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Analysis of the legal, regulatory, and policy framework concerning child sexual abuse in Ireland with a focus on interagency information and data sharing processes

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Background

This analysis has been completed for the Council of Europe in conjunction with EU DG Reform and the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) as part of the implementation of the project 'Barnahus Ireland: Supporting the implementation of the Barnahus model in Ireland'.

The Barnahus model was established in Iceland as an interagency response model to support children, who may have been victims of child sexual abuse, under one roof. The Barnahus model puts the child's best interests at the heart of investigative procedures and aims to eliminate undue delays in the treatment of child sexual abuse cases and avoid re-traumatisation of the child. Interagency cooperation and information sharing is key to achieving these goals. Since 2015, the Barnahus model has been promoted as a promising practice by the Council of Europe's Committee of the Parties to the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), which Ireland ratified in 2020.[1]

The first Barnahus service in Ireland, Barnahus West in Galway, was launched as a pilot project in 2018 under the coordination of the DCEDIY and an Interdepartmental Group (IDG) established by the Minister for Children and Youth Affairs. The IDG consists of members from the DCEDIY, the Department of Health, the Department of Justice, the Health Service Executive (HSE), Children's Health Ireland, Tusla, the Child and Family Agency, and An Garda Síochána. Barnahus West has been taking referrals since 2020 and moved on to its premises in January 2022.

Challenges in interagency coordination and the need for information sharing protocols and standardised policies and procedures for the Barnahus approach were identified in the report 'Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up' (hereinafter 2020 Appraisal Report)[2] and the Joint EU-Council of Europe Project Inception Report' (hereinafter the Inception Report).[3]

The goal of the Council of Europe project is to address the challenges encountered during that pilot project ahead of the launch of two additional Barnahus services: Barnahus South in Cork and Barnahus East in Dublin. The Council of Europe project has three main components:

1. Review the legislative and policy framework concerning children's rights and child sexual abuse and exploitation in Ireland.

2. Make recommendations on interagency response mechanisms to child sexual exploitation and abuse.

[1] Council of Europe, *Protection of children against sexual exploitation and abuse - Child-friendly, multidisciplinary and interagency response inspired by the Barnahus model* (2018) 8.
[2] Sinead Hanafin, Ciaran Lynch and Elaine O'Callaghan *Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up* (2020).
[3] Joint EU-Council of Europe project, *Inception Report: Support the implementation of the Barnahus project in Ireland'* (2023).

3. Develop interagency coordination and data sharing tools for the implementation of the Barnahus model in Ireland.

This report is part of the first and second components. The objective of the report is to:

1. Provide a review and analysis of Irish legal frameworks, which are relevant and impact the establishment and operation of the Barnahus model in Ireland, with a particular focus on interagency data sharing;
2. Identify any blockers to the implementation of the Barnahus model from a legal, policy, or practice perspective;
3. Suggest specific actionable recommendations on how these blockers can be overcome, and how interagency co-operation and data sharing can be enhanced in this field.

The report is composed of five chapters.

Chapter 1 explores the current legal and policy frameworks that are relevant to the Barnahus model in Ireland and maps any existing gaps that will need to be closed for its effective functioning.

Chapter 2 examines data protection legislation and the frameworks that need to be considered in the context of child protection, in particular for the implementation of the Barnahus model.

Chapter 3 explores and analyses interagency protocols and systems that are already in place between the core agencies involved in the implementation of the Barnahus model – An Garda Síochána (hereinafter the Gardaí), Tusla – Child and Family Agency (hereinafter Tusla), the Health Service Executive (hereinafter the HSE), and Children's Health Ireland (hereinafter CHI).

Chapter 4 recommends a new model for interagency data sharing to address the blockers that have been identified by stakeholders in the Barnahus project and those discussed in the previous chapters.

Chapter 5 summarises the main points of the report and the actionable recommendations that can be carried out in the short- and long-term to improve the functioning of the Barnahus model in Ireland with respect to interagency data sharing and data protection more widely.

Methodology

The methodology applied to this research was a combination of desk research and stakeholder engagement. Stakeholder input highlighted areas of concern in relation to interagency data sharing within the Barnahus model and influenced the focus of this research. A desk review of the legislative, policy, and regulatory framework in Ireland in the context of child protection with a focus on data protection and data sharing was conducted taking this into consideration. This involved a doctrinal analysis of identified relevant laws – including laws governing the respective agencies, as well as wider criminal justice and child

protection laws regulating interventions in suspected child abuse cases, and data protection laws regulating the exchange of information between authorities. Other relevant primary resources such as case law, policy documents, official guidelines, and government reports were also reviewed. Further to that, policies, protocols, and professional codes of conducts related to data protection and data sharing for each agency were also analysed. Current Barnahus West documentation related to data protection and data sharing was also supplied for review.

Stakeholder interviews were held with professionals working on the ground in the Barnahus context to ascertain the potential challenges they face or expect to face in relation to information sharing as part of the delivery of Barnahus services. In Barnahus West, the Barnahus manager, employed by Tusla, was interviewed along with professionals from the HSE and the Gardaí. In Barnahus South, the Barnahus manager, employed by Tusla, was interviewed along with professionals from the HSE, and the Gardaí. In Barnahus East, a Barnahus manager has yet to be appointed, interviews were held with professionals employed by CHI, one holding a senior position in St Clare's Unit in Connolly Hospital and the other holding a senior position at the Laurel's Clinic in Tallaght Hospital.

The aim of the interviews was to establish current data protection and data sharing practices, verify that the legal and policy analysis had identified all the relevant challenges, and to consult with practitioners on possible solutions. The interviews were held with working professionals from each agency who had or will have professional experience working within the Barnahus model and were conducted via Microsoft Teams following a semi-structured interview template.

The Council of Europe appointed two experts to provide guidance and feedback in the drafting of this report; Dr Sinead Hanafin, who authored the 2020 Appraisal Report, and Niamh O'Loughlin, Social Work Team Leader at Barnahus West. Detailed interviews were held with these experts throughout the process and their input has significantly shaped the contents of the report.

Further written feedback was sought from more stakeholders, including the IDG. The first draft of the report was shared with the IDG on 11 September 2023 and IDG members had the chance to offer their input on the report, with a second round of feedback taking place after the analysis was presented in a Roundtable in Dublin on 10 October 2023. More comprehensive consultations did not take place due to time constraints of the European Union – Council of Europe project under which this analysis was funded. This is a limitation of the analysis and it is noted that interviews with members of the IDG could have enhanced the report. However, this report is only intended to identify potential challenges to the implementation of the Barnahus model in Ireland from an information sharing perspective. These issues require further careful consideration from all stakeholders involved.

The information in this report takes into account developments up until October 2023, and it is noted that the development of processes for the implementation of the Barnahus model in Ireland is continuing and engagement is ongoing in relation to some of the issues addressed in this report.

Chapter 1 Investigating child sexual abuse in Ireland: Establishing the legal and policy landscape

1.1 Introduction

Ireland has two distinct legal and policy frameworks for responding to child sexual abuse; the child protection and safeguarding framework and the criminal justice framework. The agencies with statutory responsibility in this area are Tusla and the Gardaí respectively. Both agencies are tasked with responding to claims of child sexual abuse but have distinct purposes for doing so; Tusla's overall aim is to safeguard children, while the Gardaí's responsibility is to detect and prosecute crime. Despite repeated calls for Ireland to develop a national strategy on child sexual abuse, it has yet to do so, leaving the country without a nationally coordinated strategic framework for preventing and responding to child sexual abuse.[4] The absence of a 'whole of government' response has left agencies to operate independently of one another to carry out their work in line with their individual purposes as opposed to a holistic approach with the best interests of the child as the overarching goal.

Since the passing of the Children's Referendum in 2012 there have been several significant legislative changes introduced aimed at strengthening the child protection system. The addition of Article 42(A) to the Constitution provided express and independent protection for children's rights at a constitutional level for the first time. The principal change in statute law was the enactment of the Children First Act 2015, placing some of the key elements of Children First National Guidance on a statutory basis. This Act is part of a suite of legislation aimed at bolstering the State's response to child sexual abuse which includes the National Vetting Bureau (Children and Vulnerable Persons) Acts, 2012-2016 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, as well as the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017, both transposed from EU Directives. While Ireland has made progress in passing laws that enhance its response to child sexual abuse in line with its international obligations, significant gaps remain. Reform is ongoing, however, and the Child Care (Amendment) Bill 2023, which revises the Child Care Act 1991 – the primary piece of legislation regulating child protection policy in Ireland – provides a timely opportunity to address and close some of these legislative gaps.

[4] Irish Society for the Prevention of Cruelty to Children, 'ISPCC highlights need for national strategy on child sexual abuse, as statistics highlight prevalence' (26 April 2021) <https://www.ispcc.ie/ispcc-highlights-need-for-national-strategy-on-child-sexual-abuse-as-statistics-highlight-prevalence/> accessed 18 July 2023; Alison Healy, '
Call for national strategy on child sex abuse' *The Irish Times* (17 September 2008) <https://www.irishtimes.com/news/call-for-national-strategy-on-child-sex-abuse-1.828832> accessed 18 July 2023; Office of the United Nations High Commissioner for Human Rights, 'Ireland: UN human rights expert calls for national strategy to protect children from sexual violence' (22 May 2018) <https://www.ohchr.org/en/press-releases/2018/05/ireland-un-human-rights-expert-calls-national-strategy-protect-children> accessed 18 July 2023.

1.2 International law

Ireland's current policy and legal framework in relation to child protection, and child sexual abuse specifically, has been significantly shaped by its obligations under international law. Broadly, these include its obligations to:

- Protect children from violence and abuse;
- Investigate reports of child abuse;
- Consider the best interests of the child in all actions;
- Hear the child's views with respect to the age and maturity of the child.

Ireland committed to promoting children's rights when it ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1992. While the treaty has not been fully incorporated into Irish law, it has influenced several changes in the Irish legal, policy and regulatory landscape and an overall shift in how the State views children; moving away from a paternalistic approach to a child-centred approach where children are recognised as individuals in their own right. These changes include the establishment of the Ombudsman for Children's Office in 2004, an amendment to the Irish Constitution following the Children's Referendum in 2012, legislative changes including the Children First Act 2015, and the ratification of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) in 2020.

