THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 541

[Record No. 2022/357 J.R.]

BETWEEN:

TOM MCGRATH

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 3rd day of October, 2022

INTRODUCTION

1. The net issue which arises for consideration in these proceedings is the proper interpretation of the mandatory reporting obligation created under Section 14(1)(a) of the Children First Act 2015 [hereinafter "the 2015 Act"].

2. An interpretation of that provision has informed the HSE Child Protection and Welfare Policy 2019 [hereinafter "the 2019 Policy"] and its implementation in respect of the circumstances in which a mandatory report of historic sexual abuse must be made to Tusla. The 2019 Policy proceeds on the basis that a report to Tusla is mandated where there are reasonable grounds, in prescribed circumstances, to suspect that a child has been harmed whether or not that child is now an adult.

3. The Applicant contends that s. 14(1)(a) of the 2015 Act does not require the mandatory reporting to Tusla of information received from an adult in relation to an incident which allegedly took place when they were a child. It is the Applicant's position that an error of law relating to a mistaken interpretation of the word "*child*" in s. 14(1)(a) underpins the 2019 Policy. The Applicant contends that the obligation to report retrospective abuse is confined to situations where there is identifiable information about the person(s) who is the subject of the

allegation of abuse, unless there are reasonable grounds for concern that a child is currently at risk from the person who is the subject of the allegation. By contrast, the Respondent's position is that s. 14(1)(a) of the 2015 Act, properly construed, requires that mandated persons notify Tusla where an adult discloses past harm suffered as a child, where that harm falls within the definition of harm set out in s. 2 of the 2015 Act whether the alleged abuser is identifiable or not.

4. The question of statutory interpretation which arises is whether, properly construed, s. 14(1)(a) of the 2015 Act requires a report to Tusla only where the child concerned is still a child.

BACKGROUND AND THE HSE CHILD PROTECTION AND WELFARE POLICY

5. The Applicant is the Director of Counselling with the Health Service Executive [hereinafter "the HSE"] in Sligo. He is employed within the HSE National Counselling Service [hereinafter "the NCS"]. The NCS provides, inter alia, counselling and psychotherapy for adults who experienced childhood abuse or neglect. As a person providing counselling services the Applicant is a "*mandated person*" within the meaning of the 2015 Act.

6. The HSE published the 2019 Policy on the 14th of November, 2019 setting out the roles, responsibilities and procedures assigned to ensure the management of child protection and welfare concerns in the HSE. Section 8.2 of the 2019 Policy addresses disclosures of retrospective abuse. It provides, *inter alia*, that service users should be informed at the outset of contact with a service that if any child protection issue arises, including disclosures of retrospective abuse, that this information must be passed on to Tusla where there are reasonable grounds for concern that abuse has occurred as there may be a current or potential risk to children (identifiable or not). Essentially this means that if a disclosure of retrospective child abuse is made in the context of counselling services, that information must be passed on to Tusla. Section 8.2 states:

> *"In circumstances where the adult may be vulnerable to psychological distress, self-harm or suicide as a result of reporting the concern, the staff member and/or line manager should have an informal consultation with TUSLA, with a view to considering how best to support the adult who discloses, whilst ensuring that the welfare of any child who may currently be at risk of abuse remains the paramount consideration".*

7. The NCS raised concerns with the HSE regarding the 2019 Policy. In December, 2019 the NCS proposed that it would report retrospective disclosures of childhood abuse, *inter alia*, where there was identifiable information about the person(s) who is the subject of the allegation of abuse or where there are reasonable grounds for concern to suggest that a child is currently at risk from the person who is the subject of the allegation of abuse even if this person is not identified by the adult complainant. At the heart of the NCS proposal was a concern that the nature and extent of the mandatory reporting requirement could pose a risk of harm to NCS clients.

8. Following receipt of the NCS Proposal, the HSE engaged with Tusla and the Department of Children and sought legal advice (Opinion of Counsel obtained by the HSE was exhibited in the proceedings) as to whether the 2019 Policy should be amended. On foot of this process it was concluded that the 2019 Policy reflects the proper interpretation of s. 14(1) of the 2015 Act. As pleaded in the Statement of Opposition, the HSE proceeded on the basis that there is no exemption from the obligation to make a mandatory report where the making of the report may cause harm to the service user.

9. The HSE issued an Interim Standard Operating Procedures entitled *"HSE NCS Interim Procedures"* to guide NCS staff on the operation of the 2015 Act by memorandum dated the 13th of December, 2021. Under the Interim Standard Operating Procedures there is an obligation on the counsellor to properly inform the service user as to how confidentiality in counselling is managed and the limitations on confidentiality, including the mandatory reporting obligations imposed under the 2015 Act. The person seeking counselling is requested to give informed consent to proceed with the referral/engage with the counselling service. The memorandum dated the 13th of December 2021 was addressed *inter alia* to Directors of Counselling employed by the National Counselling Service, the National Head of Quality and Patient Safety, Community Operations, the National Head of Operations Mental Health Service and the National Clinical Advisor and Group Lead Mental Health. Referring to the practice position of the NCS the memorandum stated:

> *"…the NCS practice position in relation to reporting of retrospective childhood abuse has been that Counsellor/Therapists make a retrospective report to Tusla where identifiable information about the person who is the subject of the allegations is disclosed or if a current risk to a child(ren) is identified. This position was not*

compliant with HSE Child Protection and Welfare Policy (2019) or the Children First Act (2017) which requires all cases of harm to children [current or retrospective] to be reported to Tusla, Child and Family Agency regardless of identifiable information".

10. It is further stated in the memorandum that if the client does not consent to proceed with the referral, their case should be closed and the decision recorded on the relevant information system.

11. The Applicant maintains that the 2019 Policy does not take on board clinical concerns. While he acknowledges that the question is primarily one of statutory interpretation, he maintains that the entitlements of adult survivors of childhood abuse to be treated as adults should not be set aside unless a particular legal interpretation of the 2015 Act clearly necessitates that.

STATUTORY FRAMEWORK

12. The Long Title to the 2015 Act states that it is:

"an Act for the purposes of making further and better provision for the care and protection of children ... to require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances ...".

13. Section 2 provides that where in the Act the word "*child*" appears, it is to have the same meaning as it has in Section 2 of the Childcare Act 1991. The Act of 1991 provides that "*child*" means "*a person under the age of 18 years other than a person who is or who has been married*".

14. "*Harm*" is defined in the 2015 Act as:

"'*harm' means, in relation to a child –*

(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 of the child,

whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise"

15. Part 3 of the 2015 Act is headed "*Reporting*". Section 14 of the 2015 Act places mandatory reporting obligations on classes of persons listed in Schedule 2 of the said Act, defined as "*mandated persons*". "*Mandated persons*" as defined under the 2015 Act encompass a wide range of persons including, *inter alia*, registered medical practitioners, registered nurses, paramedics, teachers registered with the teaching council, persons providing counselling, managers of homeless provision or emergency accommodation facilities, members of the clergy, persons employed for the purpose of performing the child welfare and protection function of religious, sporting, recreational, cultural, educational and other bodies and organisations offering services to children.

16. The primary reporting obligation is created by s. 14(1) which states that subject to ss. 3, 4, 5, 6 and 7:

"…where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that 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 child –

(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 the Agency".

17. Section 14 (2) provides that:

"Where a child believes that he or she –

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

and discloses that belief to a mandated person in the course of the mandated person's employment or profession as such a person, the mandated person shall, subject to subsections 5, 6 and 7, as soon as practicable report that disclosure to the Agency."

18. Section 14(3) deals with the circumstances in which it is not required that sexual activity involving a person under age of 18 years who is not married be reported as follows:

"(3) A mandated person shall not be required to make a report to the Agency under subsection (1) where—

(a) he or she knows or believes that—

(i) a child who is aged 15 years or more but less than 17 years is engaged in sexual activity, and

(ii) the other party to the sexual activity concerned is not more than 2 years older than the child concerned,

(b) he or she knows or believes that—

(i) there is no material difference in capacity or maturity between the parties engaged in the sexual activity concerned, and

(ii) the relationship between the parties engaged in the sexual activity concerned is not intimidatory or exploitative of either party,

(c) he or she is satisfied that subsection (2) does not apply, and

(d) the child concerned has made known to the mandated person his or her view that the activity, or information relating to it, should not be disclosed to the Agency and the mandated person relied upon that view."

19. Section 14(4) is addressed to avoiding double or multiple reporting by mandated persons and provides:

"(4) A mandated person shall not be required to make a report to the Agency under subsection (1) where the sole basis for the mandated person's knowledge,

belief or suspicion is as a result of information he or she has acquired, received or become aware of—

(a) from—

(i) another mandated person, or

(ii) a person, other than a mandated person, who has reported jointly with a mandated person pursuant to subsection (6)(b),

that a report has been made to the Agency in respect of the child concerned by that other person,

(b) pursuant to his or her role, as a member of staff of the Agency, in carrying out an assessment as to whether a child who is the subject of a report or any other child has been, is being or is at risk of being harmed, or

(c) pursuant to his or her role in assisting the Agency with an assessment as to whether a child who is the subject of a report or any other child has been, is being or is at risk of being harmed."

