated reports received. All reports can be submitted online using the Tusla Portal on its website and you should note that mandated reports cannot be submitted anonymously.

There is no legal requirement for you to inform the child's parents / legal guardians that you are making a mandated report; however, in many cases, it is likely that the parents / legal guardians will be patients with whom you have developed a therapeutic relationship and it is best practice for you to tell them that you intend to make / have made a mandated report. You should also communicate your reasons for your decision.

If, however, you are of the view that informing the child's parents / legal guardians will place the child at further risk of harm or may impair Tusla's ability to carry out a risk assessment / investigation, then you should not inform the parents / legal guardians of your intention to make a mandated report to Tusla. You may wish to seek Tusla's guidance on this issue and ask if there is any reason why you should not inform your patient of the fact that you have made/intend to make a mandated report.

If you are unsure as to whether your concern reaches the legal definition of harm for making a mandated report, you can discuss the concern with a Tusla social worker. If you think urgent intervention may be required to make the child safe, you can alert Tusla in advance of submitting a mandated report. You must

then submit the report within three days. It is extremely important that a child is not left in a situation that exposes them to harm or a risk of harm.

If you think a child is in immediate danger, you should contact the Gardaí.

Consequences of not making a mandated report

The Act does not impose criminal sanctions on mandated persons who fail to comply with their statutory obligation to make a mandated report to Tusla; however, if it emerges that you did not make a report and a child was left at risk or was harmed, it is open to Tusla to:-

- Complain you to the Medical Council; and / or,
- Pass information to the National Vetting Bureau of An Garda Síochána which means that your failure to make a mandated report will be recorded and could be disclosed to your current / future employer when you are next vetted. Please see our factsheet on Garda Vetting (available on our website) for more information.

The Criminal Justice Act 2006 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 make it an offence to have information relating to certain serious offences against children and not report the information to the Gardaí.

Reporting Exception- Consensual Sexual Activity

As noted above, you must submit all concerns about sexual abuse of children as a mandated report to Tusla; however, there is one statutory exception which deals with certain consensual sexual activity between teenagers.

Technically, a sexual relationship where one or both parties is under 17 years is illegal; however, for the purpose of making a mandated report to Tusla, it may fall under the statutory exception provided for in section 14(3) of the Act.

In order for you **not** to make a mandated report, **all** of the following criteria must be satisfied:

- The young person concerned must be between 15 and 17 years;
- The age difference between the young person and their sexual partner must not be more than 24 months;
- There must be no material difference in their maturity or capacity to consent;
- Their relationship does not involve intimidation or exploitation of either party;
- The young person states that they do not wish for any information to be disclosed to Tusla.

If you are satisfied that all of the above criteria are met and you have made the decision not to make a mandated report to Tusla, we advise that you carefully document your decision-making process in the patient's records, which may include reference to the above criteria and the fact that you discussed this with your patient.

It is very important to remember that there is no discretion / statutory exception for not reporting sexual activity involving persons under 15 years; you must make a mandated report to Tusla in those circumstances.

Mandated Assistance

Section 16 of the Act provides that mandated persons can be requested by Tusla to provide necessary and proportionate assistance to aid Tusla in their assessment of risk to a child. A request for mandated assistance usually involves a request to supply further information, a verbal / written report or to attend a meeting / case conference relating to a child. Should you receive such correspondence from Tusla, it is important that you comply with the request to provide mandated assistance, regardless of who made the initial report to Tusla.

Tusla has the authority to share information concerning a child with a mandated person who has been asked to provide mandated assistance. Tusla can only share what is necessary and proportionate. Under section 16(3) of the Act, you are protected from civil liability for sharing information with Tusla at its request.

Data protection legislation does not prevent the sharing of information on a reasonable and proportionate basis for the purpose of child protection.

Section 17 of the Act makes it an offence to disclose information shared with you by Tusla, unless you are provided with prior written authorisation from Tusla to do so. For example, if you receive a request from a parent / legal guardian for the release of their child's clinical records and those records contain information about the child provided to you by Tusla, we advise that prior to making any disclosure it is prudent to seek guidance from Tusla regarding the information they provided to you. We also advise that you contact your indemnifier for specific advice in respect of such requests.

Child Safeguarding Statement

The Act further provides that relevant organisations must undertake a risk assessment and draft a Child Safeguarding Statement ("Statement"). Schedule 1 of the Act outlines the types of organisations and services to which this applies, which includes "*any hospital, hospice, health care centre or other centre which receives, treats or otherwise provides physical or mental health services to children.*"

Section 11 (3) of the Act sets out what must be included in the Statement. The Statement should be in written format and refer to the service being provided and the principles and procedures that are in place to ensure; as far as practicable, that a child availing of the service is safe from harm.

The legislation provided that as of 11 March 2018, relevant organisations should have their Statement displayed in a prominent place and it should be reviewed every two years. A copy of the Statement should also be provided to staff members and, if requested, to Tusla, and to parents / legal guardians.

If Tusla request a copy of your Statement and you cannot produce it, you are at risk of being served with a Non-Compliance Notice. There is a Register of Non-Compliance which is available for inspection on-line and at Tusla's principal office.

For guidance on how to develop a Child Safeguarding Statement, including a template statement, please see Tusla's website.

At Medisec, we frequently receive queries from our members relating to their statutory obligations as mandated persons and we are happy to provide specific advice on any query that you may have. Please do not hesitate to contact us for specific advice.

The contents of this publication are indicative of current developments and contain guidance on general medico legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice.