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Law Reform Commission  
Styne House  
Upper Hatch Street  
Dublin 2  
D02 DY27  
**By email only**

28 May 2020

Dear Sir/Madam

## **Issues Paper – A Regulatory Framework for Adult Safeguarding (LRC IP 18 – 2019) (“Issues Paper”)**

The Law Reform Commission’s Issues Paper is welcome and I congratulate the Commission and its team on its comprehensive work. My comments are in a personal capacity. I am a solicitor working in general practice in rural Ireland with an interest in protecting the vulnerable client particularly the elderly. I am a member of the Society of Trust and Estate Practitioners (STEP) and a member of the STEP Special Interest Group on Mental Capacity. I have also completed the Law Societies’ Certificate on Decision Making-Capacity Support.

### ***The role of solicitors in preventing financial abuse of the vulnerable***

In relation to Issue 4 (Financial Abuse) of the Issues Paper, it should be noted that solicitors can play an important role in tackling financial abuse. They have regular contact with adults at risk, particularly those solicitors whose practice consists mainly of private client work. In particular solicitors have contact with adults at risk, in relation to opening joint bank accounts, will drafting and property transactions; solicitors can provide oversight functions/advice to clients with respect to home help, family relations, the Fair Deal and third party suppliers; they play an important role in enduring powers of attorney, ward of court applications and advice on advance health care directives; they assist, advocate and advise on domestic abuse applications.



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I note there is no mention of the role of solicitors in preventing or being part of the solution to the area of financial abuse. I know that while the LRC would be well aware of the important role that solicitors play in this area, it may be worth noting the role of solicitors in any further reports.

### ***Similarity of Issues***

I note that the issues raised by the Law Reform Commission in Chapter 4 of the Issues Paper overlap with chapter 5 of the Law Reforms Commission's Consultation Paper on the *Law and the Elderly*. (LRC CP 23 – 2003) ("2003 Elderly Consultation Paper"). Chapter 5 of the 2003 Elderly Consultation Paper (which dealt with prevention of abuse of the elderly) had a specific section on the protection against financial abuse (Section B). While I note that the Issues Paper is of wider scope in its focus of the vulnerable adult rather than the elderly per se, it is worthwhile to mention that much of the topics raised in 2003 Elderly Consultation Paper mirror the topics raised in the Chapter 4 of the Issues Paper. That of joint accounts, financial products aimed at the elderly, social welfare arrangements and undue influence were all referred to in the 2003 Elderly Consultation Paper as with in the current Issues Paper.

### ***Actions Taken by the Law Society***

Section D of Chapter 5 of the 2003 Elderly Consultation Paper did recognise the role of solicitors in preventing abuse in financial and property transactions. The 2003 Elderly Consultation Paper recommended that guidelines should be available to solicitors to help in their dealings with vulnerable elderly people in respect of financial and property transactions. It went on to outline the content and nature of these guidelines. It is worth noting that since the 2003 Elderly Consultation Paper the following practice notes have been published by the Law Society reflecting these issues including:-

- Drafting Wills for the Elderly Client – Guidelines for Solicitors (2009)
- Gifts: Acting for an Elderly Client – Guidelines for Solicitors (2009)
- Joint Bank Accounts – Guidelines for Solicitors (2008)
- Transactions involving vulnerable/older adults (to include requests for visits to residential care settings) (2012);

Further the Law Society were instrumental in developing and implementing the following statutory instrument:-

- Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012 (SI 375 of 2012)

I mention the above as it demonstrates five salient points:-

- The importance and influence of the Law Reform Commission's work and the need for this work to continue;
- Industry responses on foot of the Law Reform Commission's work;
- The perennial and persistent nature of these issues and that protection of the vulnerable is key issue that needs to be tackled;
- That without a central authority, the approach to protection of the vulnerable will remain patchwork and piecemeal;
- That industry lead protection must remain an integral part of our system for protection of the vulnerable but it should only be done with the support of a strong regulatory framework and central authority.