20. The terms of s. 14 were commenced in 2017 by the Children First Act 2015 (Commencement) Order 2017 (S.I. 470/2017) and came into operation on the 11th of December, 2017.

21. For completeness, I should also refer to s. 16 of the 2015 Act which is directed to the power of Tusla to take steps on receipt of a report from a mandated person as follows:

"16. (1) Where the Agency receives a report from a mandated person or persons under section 14, the Agency may, for the purposes of assessing whether a child who is the subject of that report or any other child—

(a) has been harmed,

(b) is being harmed, or

(c) is at risk of being harmed,

take such steps as it considers requisite and such steps may include a request to any mandated person whom it reasonably believes may be in a position to assist the Agency

for those purposes, to give to the Agency such information and assistance as it may reasonably require and is, in the opinion of the Agency, necessary and proportionate in all of the circumstances of the case.

(2) Where the Agency makes a request of a mandated person under subsection (1), the mandated person shall, as soon as practicable, comply with the request.

(3) If a mandated person furnishes any information (including a report), document or thing to the Agency pursuant to a request made under subsection (1), the furnishing of that information, document or thing shall not give rise to any civil liability in contract, tort or otherwise and nor shall the information, document or thing be admissible as evidence against that person in any civil or criminal proceedings.

(4) The Agency may share information concerning a child who is the subject of a report under section 14 with a mandated person who is assisting the Agency with the assessment concerned, however, the sharing of such information shall be limited to such information as is, in the opinion of the Agency, necessary and proportionate in all the circumstances of the case.

(5) Subject to the provisions of this Act and the Child Care Act 1991, the procedures for carrying out an assessment arising from a report under section 14 shall be such as the Agency considers appropriate in all the circumstances of the case.

(6) For the purposes of performing its functions under this Part, the Agency shall have the same powers as it has under the Child Care Act 1991 or any other enactment in respect of children who are not receiving adequate care and protection.

(7) The powers conferred on the Agency by this Part in respect of reports under section 14 are without prejudice to the powers conferred on it under the Child Care Act 1991 or any other enactment in respect of reports received by it, otherwise than under section 14, concerning a child who is not receiving adequate care and protection.

(8) In this section "assistance", includes, in relation to a request under subsection (1) —

> *(a) the provision of verbal or written information or reports,*
>
> *(b) attendance at any meeting arranged by the Agency in connection with its assessment under subsection (1), and*
>
> *(c) the production to the Agency of any document or thing.*

DISCUSSION AND DECISION

22. It is submitted on behalf of the Applicant that s. 14(1)(a) only operates to mandate reporting where cause for concern relates to a person who is a child at the time of the reporting. Reliance is placed on the definition of "*child*" in the Act of 1991 which is adopted for the purpose of the 2015 Act. It is contended that by its exclusion of persons under the age of 18 who are or have been married, that the reporting requirements do not apply in respect of harm reasonably suspected in respect of every person who was or is under the age of 18 years old and does not apply in respect of persons who might be deemed to be "*adults*". In this regard, reference is made to the statutory backdrop and the fact that under the Family Law Act 1995, marriages were permitted if a party was under 18 in accordance with prescribed conditions (sections 31 and 33 of that Act).

23. The provisions allowing for parties under the age of 18 to get married were only repealed as of the 1st January 2019 (by virtue of s.45 of the Domestic Violence Act 2018). Accordingly, reliance is placed on behalf of the Applicant on the fact that at the time the 2015 Act was enacted, there were marriages being contracted by persons under the age of 18. It is submitted on behalf of the Applicant that when enacting the 2015 Act, the Oireachtas wished to maintain the policy reflected in the Act of 1991 to the effect that a certain sub-set of those under the age of 18 were to be excluded from the terms of the Act or were to be treated differently to their age-comparable peers.

24. It is further argued that the effect of the proviso exempting persons who were married but under 18 from the definition of a "*child*" is to make clear, for example, that a 17 year old girl who was married is not a "*child*" within the meaning of the Act. The girl might well have been abused by a parent or stranger two years earlier at the age of 15 but the very fact that she was now married excluded her being considered a child for the purposes of the Act. In submissions it was argued that in the context of a requirement to report child abuse, the proviso in the definition of a child can only relate to the status of the person as an adult or as a 'deemed' adult (by virtue of having been allowed by a Court to get married). It is argued that this reflects a rationale of respecting the autonomy and privacy interests of mature persons consistent with an interpretation which does not require reporting in all cases of believed or suspected abuse of historic abuse of a former child under s. 14(1)(a).

25. Some focus was directed to the use of different tenses throughout s. 14 in argument. The Applicant relies on the terms of s. 14(2) which provides for the reporting of a direct disclosure of abuse by a child who believes (present tense) that they have been abused. In other words, the belief of the person and the disclosure by that person to a mandated person must happen whilst the person comes within the definition of "*child*" in the Act for s. 14(2) to be applicable. It is pointed out that a 17 year-old girl who is or was married may very well have suffered harm in earlier years but any report she decides to make to a mandated person is not covered by the terms of s. 14(2) because she is not a "*child*" within the applicable statutory definition. It is submitted that it would be strange indeed that a direct report from that girl to a mandated person would not lead to a compulsory report being made to Tusla under s. 14(2)(a) and yet if the mandated person heard indirectly of the information, the content of the disclosure would be covered, according to the HSE, by the more general provisions of s. 14(1)(a). The point is made that a report from 19 year-old boy who was harmed when he was 15, is not covered by s. 14 (2) because the definition of "*child*" is clearly referable to the point in time at which the belief is held and the disclosure made. It is contended that were a disclosure deliberately excluded by the Oireachtas from s. 14(2)(a) and the consequent mandatory obligation to report to TUSLA, nevertheless caught by the terms of s. 14(1)(a), this would give rise to an absurd situation within the meaning of s.5 of the Interpretation Act 2005.

26. The Applicant further points to the use of the present tense in s. 14(3) and the fact that this could result in a situation where a relationship excluded by s. 14(3) (in respect of sexual activity between young people in prescribed circumstances) might nonetheless, at a future date, be reportable as having caused harm were s. 14(1)(a) construed as mandating a report even where a person is now an adult. It is suggested that this would be an absurd result.

27. For its part the Respondent relies in submission on the language of s. 14(1)(a) which is in the past tense and provides for reporting where "*a child has been harmed*". It does not contain a temporal enabling condition that the child who has been harmed remains a child at the time the mandatory reporting requirement is triggered. The purpose of the section, it is contended, is that reports be made to Tusla, the statutory body charged with child protection. It is for Tusla to assess the risk, not the mandated person. It is submitted that the effect/purpose of mandatory reporting is that reports must be made to Tusla irrespective of the consent of the

person from whom the knowledge was obtained (even where that person is the victim of childhood abuse).

28. Reference is also made on behalf of the Respondent to the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* which creates an offence of failing to disclose information to An Garda Síochána where a person knows or believes that certain offences have been committed against "*a child"* and that person has information which might be of material assistance in securing the apprehension, prosecution or conviction of that other person. A child is defined in s. 2 of that Act as follows:

> "*means a person who has not attained 18 years of age"*

29. Section 2(3) of that Act provides that *"the child against whom the Schedule 1 offence concerned was committed (whether or not still a child) shall not be guilty of an offence under this section".*

30. The 2012 Act provides a defence to a person who has not disclosed information to An Garda Síochána where the child concerned made known her view that she did not want the commission of the offence, or information relating to it to be disclosed to An Garda Síochána (section 4(1)). It is also a defence under that Act for members of a designated profession, including psychologists, not to disclose information where that designated professional is providing services to the child in respect of injury caused as a result of the offence and where that designated professional forms the view that the information should not be disclosed to An Garda Síochána. It is considered significant that no such defences are provided for in the 2015 Act in relation to any professional. Rather, it is submitted that the Oireachtas has seen fit to separate out the requirements to report reasonable suspicions of past harm to children (s. 14(1)(a)), from reasonable suspicions of current harm to children (s. 14(1)(b)), and from reasonable suspicions of risk to children (s. 14(1)(c)). The Respondent submits that this should be construed as reflecting the intention of the Oireachtas as being to impose an obligation on mandated persons to report past harm to children to Tusla.

31. In response to the reliance placed by the Applicant on what he coined "*the proviso"* arising from the adoption of the definition of child from the Child Care Act, 1991 (whereby a

married child is excluded from the definition), the Respondent argues that the fact that a person who is no longer a child does not rewrite history. The fact that the former child is now an adult does not remove that person from falling within the definition of "*a child*" who has suffered harm, where the harm being referred to is past tense harm. It does not mean that harm that occurred to that person whilst a child is not harm to "*a child*" within the meaning of the Act, or ceases to be harm that occurred because the child has in the intervening period attained adulthood.

32. As for the significance of s. 14(2) to the proper interpretation of s. 14(1), the Respondent points out that the provisions are very different. Under s. 14(1) not every suspicion must be reported, rather the mandated person must have "*reasonable grounds to suspect*" or "*know*" or "*believe*" that a child had been harmed or that a child is being harmed or that a child is at risk of being harmed, whereas under s. 14(2) every disclosure by a child must be reported. It is accordingly submitted that the Applicant is incorrect in stating that the fact that a disclosure made by a person who is 17 (and was previously married) would not be reportable under s. 14(2) but could be reportable under s. 14(1) leads to an absurdity. The two subsections fulfil two different purposes. Section 14(2) refers to reporting disclosures made by children to the Tusla whereas s. 14(1) is directed towards the reporting by a mandated person of his knowledge, belief or suspicion to Tusla that a child was harmed in the past, that a child is currently being harmed or that there is a risk of harm to a child.

33. Similarly, the Respondent submits, the fact that disclosure by a 19-year-old male that he was harmed when aged 15 is not covered by s. 14(2), because he is no longer a child, does not mean that the requirement under s. 14(1) for a mandated person to notify his belief or reasonable suspicion, following on from that disclosure, that a child has been harmed is somehow rendered inapplicable or absurd. The principle of *generalia specialibus non derogant* simply does not apply because the obligation to notify a disclosure made by a child under s. 14(2) has a different test (and serves a different purpose) to the obligation on mandated persons under s. 14(1) to report their own knowledge, belief or reasonable suspicion.

34. In further submissions on behalf of the Respondent it is urged that the purpose of s. 14(1)(a) in obliging a mandated person to report their knowledge of past harm to children, is so Tusla can use that information in considering whether there is a risk to current children. It is submitted that it may well be disclosures of childhood abuse made by adults will be of

assistance to Tusla in its statutory child protection function. In the Respondent's submission there is a clear conceivable basis on which the Oireachtas may have chosen to require mandatory reporting of all instances of historical abuse to Tusla, leaving it as the statutory body mandated to assess from such reports whether there is a risk to children. Once the mandated report has been made to Tusla, it is thereafter for Tusla to determine what investigation or further steps ought to be taken in relation to the report (see section 16(1) of the 2015 Act).

35. The crucial question for me might be put as follows: what is required of the mandated person if he or she believes or has reasonable grounds to suspect that a 19 year-old boy or a 59 year old man (a 'former child') was harmed 2 years or 42 years earlier, when he was aged 17? Does that belief or suspicion trigger the mandatory report to TUSLA required by s.14(1)(a)? It is my view, for the reasons elaborated upon hereinafter, that it does.

36. As clearly set out in the legal opinion exhibited in the within proceedings, the overriding duty of a court when asked to construe any piece of legislation is to try to ascertain the true will and intention of the Oireachtas, firstly on the basis of a literal approach. It is only when a literal approach leads to an absurdity that recourse may then be had to an alternative approach as provided for in s. 5 of the Interpretation Act, 2005.

37. While policy issues have been identified in these proceedings, it is not for the Court to assess the policy behind the legislation. Absent a constitutional challenge the Court cannot depart from the application of the legislation derived from a literal interpretation of that legislation (construed constitutionally and in compliance with obligations under the European Convention on Human Rights and EU law), where there could be a basis on which the Oireachtas might have chosen to legislate in the manner in which a literal construction of the relevant provisions would require (see *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27). This is so no matter the weight attaching to the countervailing policy considerations identified by the parties in proceedings before the Court.

38. It has been suggested that two possible interpretations arise from a literal reading of s. 14(1)(a) namely:

(i) a report is required where past harm occurred to a person as a child irrespective of their current age; or

(ii) a report is only required in instances where past harm has occurred to a person who is currently a child.

39. Of the two interpretations, the first is the broader and provides for a more extensive reporting obligation. It seems to me that the first interpretation is the one which sits most comfortably with the use of different tenses and the crafting of reporting provisions to be applied in different situations apparent throughout s. 14 and also with the purpose of the 2015 Act as discerned from the Act as whole.

40. It does not seem to me that s. 14(1)(a) of the 2015 Act can reasonably be interpreted as imposing a reporting obligation only where the information disclosed relates to harm to a person who is still a child. The use of different tenses as between s. 14(1)(a), (b) and (c) should not be ignored. Section 14(1)(a) is drafted in the past tense and clearly captures where a person, as a child, suffered harm. The fact that other provisions in the 2015 Act clearly refer to existing children does not mean that section 14(1)(a) must be interpreted so as to read the past tense of "*a child has been harmed"* as only applying provided the person harmed still remains a child. If anything, the fact that the present tense is used in s. 14(1)(b), s. 14(2) and s. 14(3) merely reinforces the intentionality of the use of the past tense in s. 14(1)(a) in that it is clear that each of these provisions are directed to different situations.

41. Accordingly, I do not agree that any absurdity is created by a reporting obligation arising under s. 14(1)(a) when it would not arise if the same information were disclosed under s. 14(2)(a) or information about the same relationship might have been excluded from reporting under s.14(3). These provisions are intended to apply in different situations. Thus, a report by an adult of abuse whilst a child is not reportable under s. 14(2) but if the information provided gives rise to a belief or suspicious that a child may have been harmed, then it is reportable under s. 14(1)(a).

42. It is clear to me that the two provisions (s. 14(1) and 14(2)) are not identical in their application and are intended to cover different situations. The fact that they may give rise to a different outcome is not therefore absurd or inconsistent because the statutory criteria triggering a reporting obligation differ as between the two. Similarly, a relationship may be excused under s. 14(3) (sexual relationship between young people in prescribed circumstances) on the basis of information available to the mandated person at that time who is required to be

satisfied that the child does not believe they have been, are being harmed or are at risk of being harmed but that is not to say that an inconsistency or absurdity arises where, on the basis of information subsequently disclosed when that child is an adult, the same relationship gives rise to a requirement to report where the information then provided supports a belief or suspicion that a child has been harmed. At risk of repetition, it is my view that the provisions are intended to apply to different situations. It may well be that a relationship between two young people does not require to be reported on the basis of available information but that does not mean that an adult looking back on that relationship might not develop a different understanding of what had transpired and make disclosures which would require to be reported.

43. While the distinct provisions of s. 14 are directed to different situations, it is further clear that a reporting obligation on a mandated person may arise under more than one provision if the separate statutory criteria under each provision are met. This does not give rise to an absurdity or an inconsistency but merely double locks the reporting requirement.

44. My view that the plain meaning of the words used in of s. 14(1)(a) leads to an unambiguous conclusion that it applies to a retrospective disclosure of abuse while a child by an adult is also consistent with the language of s. 14(4) which uses a mix of past tense and present tense when excusing double or multiple reporting as I read that section. Insofar as s. 14(4) is concerned it applies in respect of reports in relation to a *"a child who has been harmed"* where the person is no longer a child but was one at the time the suspected harm occurred as much as it does to a report in respect of suspected or believed harm which is past, current or apprehended in respect of a current child.

45. While it seems to me that the literal interpretation is clear and unambiguous, it is also my view that the broader interpretation preferred by me is that which sits best with the purpose of the 2015 Act and the intention of the Legislature. It is clear from the Long Title that the purpose of the 2015 Act is to make:

> *"further and better provision for the care and protection of children …to require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances."*

46. Thus, there is a link drawn in the 2015 Act to the statutory role of Tusla as further apparent from the use of the definition of "*child*" from the Child Care Act, 1991. It is significant that it is that Act, and in particular s. 3 thereof, that provides for Tusla's child protection function. This clear link is then reinforced through the clear terms of s. 16 of the 2015 Act which makes broad provision for requiring the giving of further information and assistance by the mandated person for the purpose of the assessment and investigation undertaken by Tusla. In considering the scope of mandatory reporting requirements under s. 14 I am satisfied that regard should properly therefore be had to the purpose of making reports to Tusla under the 2015 Act as made crystal clear through the terms of s. 16 of the Act where reference is repeatedly made to Tusla being vested with powers equivalent to powers under the Child Care Act, 1991.

47. Tusla is under a statutory duty to promote the welfare of children at risk of abuse pursuant to the provisions of the Child Care Act, 1991. In this context it has been found to have an obligation which extends beyond the protection of children who have been identified as at risk of abuse and to children not yet identifiable who may be at risk in the future by reason of potential hazard (*M. Q. v. Gleeson* [1998] 4 I.R. 85) and includes a duty to inquire into and investigate complaints of child sexual abuse (including historical abuse) (see *J v. Child and Family Agency (historical child sexual abuse allegations)* [2020] IEHC 464 and *P (DP) v. Board of Management of a Secondary School and Health Services Executive* [2010] IEHC 189). The logic of mandatory reporting is that relevant information is provided to Tusla so that these duties may be discharged.

48. It bears note that the 2015 Act makes no express reference to reporting disclosures by adults concerning harm suffered as a child or to reporting of historical abuses. Indeed, unless s. 14(1)(a) is construed as mandating the reporting of historical child abuse disclosed by an adult, the only circumstances in which such abuse would be reported to Tusla would be if the nature of the disclosure was such as to provide reasonable grounds for believing or suspecting that a child is (currently) being harmed (s. 14(1)(b)) or is at risk (future) of being harmed (s. 14(1)(c)). This would invariably result in cases of historic child abuse disclosed by adults not being reported to Tusla and a gap in the State's reporting mechanisms. Where the language of s. 14 supports a broader interpretation, it seems to me that it would be quite wrong for me to adopt the narrower interpretation which has been proffered. As McGuinness J. found in *Western Health Board v. KM* [2002] 2 IR 493 in interpreting provisions of the Child Care Act,

1991, the correct approach to the construction of this type of legislation is "*widely and liberally as fairly can be done*".

49. It is clear and not disputed that s. 14(1) envisages a report where information is received from a person other than a child in relation to historic or past abuse where there is a risk (present or future) identified to a child. Were this provision interpreted, as the Applicant urges, as not applying where information relates to the occurrence of past abuse of a child in respect of a person who is an adult now but absent a reasonably grounded belief or suspicion that an ongoing or future risk of harm exists to a child, then the reporting requirements in respect of historic abuse would be undermined. If the Applicant were correct in the interpretation pressed on his behalf then there would only be an obligation to report historic child abuse in the case of a person now an adult where another child is currently believed or suspected to be at risk or at future risk. This would relieve the obligation to report in respect of deceased persons and create an ambiguity in relation to the obligation insofar as an alleged abuser may now be retired, under supervision (perhaps in a nursing home or prison) or incapacitated. Such an outcome would seem to me to run counter to the purpose of the reporting requirements under the 2015 Act and is not consistent with a wide and liberal interpretation when regard is had to the purpose of the report, which is to secure an assessment by Tusla, in discharge of its statutory duties, of child welfare and protection issues arising from the disclosure.

50. Given the statutory duty on Tusla is established as including a duty to investigate complaints of historical child abuse, it does not seem to me that s.14(1)(a) can properly be construed as requiring a report only in instances where past harm has occurred to a person who is still a child. Far from resulting in absurdity, as has been suggested, it seems to me that there are sound policy reasons which support a measure which requires a report of child abuse when the abuse suspected relates to the abuse of a person who is now an adult. Such a measure is tied to a desire to enhance child protection and to provide a remedy in respect of past wrongs. One only has to think of a report of historic child abuse made to a school or a religious institution at the hands of a teacher or cleric. It is not for the school or the religious institution to decide not to report to Tusla as the statutory agency on the basis of their view that there is no current or future risk to a child because a teacher or priest or nun is retired or has died. Indeed, if there is any lesson from the extensive litigation in the area of historic child abuse coming before the Irish courts and leading to a decision of the European Court of Human Rights

against the State in *O'Keeffe v. Ireland* [GC] (35810/09 Judgment 28 January 2014) it is that the report of a complaint is important as evidence that a complaint was made, quite apart from any duty to assess it.

51. Indeed, it is of some significance, in my view, that the 2015 Act was introduced as part of the measures adopted by the State following the decision of the European Court of Human Rights in *O'Keeffe v. Ireland.* In that case the European Court of Human Rights concluded that there had been past failings on the part of the State to provide mechanisms which ensure that complaints are reported and investigated. The 2015 Act is an important component of the body of measures adopted by the Legislature to remedy identified shortcomings in domestic provisions directed to the problem of child abuse, not least in Irish schools. Insofar as its purpose was, amongst other things, to address these identified shortcomings and provide a domestic remedy in respect of human rights violations of children, it would seem to follow that the intention of the Legislature, consistent with the State's commitment to the Council of Europe to respect Convention rights and to remedy violations, was to require a wide level of reporting of child abuse, including historic child abuse.

52. In view of the purpose of the 2015 Act, namely to ensure that reports are provided to the appropriate statutory body, Tusla, so as to enable it to assess whether there is risk to a current identified child or other children, it seems to me that this purpose is best achieved through requiring a report where reasonable grounds exist for believing or suspecting that a person who is now an adult was abused as a child as already suggested by the language of s. 14(1)(a). In considering the Applicant's arguments in this regard it seems to me that it should be recalled that information disclosed to a mandated person and reported to Tusla may take on a different complexion when considered in the light of other information Tusla holds in its capacity as the State agency with statutory responsibility in this area. The mandated person may not be aware of the other information Tusla holds. The mandated person is not in a position to properly or fully assess the information disclosed to them from a wider child protection perspective. Further, the mandated person is not necessarily a person qualified to assess information to satisfactorily determine risk. This is the role of Tusla.

53. My conclusion that a wide interpretation of the reporting obligation is the proper one is consistent with the approach of the Courts in other areas involving special provision for children where protections have been considered to extend to deceased children and persons

who were children at the material time such as the decision of the Court of Appeal (Birmingham P.) in *DPP v. C* [2020] IECA 292 (in relation to reporting restrictions under the Children Act, 2001) and the earlier High Court decision (also Birmingham J.) in *HSE v. McAnaspie* [2012] 1 I.R. 548, [2011] IEHC 477 (in relation to the definition of "*child*" in the Child Care Act, 1991). A mandated person who becomes aware that a 19-year-old was the victim of sexual abuse when aged 15, will know that "*a child has been harmed*" within the meaning of s. 14(1)(a). In the words of Birmingham J. in *HSE v. McAnaspie, "the fact that an individual reaches the age of eighteen years, ... does not rewrite history"* and does not mean that the person, as a child, was not harmed.

54. It seems to me that the problem which has been identified by the Applicant in these proceedings arises from the failure (deliberate or inadvertent) to include additional provisions in the legislation to address the situation of counsellors working with adult survivors of childhood abuse. The 2015 Act does not differentiate between the school or the religious institution and the counsellor, albeit that information is received in a different context by each. In the absence of a statutory distinction being made, it would be wrong for me to rewrite the legislation in a manner which results in less reporting of historic child abuse than I am satisfied the Legislature intended to prescribe. If a distinction is to be drawn between counsellors and others and as between the differing situations in which abuse may be disclosed, then this is a matter for the Legislature. As observed by Clarke J. in *Irish Life and Permanent plc v. Dunne* [2016] 1 IR 92 at p. 109:

> *"the court cannot be asked to rewrite legislation. The court cannot be asked to include provisions which the Oireachtas may have omitted, but where there might be legitimate debate as to whether the Oireachtas would have included same (or in what form same might have been included)".*

55. Accordingly, if there are policy reasons which might justify a different treatment of some professionals, as contended on behalf of the Applicant and such as occurred under Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, then this is a matter for the Oireachtas. No special statutory provision has been made for counsellors under the terms of the 2015 Act and it is not open to me to construe the legislation in a manner which undermines the scope of the prescribed reporting obligations because the effect of the application of the legislation may be, as has been claimed, to hinder

access to counselling services for the adult victims of childhood abuse, undermine the therapeutic relationship or otherwise expose that adult to the consequences of a requirement to report to Tusla in a given case.

CONCLUSION

56. It is my view that s. 14(1) imposes a reporting obligation in the following circumstances:

a. Information has been received or acquired by a mandated person;
b. Based on that information the mandated person has reasonable grounds to suspect that a child has been harm, is being harmed or is at risk of being harmed.

57. The 2015 Act does not create a distinction between professionals such as counsellors engaged by the NCS and other persons in relation to the obligation to comply with s. 14 of the Act. No exemption from the obligation to make a mandatory report is given by the 2015 Act to counsellors such as those employed by the NCS in circumstances where the making of such a report may, in the opinion of the counsellor, cause harm to the service user.

58. Section 14(1)(a) of the 2015 Act properly construed requires that mandated persons to notify Tusla where an adult discloses past harm suffered as a child where that harm falls within the definition of harm set out in s. 2 of the 2015 Act. To be clear, s. 14(1)(a) does not require the consent of the person who has been harmed before the report must be made to Tusla. This does not obviate the necessity to ensure informed consent to treatment on the basis that a counsellor is subject to mandatory reporting requirements. The obligation is on the counsellor to properly inform the individual of how confidentiality in counselling is managed and the limitations on confidentiality, including the mandatory reporting obligations imposed under the 2015 Act. Section 14(1)(a) does not require that the mandated person know the identity of the alleged perpetrator (or that they be identifiable) before a report must be made to Tusla. Once the mandated report has been made to Tusla it is thereafter for Tusla to determine what investigation or further steps ought to be taken in relation to the report (pursuant to s. 16(1) of the 2015 Act).