## *The financial protocol*

I would agree that to the extent that the Central Bank and the Department of Employment Affairs and Social Protection are lacking in regulatory powers to address financial abuse that these be identified and bolstered.

However, outside of the context of legislative powers/provisions, the Issues Paper itself clearly shows in Issue 4, Section 4 (Measures to prevent financial abuse in other jurisdictions), what can be done on a voluntary basis/Code of Conduct basis. The 2015 Occasional Paper, the Lending Standards Board Recommendations and UK Finance Code of Practice (referred to at para [4.29] – [4.33] of the Issues Paper) all show the importance and effectiveness of codes of practice and guidance.

There does not appear to be any obvious statutory bar for the Central Bank to take a lead (in consultation with BPF) in commencing a consultation to create a Code of Practice for the wider financial services industry on the vulnerable adult. S. 117 of the Central Bank Act 1989 appears to provide sufficient statutory underpinning of a dedicated code of practice for vulnerable adults. While much of the amendments to the 2012 Consumer Protection Code have been statutory or legislative driven (for example the changes required by the Payments Accounts Directive, or the Packaged Retail and Insurance Based Investment Products Directive) others changes are industry or issue driven, for example the recent changes after the consultation *Enhanced Mortgage Measures: Transparency and Switching* (CP112). Lack of legislative underpinning should not be a bar to the Central Bank engaging in this process now.

The importance and effectiveness of such a potential code could be highlighted in two areas:-

- The Safeguarding your Money campaign launched during late 2019 by the Banking and Payments Federation of Ireland and Safeguarding Ireland is very welcome. Helpful information is provided to the public through the leaflet and associated advertising. I also note that this campaign was informed by the valuable work conducted by the National Centre for the Protection of Older People and the report by Phelan et al. entitled *Experience of Bank Staff on the Financial Abuse of Vulnerable Adults*. This is clear evidence of industry led education, structures and codes which is very welcome.
- Similarly nursing home staff are acutely aware of the requirement to protect the vulnerable. My experience with Nursing homes, and their staff (whether private or HSE funded) demonstrate how aware staff are of the need to protect the vulnerable. This is due in no small part to standards introduced by HIQA to include Theme 3 (called Safe Services) of HIQAs *National Standards for Residential Care Settings for Older People*<sup>1</sup> now amplified by the excellent *National Standards for Adult Safeguarding* (December 2019).

The above serves to re-iterate the central theme in my response that like the model currently being adopted with respect to capacity (where the Assisted Decision Making (Capacity) Act 2015 (the “2015 Act”) will be supplemented with a range of codes of conduct/protocols) the key way forward for the protection of the vulnerable is the twin approach of a statutory central authority supplemented by industry / sectoral action.

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<sup>1</sup> Its also worth making reference to the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI No 415 of 2013). Schedule 5 of the this SI sets out that certain policies and procedures must be in place for every nursing home. It is encouraging to note that the first on this list of policies is that of “The prevention, detection and response to abuse”.

### ***Protected Disclosure***

I agree that a statutory form of protected disclosure should be implemented. In addition it should be considered whether the issue of protected disclosures could be broadened beyond that of financial institutions to include, social care workers or advocates. Solicitors have obligations of disclosure in relation to anti-money laundering obligations and also anti-tipping off obligations and consideration should be given to the introduction of similar obligations to all in the legal and financial services regime.

### ***Consent of the Vulnerable***

Related to the issue of protected disclosure is the issue of consent of the vulnerable person or their involvement in their protection.

The issue of consent of the complainant is problematic in the context of the vulnerable where in many cases they do not have the ability to raise a complaint themselves or will expose themselves to future abuse in the event that a complaint is raised.

Many practitioners have had the experience that vulnerable persons are fearful of making a complaint due to the closeness (in terms of relationship or general physical day to day contact) of the perpetrator. Section 10 of the Petty Sessions Act 1851 appears that prosecution will only be made on foot of a complaint by a complainant. However, consideration or further research needs to be made regarding the ability of a third party to bring a criminal complaint on behalf of a vulnerable person (particularly in those cases of diminishing capacity – pre ward of court).

Clarity or guidance should be given to the Gardaí on this issue. There is reluctance of the Gardaí to commence an investigation without a written complaint from the victim. However with assistance a vulnerable person should be able to pursue a criminal complaint and perhaps the role of a decision making assistant or co-decision maker under the 2015 Act could be considered in this light.

The writer has had personal experience of cases of suspected theft which could not be prosecuted due to capacity issues. Obviously there can be no relaxation of the requirement of a case to be proven beyond reasonable doubt, but procedural hurdles could be making vulnerable individuals fair game for criminal activity. Consideration needs to be given to what extent these procedural hurdles can be re-examined to balance the public goods of a fair trial versus the protection of the vulnerable.

The need to have consent of the vulnerable individual in remedying the abuse is central to the HSE's approach to protecting the vulnerable. The HSE at page 20 (8.3) of the *Safeguarding National Policy and Procedures* outlines the barriers for vulnerable persons disclosing abuse. However, the National Policy outlines that where abuse has been identified one of the key aspects is that a safeguarding plan for a vulnerable person can only be agreed and implemented where the vulnerable person agrees to that intervention (see page 35). This demonstrates the difficulties in this area, but consideration needs to be given to the possibility of third party complaints.

### ***Institutional or Organisational Models***

A National Safeguarding Authority is vital for safeguarding in Ireland. I would strongly favour the option of establishing the authority as an independent agency. The advantages outlined in paragraphs 5.16 – 5.19 far outweigh the disadvantages.

Hopefully there is the political will for financing such a body and that sufficient resources can be given to such a body. There is the concern that a similar narrative could develop on this authority as is happening in relation to the Director of the Decision Support Service established under the 2015 Act.

Media reports in October 2018 indicated a funding shortfall of €6 million for the implementation of the 2015 Act. Minutes from the meetings of the Mental Health Commission in September and October 2019 which came to public attention in January 2020 revealed the frustration and disappointment among members of the Mental Health Commission about the continued underfunding by the Department of Justice of the implementation of the 2015 Act. According to media reports of the 22<sup>nd</sup> May 2020, the Director of the DSS wrote to all political parties requesting that implementation of the 2015 Act be prioritised in the next programme for government.

However the National Safeguarding Authority can only do so much. In fact much of the practical work of protecting the vulnerable will be conducted on a sectoral basis on the “ground”. Therefore the work of the National Safeguarding Authority will be crucial in co-ordinating these bodies and ensuring that all the different agencies work in harmony.

There is significant positive work being conducted in the safeguarding world by the safeguarding protection teams (SPTs) in each of the nine Community Health Organisations (CHOs) in Ireland. Similarly in relation to the role of HIQA and in particular with respect to the National Standards for Adult Safeguarding (2019). It is recognised that these bodies only have a patchwork of coverage, with the SPTs principally focused on HSE funded facilities and HIQAs remit related in respect of adult safeguarding, to areas such as nursing homes. It is only through a National Safeguarding Authority that these elements can be harmonised.

At the moment in Ireland we have several limbs of protection of the vulnerable (the HSE, HIQA, the Law Society etc). A National Safeguarding Authority will give these a heart and mind and create a body of protection for the vulnerable in Ireland.

### ***Reporting***

On balance I would be in favour of mandatory reporting. It should be up to the National Safeguarding Authority, HSE or Gardaí to determine on foot of a report what steps should be taken.

### ***Other general observations***

#### Multi-agency Co-ordination

In the context of multi-agency collaboration the point needs to be made that there is very little engagement across professions and industries in relation to issues of the vulnerable. In my experience solicitors are generally not aware of the HSE’s National Safeguarding Office. They would not know that there are Safeguarding Protection Teams in their area or what they do. Nor are they aware of the safeguarding officers in their local financial institution or amongst the Gardaí. Similarly, in my view, solicitors are unaware of the role of advocates and what services they provide. Far greater co-ordination is needed between the various professions (medical, legal and accountancy) financial service providers, the Gardaí and the HSE to make each other aware of what they do and how they are combatting the issue. Each appear to work in silos without co-ordination. If there were widespread proliferation of knowledge between these pillars much could be achieved. The National Safeguarding Authority should be the central core to this wheel of co-ordination.

#### Lack of Clarity/Training Requirements

When one speaks to financial service providers, solicitors, medics, clients etc there is a overwhelming goodwill to prevent harm of the vulnerable, but this is matched in equal measure by a general vagueness of what to do and what practical steps to take or where to turn when faced with cases of abuse or how to recognise abuse. While Safeguarding Ireland engages in much training and awareness campaigns, further training in the area is needed to set out for all service providers as to what can be done to prevent abuse, what are the limitations to the current system and what steps are to be taken in

particular circumstances. Again the National Safeguarding Authority will have a vital role in pushing forward with training programmes in this area.

### Protection of the Vulnerable – Anti-Money Laundering Parallels

A culture of protecting the vulnerable needs to be developed in the same way that a culture of preventing anti-money laundering has occurred across various professionals/financial institution etc or in the same way that a culture of protecting the vulnerable has occurred in the nursing home environment. I would make three suggestions here:-

- Consideration should be given as to whether the professions should have a mandate to ensuring procedures and protocols are implemented to prevent abuse of the vulnerable in the same way that this has developed for anti-money laundering procedures.
- Further, authorisations or continued membership of professional bodies should include within them demonstration of adherence to procedures, training and protocols to protect the vulnerable.
- Protection of the vulnerable should be part of the general roster of continuing professional development in the same way that being aware of regulatory issues or ethical considerations are part of mandated CPD for the legal, accountancy and medical professionals.

### ***Conclusion***

Protection of the vulnerable is the hallmark of the health of a society. There is no doubt that Irish people abhor abuse of the vulnerable. However, so far, that general sense of abhorrence has not translated into comprehensive legislative change or a core central function. It is hoped that we are now at the end of that era and the beginning of the era of the establishment of the Adult Safeguarding Authority.

The Law Reform Commission is at this juncture after many years of work to get to this point. In fact the current Issues Paper is a continuum of the layers of work by itself or other agencies/organisations and I particularly thinking of the past number of milestones:-

- The 1998 report by the National Council on Ageing and Older People;
- the 2002 Working Group on Elder Abuse;
- The Law Reform Commission reports principally the 2003 Consultation Paper on the Law and the Elderly its 2005 Consultation Paper of 2005 on Vulnerable Adults and Capacity;
- The establishment of Safeguarding Ireland;
- The National Safeguarding Policy and HSE National Safeguarding Office;
- The establishment of Sage Advocacy;
- The work of Senator Colette Kelleher and the publication of the Adult Safeguarding Bill 2017.

It is now time to bring all of this work to the next stage of development and the establishment of the National Safeguarding Authority. It is hoped that the authority will receive the funding to carry out its work.

It is ironic that submissions to this Issues Papers are written to the backdrop of Covid-19 where the State is willing to create a potential €30 billion deficit in the national finances in an effort to protect the lives of the vulnerable in Ireland, but that funding cannot be found for the work to implement the 2015 capacity legislation.

What the current pandemic demonstrates is that when called upon, the of the people of Ireland do place protection of the vulnerable ahead of economic success and personal financial wellbeing. It is hoped that this national sentiment can be harnessed with appropriate funding for the establishment of the National Safeguarding Authority.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Colm Kelly', with a stylized, cursive script.

**COLM KELLY SOLICITOR  
HEALY CROWLEY AHERN**