The UNCRC provides a framework for domestic policy and practice relating to children's rights in Ireland.[5] The international human rights treaty sets out the specific rights of children and has significantly influenced the development of child protection policy in Ireland. It is informed by four overarching principles: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. These have become key concepts in the context of child protection interventions and are core pillars of child friendly justice.[6] The UNCRC states that the best interests of the child should be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.[7] The child's best interests are a threefold concept: a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.[8] An adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention.[9] The UN Committee on the Rights of the Child further states that no right should be compromised by a negative interpretation of the child's best interests and if a legal provision is open to more than one interpretation, the interpretation that most

[5] United Nations Convention on the Rights of the Child (UNCRC) (adopted 20 November 1989, entered into force 2 September 1990) *Treaty Series*, vol. 1577.
[6] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* (2010) 17-18.
[7] UNCRC, art 3.
[8] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc No CRC/C/GC/14 [6].
[9] Committee on the Rights of the Child, *General Comment No 13 (2011) The right of the child to freedom from all forms of violence*, UN Doc No CRC/C/GC/13 [61].

effectively serves the child's best interests should be chosen.[10] The UNCRC also provides for the right of the child to be heard. It states that a child who is capable of forming his or her own views should have the right to express those views freely in all matters affecting them, and these should be given due weight in accordance with the age and maturity of the child.[11] All rights guaranteed by the Convention must be available to all children without discrimination of any kind.[12] Under the Convention, a child is defined as a person under the age of 18 years.

While the European Convention on Human Rights (ECHR) does not specifically mention the rights of children, it states that the rights it covers apply to 'everyone'. The ECHR places an obligation on the Irish State to protect children from sexual abuse and conduct an effective investigation of any allegation of sexual abuse in line with Article 3 of the ECHR, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[13] While it makes no express reference to children or child abuse, Article 3 has been extensively applied by the European Court of Human Rights (eCtHR) to cases where States have failed to adequately protect against or investigate abuse.[14] Of particular note, and relevance to the Barnahus model, is the judgment in *B v. Russia* where the eCtHR held that subjecting the child victim of sexual abuse to numerous interviews where the victim had to repeat her statements led to secondary victimisation of that individual and was a violation of Article 3 of the ECHR. In its judgment, the Court reiterated that positive obligations under Article 3 of the Convention include the protection of the rights of victims in criminal proceedings. It stated that "in cases of alleged sexual abuse of children those obligations require the effective implementation of children's rights to have their best interests as a primary consideration and to have their particular vulnerability and corresponding needs adequately addressed, in order to protect them against secondary victimisation. The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence." As such, when a complaint of abuse is made, the State is obliged to undertake a rigorous investigation of that complaint that is prompt and thorough, capable of securing all available evidence, child-sensitive, and which provides measures to support recovery such as counselling. Failure to adhere to these standards may lead to a violation of Article 3 of the ECHR.[15] The ECHR is binding on the Irish State as a matter of international law. The European Convention on Human Rights Act 2003 gives further effect to the ECHR in Irish law, imposing

[10] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc No CRC/C/GC/14 [4].
[11] UNCRC, art 12.
[12] UNCRC, art 2.
[13] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.
[14] *B v. Russia* App no. 36328/20 (ECtHR 7 February 2023); *N.Ç. v. Turkey* App no. 40591/11 (ECtHR February 2021); *X and Others v. Bulgaria* App no. 22457/16 (ECtHR February 2021); Conor O'Mahony, 'Child protection and the ECHR: Making sense of positive and procedural obligations' (2019) International Journal of Children's Rights 27(4), 2 <https://cora.ucc.ie/server/api/core/bitstreams/ca819c54-bbbb-4793-8183-8b8bf6bb4f3e/content> accessed 18 July, 2023.
[15] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 37.

obligations on both Tusla and the Irish courts to perform their functions in a manner compatible with the State's obligations under the ECHR.[16]

The European Union's Charter of Fundamental Rights builds on the ECHR and places additional obligations on Member States, including child specific rights. It states that the child has the right to protection and care as is necessary for their wellbeing; the child's best interests should be a primary consideration in all action relating to the child; the child has the right to express their views freely and have them considered in accordance with their age and maturity; and the child has the right to maintain a regular personal relationship, and direct contact, with both parents, unless that is contrary to the child's interests.[17] Article 21 of the EU Charter of Fundamental Rights prohibits direct and indirect discrimination against anyone including a child; this applies to education, healthcare and social security. While the EU does not have a general competence to legislate on children's rights, it does have competence in specific areas such as combating trafficking in human beings and the sexual exploitation of children,[18] and victims' rights where there is a cross-border dimension.[19] Ireland is bound by the Charter of Fundamental Rights when implementing EU law. Ireland has transposed EU Directives in relation to combatting child sexual abuse and the rights of victims of crime into law. Therefore, while EU law may not be specifically directed at children, Member States must take the principles contained in Article 24 into account when applying substantive EU law to children. Substantive law defines rights, duties and obligations in written or statutory law.

Ireland ratified the Council of Europe's Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as the Lanzarote Convention, in 2020. The legally binding agreement is considered the most ambitious and comprehensive international legal instrument aimed at preventing and protecting children from sexual exploitation and sexual abuse and prosecuting perpetrators.[20] Promoting national and international cooperation against sexual abuse of children, ensuring investigations are conducted without undue delay, and preventing re-traumatisation of children are among the core goals of the Lanzarote Convention.[21] It sets out the standards for investigations and criminal proceedings emphasising the best interests and rights of the child.[22] It also puts an obligation on states to establish effective social programmes and set up multidisciplinary structures to provide the necessary support for victims and to assist victims, in the short and long term, in their

[16] European Convention on Human Rights Act 2003 (ECHR Act 2003) s 3.
[17] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 24.
[18] European Union, Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 13 December 2007, 2008/C 115/01, art 79 and 83.
[19] TFEU, art 81 and art 82(2).
[20] Council of Europe, Protection of children against sexual exploitation and abuse - Child-friendly, multidisciplinary and interagency response inspired by the Barnahus model (2018).
[21] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), 12 July 2007, CETS No.: 201.
[22] Articles 30,31,34,35, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), 12 July 2007, CETS No.: 201

physical and psycho-social recovery.[23] Article 10 of the Convention states that parties to the Convention should take ”the necessary measures to ensure the co-ordination on a national or local level between the different agencies in charge of the protection from, the prevention of and the fight against sexual exploitation and sexual abuse of children, notably the education sector, the health sector, the social services and the law-enforcement and judicial authorities”. This includes encouraging co-operation between the competent state authorities, civil society, and the private sector, to better prevent and combat sexual exploitation and sexual abuse of children.

The Lanzarote Convention came into force in Ireland in April 2021; there are still potentially significant gaps between the treatment of children as victims or witnesses of abuse and the standards set down in it. The implementation of the Barnahus model, which has been endorsed by the Committee of the Parties to the Lanzarote Convention as an example of good practice for a child-friendly multi-disciplinary response to violence, on a national level would help to close these gaps. Re-victimisation of the child where sexual abuse is suspected is a key concern and the prevention of this is an important focus where multiple agencies are involved. Child-friendly justice is a key action item under the EU agenda for the Rights of the Child.[24] The EU has adopted a number of legislative and strategic actions aimed at encouraging judicial systems to adapt to children’s needs.[25] This includes strengthening the implementation of the 2010 Guidelines on Child-friendly Justice with the Council of Europe.[26]

While the rights of the child need to be balanced with other rights such as the right to a private life and the right to fair procedures, the rights of the child are not lesser rights. This is backed up in Article 8 case law of the European Court of the Human Rights where a balance must be struck between the interests of the child and the right of the parents to private and family life.[27] The Court in *Sahin v. Germany* stated that “particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development.”[28] Article 3 of the ECHR, the right to not be subjected to torture or to inhuman or degrading treatment or punishment, is an absolute right and, as discussed above, has extensively been applied by the eCtHR in relation to states’ failure to effectively investigate child sexual abuse and protect the rights of a victim of sexual abuse.

[23] Articles 11 and 14, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), 12 July 2007, CETS No.: 201
[24] European Commission, ‘An EU Agenda for the Rights of the Child’ (2011).
[25] European Commission, ‘Child Friendly Justice’ <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en> accessed 1 September 2023.
[26] Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010)
[27] *Sahin v. Germany,* App No. 30943/96 (ECtHR, 8 July 2003) [66]
[28] Ibid.

International and EU primary law emphasise protecting children and acting in their best interests. It does not put in place any blockers to the implementation of the Barnahus model in Ireland, but in fact puts an onus on Ireland to put such a model in place to fulfil its international obligations. The four core principles of the UNCRC are part of the key criteria for Barnahus, and as such it is crucial that the implementation of Barnahus in Ireland is in line with these principles. This includes ensuring the Barnahus model is implemented consistently across the country so there is no discrimination or inequity in services provided to children.

1.3 The Irish Constitution

Article 42(A) was added to the Irish Constitution in 2015, following the passing of the Children's Referendum, enshrining the UNCRC principle of the best interests of the child and respect for the view of the child in Irish law.[29] The amendment introduced an explicit statement recognising the natural and imprescriptible rights of the child and the state's duty to uphold these rights. This was a very significant development in Irish constitutional law for the protection of the rights of children, providing a strong constitutional foundation for the country's child protection system, by providing the State with the power to act when the "safety or welfare" of a child "is likely to be prejudicially affected". The provision also contains safeguards to protect against over-intervention by the State, by including the phrases "exceptional cases" and "proportionate". The provision also states the best interests of the child shall be the paramount consideration; and that the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child in child protection proceedings, providing a more heavily entrenched right for children to be listened to. The constitutional change heightens the need to safeguard and vindicate the rights of children; emphasises the paramountcy of the best interests of the child, and promotes the voice of children in proceedings concerning them. While the children's referendum heralded the start of a legislative and policy shift in the treatment of children, in practice there are still many barriers to these values being applied in relation to the child victim's journey through the justice system. The state has been criticised for delays in implementing measures that could reduce the trauma for children in these circumstances.[30] The rights of the child sometimes must be balanced with other constitutional rights, such as the right to fair procedures, when there is conflict.

1.4 Child protection framework

From a national law perspective, child welfare and protection policy is based on a legal framework provided primarily by the Child Care Act 1991 and the Children First Act 2015. Children First: National Guidance for the Protection and Welfare of Children (hereinafter Children First National Guidance), the government's overarching policy on child protection, sets out the key principles of child protection and welfare that inform both government policy and best practice for those dealing with children. These include:

- The safety and welfare of children is everyone's responsibility;

[29] Constitution of Ireland (1 July 1937), art 42(a).
[30] This has been highlighted across the annual reports of the Special Rapporteur on Child Protection cited in this report.

- The best interests of the child should be paramount;
- The overall aim in all dealings with children and their families is to intervene proportionately to support families to keep children safe from harm;
- Interventions by the State should build on existing strengths and protective factors in the family.[31]

This national guidance, last revised in 2017, sets out the statutory responsibilities of Tusla and the Gardaí when they are alerted to concerns about the welfare and safety of a child and describes how reports about reasonable concerns of child abuse or neglect should be made to the statutory authorities. It is intended to provide a framework to support the enhancement of interagency cooperation and the strengthening of multidisciplinary responses to child abuse.

The enactment of the Children First Act 2015 placed some of the key elements of Children First National Guidance on a statutory basis. The Children First Act 2015 provides an improved legislative framework for promoting interagency cooperation however its scope is limited to 'mandated persons' sharing child protection concerns with Tusla.[32] This applies where the person knows, believes or has reasonable grounds to suspect that a child is being harmed, has been harmed or is at risk of being harmed, or where the child makes such a disclosure. The Act's definition of harm expressly includes sexual abuse of a child.[33] Mandated persons include medical practitioners, therapists, psychologists, social workers, probation officers, teachers, members of the Gardaí, counsellors, youth workers, foster carers, and pre-school workers.[34] The Act makes it a statutory duty for mandated persons to report suspected abuse to Tusla by way of a mandated reporting form. While similar reporting obligations were included in the Children First guidelines, they were not legally binding as they remained guidelines only. Tusla may share information with a mandated person who is assisting them with the assessment concerned, however, the sharing of such information must be limited to what is necessary and proportionate in all the circumstances of the case. The Act includes safeguards to protect information shared during this process by making it an offence to disclose information, which has been shared by Tusla during the course of an assessment, to a third party unless it is in accordance with the law or Tusla has given written authorisation to do so.[35]

The Children First Act 2015 states the need to regard the best interests of the child as the paramount consideration in the performance of all functions under it. One of the stated aims of the Children First Act 2015 is to provide for cooperation and information-sharing between agencies when Tusla is undertaking child protection assessments. While the Act was the first to place a statutory duty on agencies to share information with Tusla when there is a child protection concern, it does not go far enough to provide a framework for

[31] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (2017) 2.
[32] Children First Act 2015, s 14.
[33] Children First Act 2015, s 2.
[34] Children First Act 2015, sch 2.
[35] Children First Act 2015, s 17.

interagency information sharing in a more collaborative way. Tusla, CHI, and the HSE, as do all persons, have a legal obligation to report suspected child abuse to the Gardaí, but there is no statutory duty for Tusla or the Gardaí to share information with the HSE or other bodies.[36] This lack of statutory underpinning for sharing information has caused concerns from some of the agencies and practitioners involved in implementing the Barnahus model. However, the lack of specific statutory underpinning is not in itself a barrier to sharing information if a legal basis is identified for the data sharing under the GDPR and the processing is done so in compliance with the Regulation. If information is being shared under the Children First Act 2015, the legal basis for processing as required by the GDPR is legal obligation (GDPR Art. 6 (1) c). This may apply to the processing carried out within Barnahus services in several instances. Other legal bases for sharing information in the context of Barnahus could be where processing is necessary to protect the vital interests of a child or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. These will be discussed in further detail in Chapter 2.

1.4.1 Child Care Act 1991 and proposals for reform

The Child Care Act 1991 is the key piece of legislation that regulates child protection policy in Ireland and should be interpreted in a manner consistent with the Irish Constitution. It states that the welfare of the child should be regarded as the first and paramount consideration and also states that due consideration should be given to the wishes of the child, having regard to their age and understanding.[37] Under this Act, Tulsa has a statutory responsibility to promote the welfare of children who are not receiving adequate care and protection.[38] While it does not deal with interagency cooperation in any detail, it does state that in order to perform its function it should "take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children."[39] There is nothing in the 1991 Act that sets out the powers or authority of Tusla to fulfil its function in this regard and, aside from the power given to members of the Gardaí to remove a child from his or her home under section 12 of the 1991 Act, the Child Care Act does not place responsibility on any other person in relation to allegations of abuse, past or present.

Ireland is currently in the process of further reform. The Family Justice Strategy 2022-2025 was launched in 2022 to begin the reform process of the family justice system in Ireland.[40] It includes goals and actions to develop and implement training across professions in core family justice areas as well as establishing formal networks and online learning hubs to develop collaborative learning and interdisciplinary awareness across profession and services within the family justice system. The Family Justice Strategy also includes a goal of researching the potential of introducing Court Liaison Officers to help guide families through

[36] Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, s 3.
[37] Child Care Act, 1991, s 24.
[38] Child Care Act, 1991, s 3.
[39] Child Care Act, 1991, s 3(2)(a).
[40] Department of Justice, Family Justice Strategy 2022-2025 (2022).

the family justice system. The Child Care Act 1991 is also being revised with enhancing inter-agency collaboration an important objective of the review of the Child Care Act. The General Scheme to amend the Child Care Act 1991 includes provisions to encourage co-operation between relevant bodies. It also includes provisions for the Minister to give "practical guidance" for interagency collaboration. The proposed legislative provisions are intended to provide the foundations for a range of necessary policy and operational measures ranging from training and case conferences to co-located services and liaison mechanisms. This process of reform provides an opportunity to strengthen the legal framework for the Barnahus model and the application of the Barnahus model should be considered in the review of the Act.

The Twelfth Report of the Special Rapporteur on Child Protection noted that the Child Care Act 1991 must be updated to reflect the provisions of Article 42A and the contents of the ECHR.[41] The General Scheme for the Child Care (Amendment) Bill 2023 includes a new guiding principles section that sets out the best interests of the child as the overriding principle. It also includes the principle that children should be able to participate in the decision-making process, strengthening the voice of the child both in court proceedings and in decisions taken outside the court. This should be supported with legislative clarity on the weight given to the child's wishes when the parent/legal guardian disagrees with the child's wishes. In the Barnahus context, parents/legal guardians may refuse consent to medical treatment or therapy for the child, even though it is considered in the best interests of the child or the child wishes to receive the treatment. As it stands in practice, professionals feel that they have little freedom to act against the parents/legal guardians' wishes unless they apply for an emergency care order from the District Court which is unlikely to occur unless there are extreme circumstances. The principles of the best interests of the child and giving weight to the child's views would be better applied in practice if they were backed with procedural rules relating to the enforcement of these substantive rights; how this could be achieved would require careful consideration from the relevant departments and legal experts in this field.

The need to address interagency collaboration has been highlighted in successive reports of the Special Rapporteur on Child Protection, as well as multiple national and international reports, as a persistent weak spot in the Irish child protection system.[42] The DCEDIY acknowledged in its 2020 consultation paper that interagency cooperation was one of the biggest challenges to securing good outcomes for children.[43] A review of the Child Care Act 1991 includes proposals to enshrine interagency cooperation in law, so as to provide a framework for greater cooperation from other state agencies to enable Tusla to fulfil its mandate.[44] Head 10 of the General Scheme for the Child Care (Amendment) Bill 2023

[41] Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) 119.
[42] Conor O' Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2021) 14; Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 30.
[43] Department of Children, Equality, Disability, Integration and Youth, *Review of the Child Care Act 1991 July 2020 Consultation Paper*, 7.
[44] Department of Children, Equality, Disability, Integration and Youth, *Heads and General Scheme of the Child Care (Amendment) Bill 2023*, Head 10.

introduces a duty to co-operate between relevant bodies, such as Tusla, government departments, the HSE, and the Gardaí. The provision would oblige designated bodies to cooperate with other relevant bodies in the performance of their respective functions to improve the development, welfare, and protection of children when an order is made by the minister. This cooperation may include the sharing of relevant information. The sharing of information includes the sharing of documents and information (including special categories of personal data within the meaning of the Data Protection Act 2018) in accordance with law and to the extent that is necessary and proportionate. This Head also provides for relevant bodies to request information from each other.[45]

The current Special Rapporteur for Child Protection supports Head 10 in principle and has identified it as one of the most important proposals in the General Scheme.[46] However, the proposed provision is the most contested in the new bill and has been criticised as being too weak and not going far enough to push interagency cooperation. In its report on pre-legislative scrutiny of the General Scheme, the Joint Committee on Children, Equality, Disability, Integration and Youth described the provision on the duty to cooperate as having the potential to be a critical tool to help ensure that children and families get the support they need.[47] It stated that child protection should take precedent over data protection where sharing of information and cooperation among relevant agencies was concerned.[48]

Stakeholders who interacted with the Committee as part of this process almost unanimously agreed the provision should be further strengthened.[49] The Committee submitted that the language should be stronger and clearer to remove any discretion.[50] The committee also noted that the new provision should also oblige relevant bodies to collaborate on the planning, delivery and funding of services and activities, not just on information sharing. The addition of this wording to the Head would be welcomed and has particular relevance to the development of multiagency services like Barnahus.

Following the stakeholder engagement process, the Committee stated that "Given the serious and widely documented consequences of not having effective interagency collaboration, the Committee recommends that such cooperation is made a legal requirement. It is too serious to be left as an 'option' and certainly too serious to leave up to practice/culture change".[51] Such a legislative obligation to cooperate would go far in cementing the Barnahus model in Ireland, however it will need to be accompanied by a deeper consideration of the complexity of this type of work; an allocation of the required resources to support it; and clear governance and protocols for sharing for successful implementation at an operational level.

[45] Ibid.
[46] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth Report on pre-legislative scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023 (June 2023), p 59.
[47]Ibid, p57.
[48] Ibid, Recommendation 55, p64.
[49] Ibid 57-58.
[50] Ibid 57.
[51] Ibid 59.

1.4.2 Child Abuse Substantiation Procedure

From our stakeholder interviews it emerged that a Tusla procedure, introduced in 2022 after several legal challenges were taken against the agency, is in some cases leading to a more hesitant approach among the agencies involved in Barnahus in terms of data collection and data sharing. The Child Abuse Substantiation Procedure replaced the 2014 Policy and Procedures for Responding to Allegations of Abuse and Neglect. According to Tusla, the new procedure does not substantially amend the substance of the 2014 document, however individuals from all agencies involved in the implementation of Barnahus in Ireland have expressed concerns around the new procedure.

The Child Abuse Substantiation Procedure (CASP) applies when there is a need to share information with a relevant third party to protect an identified child or yet to be identified child or children from harm.[52] Tusla must carry out an assessment of allegations of child abuse in line with fair procedures. CASP sets out the principles that CASP social workers are expected to follow, to ensure fair procedures are given to PSAAs (Persons subject to allegations of abuse) when they undertakes a substantiation assessment of allegations of child abuse.[53]

Under CASP, if the substantiation assessment progresses to stage 2, the accused individual must be provided with all relevant information and documentation gathered up to that point of the assessment, including the identity of the person making the disclosure and any witnesses, to ensure fair procedures are afforded to the suspect. This could potentially include a substantial amount of special category data and other sensitive personal data such as information relating to health, criminal convictions, allegations of abuse, disabilities issues (relevant in relation to interactions with the individual), literacy issues (relevant in relation to interactions with the individual), history of any abuse suffered, relationship history, mental health, addictions, event details (which may include hobbies, religion, culturally sensitive issues), current and future risks identified in respect of the individual, sexual orientation, sexual activity, sexual history, sexual preference.[54]

CASP was drafted to replace the 2014 Policy & Procedures for responding to allegations of abuse and neglect following legal challenges against Tusla alleging fair procedures had not been applied in the substantiation assessment process. The right to fair procedures is a fundamental right under natural justice and constitutional law. While the High Court judgments concurred that Tusla should carry out substantiation investigations under section 3 of the Child Care Act 1991, they varied in opinion on the precise requirements of these investigations, leaving doubt as to the standard that had to be applied. Section 3 of the Act is the only legislation that imposes obligations on Tusla to investigate complaints of abuse and to mitigate any risks that are identified. However, it is a general and broad provision that has been open to interpretation by the courts. In *MQ v Gleeson*, the High Court confirmed that the section 3 duty applies both to children in immediate risk and to children who, although not immediately identifiable, may become subject to a risk which the health board (who held statutory responsibility for child protection at the time) reasonably expects may come

[52] Tusla, Child Abuse Substantiation Procedure (CASP), Version 1.3, May 2023, p 17.
[53] Ibid, p 19.
[54] Tusla, CASP Person Making a Disclosure Data Protection Notice, 14.

about.[55] The case confirmed that section 3 not only authorises but obliges Tusla to take steps to protect children, including sharing information with third parties, in circumstances where an individual poses a risk that children will be abused. The judgment has subsequently come to be recognised as establishing the foundational principles governing the investigation of complaints of abuse and notification of complaints to third parties, and has been repeatedly cited in later policy documents and case law (where it is often referred to in shorthand as the "Barr Principles" after the presiding judge, Justice Barr).[56]

However, section 3 contains no detail about the nature of Tusla's obligation to investigate complaints; about the procedural requirements that such an investigation should adhere to; or about the steps that Tusla may take in the event that a complaint is substantiated. This lack of detail has allowed for case law resulting from judicial review proceedings (most often taken by PSAAs) to dictate how Tusla must carry out an investigation/assessment of allegations of child abuse. Conflicting messages from the courts, and the absence of defined legislation, that does not provide Tusla with any powers of investigation, leaves Tusla in a precarious situation, whereby practice and policy will continue to be influenced by the Courts' interpretation of Tusla's obligations and how it should fulfil its obligations under section 3 of the Act. The Child and Family Agency Act 2013, which established Tusla, is also devoid of a framework for conducting investigations. This legislative void has resulted in litigation against Tusla and left the agency to fill the gaps by way of a procedure that was "developed to produce the most effective, thorough, and robust procedure possible, within existing legal limitations and the lack of a legislative framework underpinning this crucial work."[57]

The need to close the legislative gap that has been filled by CASP has been highlighted by experts in the child protection field, including former Special Rapporteur Conor O'Mahony, who acknowledges that under the current legal framework the absence of such measures would likely lead to investigations being successfully challenged in court, which would undermine the child protection aims of the investigation.[58] O'Mahony noted that a delicate balance needs to be struck between the rights of children and the rights of the suspect and detailed procedures are necessary to this end.[59] As it stands there is no legislative guidance on how the competing rights of children and the suspect should be weighed against each other. He describes the general terms of section 3 of the Child Care Act 1991 as "arguably unfit for purpose as a legal basis for this specialised and technical area of child protection work," noting it was not drafted with investigations of complaints in mind and contains no detail about the nature of Tusla's obligation to investigate complaints; about the procedural requirements that such an investigation should adhere to; or about the steps that Tusla may take in the event that a complaint is substantiated.[60] O'Mahony recommends the introduction of a tailored provision that clarifies which set of rights is to receive priority in circumstances where they cannot be reconciled. Doing this in the legislation would limit the scope for successful judicial reviews of investigations, and thus strengthen Tusla's hand in

[55] *MQ V Gleeson* [1998] 4 IR 85.
[56] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection*(2020) 39-40.
[57] Tusla, Child Abuse Substantiation Procedure (Version 1.3 May 2023) 3-4.
[58] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 48.
[59] Ibid 43.
[60] Ibid 44.

carrying out effective investigations.[61] O'Mahony notes that if the procedure for investigating complaints of abuse were placed on a clear statutory footing, the bar for a successful judicial review of an investigation would be raised significantly higher than it is under the current arrangements as legislation carries the presumption of constitutionality.[62]

The case law interpreting the current legislation is binding on Tusla in its policy formation, but it is not an obstacle to future legislative action in this area (beyond the broad position that constitutional rights cannot be entirely disregarded).[63] Any such legislative modification would be bound to comply with the parameters established by the Constitution and the ECHR.[64] Research by Mooney has argued that a fear of being sued is a contributory factor in the long delays in investigating complaints that have been noted by HIQA on several occasions.[65] Establishing Tusla's investigation powers in law would put the agency on a stronger legal footing and provide more assurance that they are conducting their work within the letter of the law.

The General Scheme for the Child Care (Amendment) Bill includes a proposal to address this by amendment to the Children First Act 2015 under 'authority of Tusla to assess reports', instead of in Section 3 of the Child Care Act. The proposed provision is detailed in Head 44. Head 44, as proposed, is intended to provide an express legal basis for Tusla to receive and assess reports from non-mandated persons and members of the public. It states in the explanatory note that "This Head requires the Agency to determine what procedures are appropriate with regard to the assessment and management of allegations of harm, and to issue guidelines in that regard. It is intended therefore, that the effect of these provisions will be to place current practice, as set out in Tusla's Child Abuse Substantiation Procedure [CASP], on a statutory footing. It is intended that this approach will allow Tusla to retain the flexibility to adjust its procedures in line with the jurisprudence of the courts."[66]

The amendment, as currently proposed, was met with some concerns during the pre-legislative scrutiny process. The report on pre-legislative scrutiny of the Heads and General Scheme notes that Head 44 was flagged by the Special Rapporteur for Child Protection as needing further attention and was also flagged by the Ombudsman for Children's Office (OCO) as of significant concern. The OCO said that the processes under Head 44 should not be dictated by case law, but on the research of the former Special Rapporteur for Child Protection, Conor O'Mahony.[67] This research has been highlighted in this report.

CASP has in the past been the subject of significant criticism by abuse survivors, support groups and academics, in particular in relation to the potential cross-examination of

[61] Ibid 46.
[62] Ibid 44-45.
[63] Ibid
[64] Section 2 ECHR Act 2003 obliges Irish courts, in so far as is possible, to interpret and apply Irish law in a manner compatible with the State's obligations under the ECHR.
[65] Joseph Mooney, 'Adult disclosures of childhood sexual abuse and section 3 of the child care act 1991: past offences, current risk' (2018) 24(3) Child Care in Practice pp 250-251.
[66] Department of Children, Equality, Disability, Integration and Youth, *Heads and General Scheme of the Child Care (Amendment) Bill 2023*, Head 44.
[67] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth Report on pre-legislative scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023 (June 2023), p62.

complainants.[68] It has been viewed as a step backwards for victims and the progress that has been made in criminal law to provide protection against cross-examination by the accused.[69] While it's noted that CASP has undergone a number of iterations since then and substantial work has been carried out to ensure that the procedure balances the best interests of the child with an individual's rights to fair procedures under the Constitution, concerns persist from individuals working in the Barnahus context. CASP has been perceived by individuals from all agencies interviewed as part of this stakeholder engagement process as a potential area of concern in relation to the successful implementation of the Barnahus model. Individuals expressed varying degrees of concern over the possibility that information added to a Tusla case file could become subject to the CASP process and potentially be provided to the suspect.

From the Gardaí's perspective, sharing such information and knowing it could get back to the suspect may hinder their criminal investigation. Tusla note that CASP is very clear about the necessity to liaise with the Gardaí before moving to Stage 2 of a CASP assessment and requires the CASP social worker to consult Gardaí before progressing to Stage 2 so as not to jeopardise any ongoing Garda Investigation. Tusla employees are concerned that a child's assessment information could be taken out of context and used against them if they are provided to the suspect. CHI and the HSE have also expressed concerns over CASP and have noted how it is impacting the level of information they are willing to share with Tusla. CHI staff reported having received direct requests for assessment reports under CASP and are concerned that consent is not being sought from parents for the sharing of this data and information is not being provided on how the information in the report will be used. While it is noted Tusla has guidelines in place to explain how a child's information within Tusla is shared with CASP, and Tusla have briefed the CHI on CASP and offered support in understanding this better, it is recommended that further education around CASP be provided to all stakeholders involved in Barnahus.

Concerns were also raised that CASP is in conflict with the Barnahus standards as it involves potential reinterviewing and retraumatisation of the child. CASP affords the suspect the opportunity to request the child be interviewed again as part of a reliability and accuracy check to put any questions or comments the suspect has to the child. The procedure states direct questioning of the complainant or witness by the suspect should generally be avoided particularly if the complainant or witness is a child, and it is more appropriate for the CASP social worker to put an agreed set of questions to the child. This procedure gives the option of the alleged perpetrator to question the child, albeit only with their permission. It is noted that this obligation arises from a High Court Judgement that placed an obligation for allegations of abuse to be "stress tested" by means of putting a PSAAs denials to the complainant. Failure to do this could lead to the court to hold that it could not reasonably accept a finding of a founded allegation against a PSAA, which in turn, could compromise the child protection actions Tusla can take.

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[68] Conor Gallagher and Jack Power, 'Guidelines for investigating abuse 'horrifying', says survivor' The *Irish Times* (4 February 2020) < https://www.irishtimes.com/news/crime-and-law/guidelines-for-investigating-abuse-horrifying-says-survivor-1.4160714> accessed July 22 2023.

[69] Criminal Law (Sexual Offences) Act 2017, s 36, which inserted a new s 14C into the Criminal Evidence Act 1992.

Article 31 of the Lanzarote Convention calls for ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the best interests of the child or the investigations and proceedings require it. While CASP makes it clear that the complainant always has the right to refuse to be directly questioned by the suspect, the effect of these measures nonetheless makes the process more intimidating and less victim friendly, albeit it is accepted that this is not the intention of Tusla. This may re-traumatise victims and deter them from proceeding with a complaint. It is noted Tusla has tried to address this by removing potentially intimidating language including 'stress testing' and 'cross examination' from the CASP document.[70]

Interviews conducted by CASP do not follow the Good Practice Guidelines and are not recorded using the same evidence-based protocol applied to joint specialist interviews. This could impact the standard and consistency of interviewing for children. It is recommended that there should be one consistent training programme provided to all interviewers of children who may have experienced sexual abuse.

A further process of consultation with key stakeholders and engagement with Tusla's CASP teams and managers on the procedure's potential compatibility with Barnahus needs to take place. Clarification and further insights should be provided to professionals working on the ground to ensure their concerns are addressed and the practical application of CASP is in line with the aims and implementation of the Barnahus model. This should include suitable training in relation to CASP to all agencies working to implement the Barnahus model.

While it's noted Data Protection Impact Assessments have been conducted for CASP and Barnahus, and are presumably under ongoing review, it's recommended that consideration is given to risks associated with personal data processed as part of Barnahus services being shared with CASP workers and the transparency of this process. There could be a risk of potential violation of the principle of purpose limitation as it could be argued, for example, if a child's personal data is processed to provide Barnahus services to them and is then shared with the individual suspected of child sexual abuse, it is being further processed in a manner that is incompatible with those purposes. Data protection information provided to the child and their family receiving Barnahus services should be transparent about how personal data could be further processed if CASP needs to be applied.

The CASP policy also raises concerns from an access controls and security perspective. Barnahus West and other new Tusla led therapy services store all their notes on the Tusla Caseload Management system (TCM). While Tusla services have different levels of access to TCM, all of the information inputted in the system belongs to Tusla. It needs to be ensured that information stored on TCM as part of Barnahus cannot be accessed by CASP workers or other Tusla workers without permission from the designated Barnahus social workers. This needs to be governed by policy and strict access controls to ensure that information inputted by employees working in Barnahus services can only be accessed by them.

[70] Tusla, Child Abuse Substantiation Procedure (CASP) (Excluding CASP Review) Data Protection Impact Assessment Stage 1 Final, (March 2022). See concerns raised by: Conor O'Mahony, Special Rapporteur for Child Protection and submissions from various stakeholders relating to section 3 of the 1991 Act, p33-34.

It's understood a working group has been established to look at CASP and Barnahus to ensure there is a clear mechanism in place for CASP requesting relevant information. This working group should also examine the issues brought up in this report to ensure that while CASP is in place, in the absence of robust legislative measures, that there is effective communication and awareness between individuals working in CASP and Barnahus so that it is clear to all agencies how information will be sought under CASP, the legal basis for doing so, the safeguards in place, and how redactions are applied. CASP is still a new process, and its implementation in practice should be reviewed on an ongoing basis with consideration to any impact it may have on the implementation of the Barnahus model.

1.5 Criminal justice framework

Irish criminal law related to sexual offences has undergone significant development in recent years. The Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 requires that any person who has information about a serious offence against a child, which may result in charges or prosecution, must report this to the Gardaí. Failure to report under the Act is a criminal offence punishable on conviction in the District Court by a maximum fine of €5,000 and/or 12 months imprisonment. Where convicted in a higher court, the penalty imposed is variable depending on what the maximum penalty would be for the person who committed the underlying offence, and the penalties range from three to 10 years' imprisonment.[71] This obligation is in addition to any obligations under the Children First Act 2015. The criminal justice framework for responding to child sexual abuse, while far from being overhauled, has introduced some new legislation in relation to combatting child sexual abuse and victims rights, in line with the relevant EU Directives.[72] The Criminal Evidence Act 1992 has also undergone significant amendment since its enactment, including several provisions designed to assist vulnerable victims and witnesses.

The EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography ('Child Sexual Abuse Directive') and the EU Directive establishing minimum standards on the rights, support and protection of victims of crime ('Victims' Rights Directive) introduced several articles that are of relevance to medical interventions in Barnahus, including taking account of the child's view, provision of information, right to assistance and support, individual assessment, involvement of trained professionals and keeping medical examinations to a minimum (in the context of criminal investigations). The Criminal Justice (Victims of Crime) Act, 2017 transposes the EU Directive on Victims' Rights 2012/29/EU into national law, conferring a wide range of rights on victims of crime. In relation to children the Act states that for the purposes of an assessment, where a victim is a

[71] Section 7, Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

[72] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (hereinafter EU Directive on Child Sexual Abuse); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter EU Directive on Victims' Rights).

child, the child shall be presumed to have protection needs. When determining to what extent the child might benefit from protection measures or special measures Gardaí (or an officer of the Ombudsman Commission, as the case may be) should consider: the best interests of the child; any views and concerns raised by the child taking into account his or her age and level of maturity; any views and concerns raised by a parent or guardian of the child or any other person duly authorised to act on their behalf provided that such parent, guardian or other person has not been charged with, or is not under investigation for, an alleged offence relating to the child.[73] The Act excludes the views of parents if they are under investigation for an alleged offence relating to the child; consideration of a similar provision in child protection law could provide Tusla with more procedural rules when dealing with conflicts related to parental consent for medical and social care interventions, as well as specialist interviews.

The Criminal Law (Sexual Offences) Act 2017 also amended the Criminal Evidence Act 1992 with regard to the disclosure of counselling records, introducing a procedure whereby, unless there is voluntary disclosure, the accused must apply to the trial court for the disclosure of counselling records.[74] It is essential for the purpose of a fair trial that the prosecution should disclose all relevant material within its possession or power of procurement to the defence unless there is a valid reason for not doing so. The defence in sexual offence cases will often seek disclosure of the victim's counselling records, resulting in possible distress for the victim. To address this situation, the Criminal Law (Sexual Offences) Act 2017 introduced a procedure whereby, unless there is voluntary disclosure, the accused must apply to the trial court for the disclosure of counselling records. If the victim objects to the disclosure of certain records the final decision will be made by a judge who has heard from all the relevant parties and who has taken account of the specified statutory criteria. The court may order disclosure of the content of the counselling record to the accused and the prosecutor where it is in the interests of justice to do so, and where there is a real risk of an unfair trial in the absence of such disclosure.[75]

Despite the additional rules of disclosure, practitioners interviewed as part of this stakeholder engagement have identified this provision as a potential blocker to the Barnahus model as children often feel they must consent to disclosure even if they do not want to as they fear adverse consequences that may impact their case if they do not. In such cases, consent cannot be considered to be freely given as there is a clear power imbalance between the defence team, the courts, and the child victim. This process also does not meet the criteria of informed consent. Children are generally not aware that the information they disclose in therapy could be used for these purposes. It should be communicated to children and their families in an age-appropriate privacy notice that there is a possibility that their counselling records could be later requested under the Criminal Law (Sexual Offences) Act 2017. Likewise, the possibility that their personal data could be shared as part of CASP with

[73] Criminal Justice (Victims of Crime) Act 2017, s 15 (7).
[74] Criminal Law (Sexual Offences) Act 2017, s. 39 which inserted a new s. 19A into the Criminal Evidence Act 1992.
[75] Criminal Law (Sexual Offences) Act 2017, s. 39 11(a)(b)

the alleged suspect and the CASP social worker needs to be clearly communicated to children and their families. It appears that children and their families are not being informed at the first point of contact that their information could be later shared in this way, a violation of the GDPR principle of transparency.

Therapists in Barnahus West are aware of their obligations under the GDPR and in line with this follow the principle of data minimisation and confine the notes they take to what is required for administrative purposes, such as when sessions occurred and a brief overview to determine therapeutic needs and interventions going forward. Any work completed by the child is placed into a workbook and the child has ownership over this as it is their information and work. It appears a different approach is applied in CHI services, with the level of information recorded dependent on the type of therapy service and the therapist in question. It is believed that the level of notes recorded is influenced in some cases by the knowledge that they could be later disclosed in court. CHI hold the artwork a child completes until the process concludes, at which point the child can take it home or CHI will store it for three years before it is destroyed.

It will need to be determined what level of information therapists are obliged to record in their notes and for what purpose. There should be consistency applied throughout Barnahus services so that if counselling records are requested under the Criminal Law (Sexual Offences) Act 2017 the level of information provided will not depend on which Barnahus service the child attended. The basis of therapeutic intervention is dependent on young people being vulnerable with their information, it is important to ensure this personal data is not being exploited and data protection impact assessments are carried out to assess the risks that processing poses to the fundamental rights of these children.

Section 19A of the Criminal Evidence Act 1992 applies solely to counselling records. Medical records do not come within this definition. They are subject to the ordinary rules of disclosure, even though they may include information in respect of which there is also a reasonable expectation of privacy. Further consideration should be given to the question of whether the disclosure of medical records should be made subject to a statutory regime similar to that applicable to the disclosure of counselling records.[76]

1.5.1 Criminal Evidence Act 1992 and the Good Practice Guidelines 2003

The Criminal Evidence Act 1992 lays down the rules regarding what documentary evidence can be admitted in criminal proceedings and facilitates the evidence of vulnerable victims and witnesses in criminal trials. The Criminal Evidence Act 1992 provides for the submission of video recorded evidence from child victims for sexual and violent offences. The Act has undergone significant amendment since its enactment and includes several provisions designed to assist vulnerable witnesses and victims especially in sexual offence trials. These include insertions made by the Criminal Law (Sexual Offences) Act 2017 that transposed the Directive on Child Sexual Abuse (Directive 2011/93/EU) into law. This included a restriction on cross examination of victims under the age of 18 at a sexual offence trial. The

[76] Tom O'Malley, *Review of protection for vulnerable witnesses in the investigation and prosecution of sexual offences* (hereinafter the O'Malley Report) (2020) 84.

amendment allows the court to direct that the accused shall not personally examine the victim unless satisfied that the interests of justice require that the accused should conduct the cross-examination personally. The same applies where the victim is giving evidence, even if he or she has reached the age of 18 years.[77] Section 13 of the Act provides that a person other than the accused may give evidence, whether from within or outside the State, through a live television link if the person giving evidence is under 17 years of age or in any other case, with the leave of the trial judge. This provision applies not only to the victim but also to any witnesses. The Act continues its protection of the complainant by permitting such examination to be conducted via the video-link system. This system allows the complainant to be seen and heard in court on television monitors without ever having to appear in the court room. Any evidence given in this way must be video recorded for use at the trial and any subsequent appeal. Where a person under 18 years is giving evidence at a sexual offence trial through a live television link, the court may direct that any questions put to the witness be put through an intermediary. Barnahus offers the facility for these live links to be conducted at their centres. The use of intermediaries is at the discretion of the Courts for these measures to be granted. There should be clear and consistent guidelines on when the use of intermediaries is sought to ensure non-discrimination. The Criminal Law (Sexual Offences) Act 2017 also inserted an amendment into the Criminal Evidence Act 1992 for the victim to give evidence from behind a screen where evidence is not being given via a live television link.[78]

The Criminal Evidence Act 1992, as amended, allows for a video recording of a statement made during an interview with a member of the Gardaí or any other person who is competent for the purpose, by a person under the age of 18 years to be admissible at the trial as evidence on condition that direct oral evidence by that person would be admissible.[79] Such a recording can provide a very valuable, early record of the complainant's account and result in fewer requests to repeat their account to others and potentially spare them from having to recount evidence to the court in person. The preservation of this visual evidence through a DVD recorded interview while the child is still a child is particularly crucial due to the long delays in the judicial system. The courts have ample power to accept pre-constituted evidence and have a crucial role to play in driving a judicial practice of accepting these video recordings as evidence, where doing so does not obstruct the principles of natural justice. Recognising the independence of the judiciary and that the Criminal Evidence Act 1992 already provides for the acceptance of video recordings of statements by children who have been sexually abused as evidence and facilitates cross examination by live TV link where this is deemed appropriate by the Courts, it is recommended that there would be an engagement process with the relevant stakeholders to explore any areas for improvement in the best interests of the children.

Interviews conducted under section 16 are carried out in special interview suites that have been established in various locations throughout the country and are equipped to record

[77] Criminal Evidence Act, 1992, s 14C, as inserted by the Criminal Law (Sexual Offences) Act 2017.
[78] Criminal Law (Sexual Offences) Act 2017, s 36 (Amendment of Act of 1992).
[79] Criminal Evidence Act, 1992, s 16(1)(b)

such interviews for later use at trial. Barnahus West offer this facility for cross examination of a victim, where the victim has a recorded DVD of their specialist interview as their evidence. All Barnahus services should have a specialist interview suite on site at the centre to conduct these interviews. Currently, the family centre at St. Finbarr's does not have a specialist interview suite on site but it is hoped the space can be repurposed to provide this. CHI have three interview rooms available at both St Clare's and St Louise's units and currently record interviews with children. These recordings are stored on site at CHI on a hard drive with access controls in place. CHI have facilities for joint interviews including the equipment and an observation room for the second interviewer. They also envisage that they would be able to provide facilities for live links to the court where it is the case that the child is being cross examined. It should be ensured that all Barnahus centres have the technology and resources available to provide this service on site.

Video recorded evidence will not be admitted if the court is of the opinion that its admission would be contrary to the interests of justice. The person whose statement was recorded must be available for cross-examination at trial.[80] Section 16 does not directly state that such a recorded statement is to be treated as evidence in chief, though in practice it is treated as such. [81] The video recorded interview is intended to take the place of the first stage of the complainant's evidence in court. The court must consider any risk that the video recording could result in unfairness to the accused when assessing its admissibility as evidence.[82] The circumstances under which the making of a video recording takes place are highly relevant when considering such a 'risk'. Of particular relevance is the timing of the video recorded interview (i.e. at what stage of the investigation process it is decided to commence video recording) and secondly the persons who are present at the interview and their respective roles in the conduct of the interview.

The Good Practice Guidelines 2003 were developed in line with these concerns to assist specialist victim interviewers in observing fair procedures while conducting the interview so that it may be admitted at trial.[83] The objective of the guidelines is provide guidance to operational specialist interviewers in planning and conducting Section 16 (1) (b) interviews with child victims of sexual abuse, however the guidance has not been updated since it was drafted in 2003.

Since then, there have been several amendments to the Criminal Evidence Act 1992 and other legislative developments including changes in statutory responsibilities such as the creation of Tusla as the child and family agency; changes in practice within the Gardaí, for example in terms of evidence storage; and technological advances. In addition, the area of the 'Clarification Meeting' prior to recorded interview needs to be updated and clear guidelines for same provided.

[80] Criminal Evidence Act, 1992, s 16(1)(b)(ii)
[81] Criminal Evidence Act, 1992 s 16
[82] Criminal Evidence Act, 1992, s 16(2)(b)
[83] Miriam Delahunt, *Good Practice Guidelines for persons involved in video recording interviews with complainants under 14 years of age (or with intellectual disability) for evidential purposes in accordance with Section 16(1)(B) of the Criminal Evidence Act, 1992, in cases involving sexual and/or violent offences* (July 2003).

The Guidelines reference the Health Board, who had statutory responsibility for child protection at the time. This should be updated to cover competent authorities for this purpose. This would naturally include Tusla, but it also needs to be clarified if it could include suitably trained professionals from other agencies. There needs to be a thoroughly explained interpretation of section 16 (1b) with regard to the area of 'competent persons' as it is becoming widely interpreted by different agencies. There needs to be clear context around the way Section 16 (1b) is used and a clear definition of a competent person. It appears currently that there is a literal interpretation of section 16 (1b) is that any 'competent persons' can carry out this interview, without Garda involvement or a report to the Gardaí. This is concerning in the context of the chain of evidence for court and could put victims at risk of their statement being inadmissible at a later point.

It needs to be clarified if specialist interviewers need to be from an agency tasked with an investigative role and statutory responsibility in the area of child protection i.e. the Gardaí and Tusla, as has traditionally been the case. CHI have begun the process of training employees to take on the role of specialist interviewer and intend to hold joint interviews with the Gardaí. This will be an important part of achieving the goals of the Barnahus model, so it is imperative that there is no legal obstacle to this. It needs to be firmly established that CHI medical social workers are competent persons in this regard and have the legal backing to perform their duties so that there are no inequalities in the services delivered to children in this area. A process of clarification should be held with CHI and the Department of Justice in this respect. If this is the case the current Joint Interview Protocol for interviewers between Tulsa and the Gardaí will need to be amended to include CHI and any other competent bodies/persons.

Currently joint interviews are not taking place widely due to the lack of qualified specialist interviewers available. Efforts are ongoing to increase the number of trained specialist interviewers who can conduct Section 16 (1) (b) interviews. Nevertheless, concerns have been expressed as part of this stakeholder engagement process that differing opinions at national levels about the training provided is impacting the number of social workers being trained and resourcing issues may still pose an issue in having an adequate number of specialist interviewers available in Barnahus nationwide. This could be assisted by a national direction that all interviewers must be trained in exactly the same method and places will be provided in equal measure to social workers and Gardaí. An increase in appropriately trained specialist victim interviewers will greatly benefit children who have experienced sexual abuse as it will reduce waiting times for interviews being conducted and is crucial to the success of the implementation of the Barnahus model in Ireland.

It is imperative specialist victim interviews are carried out by appropriately trained individuals competent to do so and observe fair procedures so that they may be admitted as evidence at trial. It is not explicitly stated in the guidelines who is tasked with providing the specialist training and what has been agreed with the criminal justice system. Concerns were expressed during the stakeholder engagement process that private companies are attempting to train the good practice guidelines; it needs to be clarified how this is monitored by the courts as it could be detrimental to a child's case if interviewers trained

differently take the stand at court to give evidence. Questions have also been raised in relation to the training itself, and if it is still up to date considering the amount of time that has passed and the legislative and policy changes in the interim. This should be considered further in light of the possibility of new agencies taking on the responsibility of joint interviews. The Good Practice Guidelines should be revised to confirm who falls under competent persons for specialist interviews and what is the required training to carry out this role. Consideration should be given to adopting formal recognition of this training before the courts, in view of the divergent training programmes in operation, and providing clarification on the organisations and individuals who have competence in this regard under the Criminal Evidence Act 1992. This would greatly benefit the organisations involved in specialist interviewing and the individual interviewers themselves.

Guidance should also be drafted to include the standards for interviewing a child victim in where there is no criminal statement. Children are currently not equal in relation to interviewing where there is no criminal statement. Standards for a Barnahus interview have been discussed by the Barnahus National Agency Steering Committee but to date there has been no agreement or plan on this. From operational experience, Barnahus West has put forward the suggestion that criminal investigations continue to employ the traditional method in Barnahus with joint interviews occurring as standard with equal training provided for Tusla and the Gardaí. Where a criminal statement is not being taken, but Barnahus services are involved, children should be afforded the same right to a standardised interview in Barnahus using the same equipment and afforded access to trained interviewers, with the only difference being the omission of the garda representative. The Barnahus interview will need to follow consistent standards across all services; responsibility for the recording will need to be clarified as unlike the joint interview it will not be stored by the Gardaí as there is no criminal statement involved. If it was to be held by Tusla, concerns may again arise in relation to accessibility by CASP and suitable safeguards would need to be in place. Currently if a CASP social worker requests the child's recorded interview, an independent social worker reviews the video recording and provides a report to the CASP social worker, they do not provide an opinion on their credibility. In St Clare's and St Louise's units assessment interviews with children are already being recorded and stored on a hard drive on site. The Barnahus interview should be standardised, conducted by interviewers who have received the same level of training, and follow the same standards as where there is a criminal statement being taken. It is recommended that there should be one evidence-based training programme for all specialist interviewers of children who may have been sexually abused, including CASP interviewers.

The Good Practice Guidelines also provide for specialist interviews to use the assistance of an intermediary. Ireland has only begun their training of intermediaries at University of Limerick however the first cohort of trained intermediaries are now available and registered with the Department of Justice. To date, there appears to be no current national procedure for accessing an intermediary for specialist interviews. This could also be an area where Barnahus could have these skills within their staff as an independent model for a coordinated response for children.

The Good Practice Guidelines also reads particularly outdated with regard to technology systems, with references to VHS recorders in the equipment section. They should be revised in line with developments since 2003.

1.5.2 Non-Fatal Offences Against the Persons Act 1997 and the HSE National Consent Policy

The Child Care Act 1991 provides a definition of a child as a person under the age of 18 years who is not married. The General Scheme of the Child Care (Amendment) Bill 2023 suggests a revised definition removing the exception of those who are married to reflect the banning of marriages for anyone under the age of 18. The Children Act 2001 and the Mental Health Act 2001 define a child as a someone under the age of 18 years of age. While the age of majority is 18, the Non-Fatal Offences Against the Persons Act 1997 provides that a child who has attained the age of 16 years may consent to medical treatment without the consent of their parent/guardian.[84] The provision applies to medical, surgical and dental treatment but does not apply to mental health treatment. The distinction between physical and mental health has been criticised by many including the HSE and the Law Reform Commission, who have advocated for an amendment to the Mental Health Act 2001 to provide a right for minors over the age of 16 to consent to mental health treatment and to provide for related matters.[85] A recent bill to amend this was defeated in parliament.

It is a basic rule in common law that consent must be obtained for medical examination, treatment, service or investigation. This requirement has been established in Irish case law and recognised in International and European human rights law and under the Irish Constitution. The rationale behind the importance of consent is the need to respect the service user's right to self-determination/autonomy.

There is a complexity around consent which extends beyond GDPR. In the Barnahus context, the number of instances where parents/guardians have to be asked for consent, are causing concerns on how 'informed' consent actually is and confusion remains between consent sought under the GDPR and consent for medical treatment or therapy. This is also compounded by the variation in the age of consent as, in line with the Non-Fatal Offences Against the Persons Act 1997, children aged 16 or over can give consent to medical exams, however their parent/guardian's consent is sought for therapy assessments as it is not clear whether a young person of 16 or 17 years of age can consent to his or her mental health treatment under section 23 of the Act.

Further to this, issues also arise where parents/guardians refuse consent for these supports, even though they may be considered in the best interests of the child and the child themselves wants to receive the supports. For example, there are cases where parents/ guardians may be suspected of abuse or aware of the abuse and may try to prevent a medical examination. Article 14 of the Lanzarote Convention puts an obligation on the State to take the necessary legislative or other measures to assist victims, in the short and long

[84] Non-Fatal Offences Against the Persons Act, 1997, s 23 (consent of a minor to medical treatment); Age of Majority Act, 1985.
[85] Houses of the Oireachtas, 'Dail Eireann debate: Mental Health (Capacity to Consent to Treatment) Bill 2021: Second Stage [Private Members]' (27 October 2022). <https://www.oireachtas.ie/en/debates/debate/dail/2022-10-27/40/ > accessed July 17 2023.

term, in their physical and psycho-social recovery. These measures should consider the child's views, needs and concerns. It further states that measures should be taken to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims. When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures taken should include: – the possibility of removing the alleged perpetrator; – the possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.[86]

The Irish Courts have not provided a definitive ruling on consent by children under 16 years. In the UK and some other jurisdictions, the Courts have recognised that a child under the age of 16 years may give a legally valid consent if they are sufficiently mature to understand the nature of the proposed treatment (sometimes referred to as 'Gillick competence').[87] The HSE has developed a National Consent Policy that must be followed by all health and social care workers providing health treatment or social care intervention to ensure they obtain informed consent. In Ireland there is a general rule that the consent of a parent (s) or legal guardian(s) should be obtained before providing treatment to a child."[88] The HSE consent policy states that where parent(s) or legal guardian(s) refuse to consent to an intervention which the healthcare worker reasonably believes to be in the best interests of the child, every effort should be made to reach a consensus position as regards the best interest of the child, however in exceptional circumstances an intervention may be required in the best interests of the child without parental consent. However, according to stakeholders in Barnahus West, in practice if parents/guardians do not consent to a medical examination or therapy, then it is unlikely to proceed. Practitioners see their only real avenue to carry out a treatment without parental consent is for Tusla to apply to the District Court for an emergency care order, which will place the child temporarily in the care of Tusla.[89] The judge can then give direction on the medical or psychiatric examination, treatment or assessment of the child.[90] This is considered an extreme measure, will impose significant further trauma to the child, and will not be ordinarily carried out. According to some practitioners, interviewed as part of this stakeholder engagement, an extensive threshold of evidence is expected at district court level and the judicial system weighs heavily in favour of parental rights.

The Irish Constitution recognises the family as "a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" so the courts tend to take the view that parents' wishes should only be overridden in exceptional circumstances – i.e, if there is a serious threat to a child's life or wellbeing. Article 42A of the Irish Constitution outlines the importance of considering the views of a child and the threshold

[86] Article 14 (3) of the Lanzarote Convention.
[87] NHS, 'Children and Young People Consent to Treatment' <https://www.nhs.uk/conditions/consent-to-treatment/children/ > accessed 1 September 2023
[88] HSE, HSE National Consent Policy (2022) 47.
[89] Child Care Act 1991, s 13.
[90] Child Care Act 1991, s 13 (7)(iii).

for State interventions. In exceptional circumstances, where the parents fail in their duty towards their children to such extent that their safety or welfare is likely to be prejudicially affected, the State may intervene as guardian of the common good. As discussed throughout this report, children and minors also have significant personal rights of their own under the Constitution, the European Convention of Human Rights, and the United Nations Convention on the Rights of the Child. These rights include rights to liberty, bodily integrity, the freedom to communicate with others and to follow their own conscience. It is unclear how the Irish courts would interpret the provisions of the Constitution and weigh up the rights of the family and the child in cases where there is conflict around consent to medical or social care interventions. The lack of case law and legislative provisions here leaves agencies without legal certainty for providing treatment to under 16s without parental consent. While seeking the consent of one parent is widely accepted as sufficient and more practical for a timely and effective service provision in the interests of the child, in some cases the allegation of abuse may be against one parent or another family member and the other parent may be protecting the alleged abuser. Difficulties in obtaining consent in these cases, and confirming who may be eligible to give consent, has led to delays in children receiving the necessary support and treatment, according to practitioners. It is not necessarily a GDPR issue but related to informed consent for health or social care interventions. CHI did not report any issues in relation to obtaining parental consent; one parent consent is sought for medical exams, while two parent consent is sought for assessment and therapy. This appears to be a different process than applied in Barnahus West; agreement should be reached on how consent will be obtained across Barnahus services so that this is standardised.

Child protection laws are mainly concept-driven placing the emphasis on principles such as the best interests of the child and hearing the child but fall short on procedures for practical application. This leaves a lot of issues open to interpretation creating inconsistency and difficult situations for professionals working in the area. This has emerged in relation to parental consent for medical exams and social supports such as therapy, as well as consent for specialist interviews. The best interests of the child is not always being pursued, as obtaining parental consent can be an obstacle and practitioners have no clear guidelines on how to navigate this. The best interests of the child, and the rights of parents/guardians is another area that will need to be balanced in implementing the Barnahus model. Detailed procedures for this decision-making process are necessary to this end.

1.6 Legal and policy blockers to the implementation of Barnahus services

The legal and policy framework broadly outlined above poses no direct barrier to information sharing within the Barnahus model, however gaps in legislation are likely to impact the practical application of information sharing as culture and confidence issues in the process persist. As noted, progress has been made to align Ireland's response to child sexual abuse with international standards. This has been done mainly through amendments to existing laws and the introduction of new laws that try to minimise the trauma for victims. Progress is still ongoing in this area with current reform of the Child Care (Amendment) Bill 2023 and Criminal Law (Sexual Offences and Human Trafficking) Bill 2023. The trajectory of

new legislation is very much in line with Ireland's obligations under international law and the principle of considering the child's best interests.

From a child protection context, Tusla's investigation process needs to be clarified in law. Tusla is currently in a difficult predicament where it must balance the best interests of the child with a suspect's constitutional right to fair procedures without any legislative backing. The CASP policy is a response to repetitive litigation from child sexual abuse suspects and conflicting decisions from the Courts. As it stands, the perception of CASP has the potential to weaken the process of information sharing within the Barnahus model in Ireland. This has been highlighted by practitioners, who have expressed concerns around sharing information that may end up going through the CASP process and being provided to the suspect for review. Engagement between CASP and Barnahus teams is crucial to ensure CASP does not become a blocker for the implementation of Barnahus.

Currently, section 3 of the Child Care Act 1991 lacks specificity; there is nothing there that sets out the powers or authority of Tusla to fulfil its function in this regard. The Child Care Act (Amendment) Bill 2023 provides an opportunity to clarify Tusla's scope of investigations and set it out in statute, strengthening its position to legal challenge. In the annual report of the Special Rapporteur on Child Protection for 2021, the pressing need for legislative reform was highlighted, noting that CASP was only intended as a holding measure. While the process of legislative reform has begun and is being addressed under Head 44 of the Heads and General Scheme for the Child Care (Amendment) Bill 2023, concerns have been raised from the current Special Rapporteur on Child Protection and the OCO that this provision allows processes to be dictated by case law, which the OCO remarked is "a skewed system of case law that does not fully represent the victims' experience."[91]

In terms of criminal justice law, guidance is required to clarify who is a competent person to carry out an interview under section 16(1)b of the Criminal Evidence Act 1992 and what context does this apply to. This needs to be considered fully as CHI does not have statutory responsibility in terms of child protection in the way Tusla does. The question arises does it have the remit to carry out an interview to make a child protection assessment independently or is it acting as a processor, carrying out the assessment on behalf of Tusla. In light of judicial challenges questioning Tusla's own investigative powers, this should be considered very carefully.

It also needs to be ensured that interviews with children where there is no criminal statement meet agreed standards and are conducted by trained specialists. The responsibilities for training and processes to ensure those conducting interviews are adequately trained also need to be in place.

Policy has not kept up to speed with legislative developments. It is important that the Good Practice Guidelines 2003 is updated in line with the amendments to the Criminal Evidence

[91] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth Report on pre-legislative scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023 (June 2023), p62-63.

Act 1992 and also considers potential technological changes to how the interviews may be conducted and stored, and who may be involved in conducting them.

In terms of the disclosure of counselling records, this is still an issue of concern for the Barnahus model and again is causing therapists to exercise an administrative approach when taking therapy notes in order to protect the right to privacy for the child as they are aware the court may order their disclosure to the defendant and their team. The lack of legal certainty around providing treatment to under 16s without parental consent is also leaving health and social care practitioners in a legal grey area where issues of conflict arise.

1.7 Recommendations

A number of issues emerge in this chapter where a lack of clarity in law or policy is resulting in ineffective processes. Many of these issues have been blamed on data protection law when there are other issues at play. For example, the CASP policy did not emerge from suspects alleging violations of their data protection rights but from alleged violations of their right to fair procedures. Likewise, there is complexity in the area of consent that goes beyond GDPR consent; as the right to exercise consent for medical or social care interventions is part of the right to self- determination and bodily integrity. It is also important to obtain clarity in relation to the definition of competent persons under the Criminal Evidence Act 1992, and in relation to the training provider of specialist interviewers.

Recommendation 1: The Child Care (Amendment) Bill 2023 should provide a clear and strong legal obligation on agencies to work together and share information for the purposes of child abuse investigations. It is recommended the wording of Head 10 'Duty of relevant bodies to cooperate' is strengthened in line with recommendations from the pre-legislative committee, and that the obligation to collaborate includes the planning, delivery and funding of services and activities, as well as information sharing. The inclusion of this legal obligation would give agencies in the Barnahus model a legal mandate to share information, removing ambiguity in this area, and ensure that agencies work together to ensure an efficient and consistent delivery of Barnahus services.

The application of the Barnahus model should be considered under Head 10 with consideration to how this provision could strengthen interagency collaboration within Barnahus and any limitations of this provision with regard to its application to Barnahus services. However, such a legal provision alone would not be enough as it does not offer a model of how such data sharing would work and would need to be supported by other measures that make careful consideration of the wide range of systemic, professional and political issues encountered in inter-agency working.

Recommendation 2: Tusla's investigative functions should be clearly set out in law. While section 3 of the Child Care Act 1991 is currently used as the statutory basis for Tusla to assess allegations of abuse, the Department is proposing to reorient this section and to locate amendments in relation to the authority of the Agency to receive and assess reports

of harm in the Children First Act.[92] The DCEDIY are currently drafting this legislation and it has been through pre-legislative scrutiny. The proposed amendment to the Children First Act 2015, as set out in Head 44, has been met with concern, however, from the Special Rapporteur of Children and the OCO as it still leaves Tusla's processes open to be dictated by case law.

The amendment in relation to Tusla's investigative powers should be within the parameters established by the Constitution and the ECHR. It should include, in line with comments from former Special Rapporteur Conor O'Mahony, consideration to the nature of Tusla's obligation to investigate complaints; the procedural requirements that such an investigation should adhere to; and the steps that Tusla may take in the event that a complaint is substantiated. Frequent litigation in this area can cause additional trauma for the complainant due to the investigation being dragged out over the extended period of time involved with High Court proceedings. The current CASP process may be a deterrent for victims to come forward and does not appear to be in line with the ethos of child friendly justice or the Barnahus model. It has also been identified by some practitioners as impacting the level of information they record and share.

It is recommended in line with advice from child protection experts that further consideration be given to how Head 44 can be strengthened so Tusla's processes are not left to be continuously determined by case law.

Recommendation 3: It is noted and welcomed that a working group has been established to look at CASP and Barnahus to ensure that there is a clear mechanism for CASP requesting relevant information. As CASP is new, its implementation in practice should be reviewed regularly to ensure it is being applied in a way compatible with the aims of Barnahus. It is recommended that further engagement is held with all Barnahus stakeholders, including staff on the ground, to ensure concerns in relation to CASP are heard and addressed. An educational piece is necessary to ensure any perceived barriers in relation to CASP are urgently addressed.

It is also recommended that the DPIA for Barnahus considers the risks associated with sharing personal data with CASP around the principle of purpose limitation and it is transparent to Barnahus service users from their initial engagement with the service that their personal data could be used in this way.

Recommendation 4:

The definition of 'competent persons' under section 16 of the Criminal Evidence Act 1992 needs to be thoroughly explained in an unambiguous manner as it is becoming widely interpreted by different agencies. There also needs to clear context around the way Section 16 (1b) is used to ascertain if 'competent persons' can only carry out this interview under section 16 with Garda involvement. This should be considered in relation to CHI before they take on the role as a joint specialist interviewer. There also needs to be guidance in relation

[92] Department of Children, Equality, Disability, Integration and Youth, *Heads and General Scheme of the Child Care (Amendment) Bill 2023*, Head 6, Explanatory Note.

to investigative interviews conducted with children (especially where Barnahus is involved), regardless of if they are conducted by a Garda/ non garda; and a standard and equal opportunity for all children to be interviewed the same, in line with best practice, where there is no criminal statement. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana.

Recommendation 5: The Good Practice Guidelines should be revised in line with developments in criminal justice law, child safeguarding, and data protection, as well as technological advancements and changes in practice that have occurred in the last 20 years. They should clarify who are the 'competent persons' to conduct a specialist interview and the context, as well as the accepted level of training required to carry out this role. The guidelines should also be reviewed in line with a more holistic approach to child sexual abuse reflecting the Barnahus context and clarifying all potential persons and agencies who the guidance may apply to. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana.

Recommendation 6: The use of intermediaries is at the discretion of the Courts for these measures to be granted. There should be clear guidance in place on the use of intermediaries in the court setting. There also needs to be a national procedure developed for accessing an intermediary for specialist interviews. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana.

Recommendation 7: Recognising the independence of the judiciary and that the Criminal Evidence Act 1992 already provides for the acceptance of video recordings of statements by children who have been sexually abused as evidence and facilitates cross examination by live TV link where this is deemed appropriate by the Courts, it is recommended that there would be an engagement process with the relevant stakeholders to explore any areas for improvement in the best interests of the children.

Chapter 2 Data protection law in the context of child sexual abuse investigations

2.1 Introduction

Data protection regulations have been commonly misperceived as a blocker to interagency collaboration, with many reports citing concerns over data protection as leading to a cautious approach to interagency data sharing. Data protection is a fundamental right set out in Article 8 of the EU Charter of Fundamental Rights, distinct from the right to private and family life under Article 7 of the Charter. It is not an absolute right and can be limited in certain circumstances. The General Data Protection Regulation (GDPR) (EU) 2016/679 implements Article 8 of the EU Charter and also reflects the principles of the Council of Europe's Convention 108, the first binding international instrument aimed at protecting the

right to privacy of individuals against possible abuses with regard to the processing of their data.[93]

The GDPR, as implemented and supplemented by the Data Protection Act 2018, is the principal data protection legislation in Ireland. It does not prevent the sharing of information between agencies on a reasonable and proportionate basis for the purposes of child protection once a legal basis has been identified for sharing the data. The Data Protection Commission has been very clear in stating that its position is that child protection/ welfare measures should always take precedence over data protection considerations affecting an individual, noting that the GDPR, and data protection in general, should not be used as an excuse, blocker or obstacle to sharing information where doing so is necessary to protect the vital interests of a child or children.[94] Despite this, uncertainty around the application of data protection law appears to be posing a barrier to interagency data sharing generally, and within the Barnahus context. This has been documented in the 2020 Appraisal Report, the annual reports of the Special Rapporteur on Child Protection, and in the stakeholder engagement process.

As part of this research, stakeholder interviews were conducted with representatives from the agencies involved in the implementation of Barnahus West: Tusla, the HSE, and the Gardaí to gain a rudimentary understanding of how personal data flows through the Barnahus process. Discussions were also held with the agencies that will be involved with the implementation of Barnahus South, and Barnahus East to determine how it is envisaged data will be collected and shared as part of these services. The greatest concerns appear to centre around sharing personal data with agencies where there is no statutory obligation to do so; the practice of sharing personal data in a way that is legally compliant; and the use of consent as a legal basis for processing personal data. The Barnahus context poses even more complexities due to the number of agencies involved in processing with different purposes for doing so, and the very sensitive nature of personal data being processed. Accordingly, due consideration needs to be given to:

(i) The applicable legal frameworks, which aside from the GDPR and the Data Protection Act 2018 may also include the Law Enforcement Directive (as transposed in Part 5 of the Data Protection Act 2018) and the Data Sharing and Governance Act 2019.

(ii) The controllership arrangement for personal data processed within the Barnahus context.

[93]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, art 1, recitals 1-3;
The right to personal data protection is ingrained in Article 8 of the European Convention on Human Rights, 'the right to respect for your private and family life' and complemented and reinforced by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe Convention 108). Ireland ratified Convention 108 in 1990.

[94] Data Protection Commission, *The Fundamentals for a Child-Oriented Approach to Data Processing* (2021) 24.

None of these factors provide a direct impediment to sharing data with other agencies, however it is important they are addressed and documented to ensure compliance with data protection law.

2.2 The GDPR and the Data Protection Act 2018

The GDPR sets out obligations for both data controllers and data processors with regard to the processing of personal data. It is important to establish who holds these roles in all data processing contexts to determine where responsibilities lie. A data controller refers to the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.[95] A data processor is defined as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.[96] In some cases there might be a joint controllership agreement in place, where two or more bodies determine the purposes and methods of processing.

Within Barnahus West currently, each agency acts as the controller over the personal data they process directly, for example, the HSE is the controller of medical examination data, Tusla is the controller of therapy assessments, and the Gardaí appears to be the controller or joint controller of joint interviews. Currently this is not transparent to data subjects who receive the Barnahus data protection notice and consent form, which implies Tusla is the controller of all personal data processed within Barnahus. It is noted that Tusla has taken on the role of overall controller of shared information for Barnahus and inputs the information gathered from all agencies at the Interagency meetings on TCM. Tusla has the responsibility for noting the agreed actions and engaging in correspondence with families in relation to these interagency actions. This role of overall controller should be considered in detail. If this role falls to CHI in Barnahus East, there is likely to be inconsistency in processes across centres. The data controller should be the body that is ultimately determining the means and purposes of processing. The relationship between CHI and Tusla in Barnahus East also needs to be clearly established. Noting the fact that CHI receives the majority of its referrals from Tusla, does not have direct statutory responsibility for child protection assessments, and sends all of its assessment reports to Tusla, is it effectively acting as a data processor for Tusla in some circumstances?

The controllers and processors in each distinct processing operation within Barnahus need to be identified so responsibilities are clear and appropriate agreements i.e a data processing agreement or data sharing agreement are in place. It may be the case in some instances that two or more agencies will act as joint controllers; if this is the case an agreement needs to be made to determine how responsibilities will be shared.

It also needs to be determined who is ultimately responsible for determining the means and purposes of data processing within Barnahus and as such will be the controller of any shared information. For example, if a system was developed specific for Barnahus communications, who would be the controller of this data and have responsibility for this. These questions

[95] GDPR, art 4(7).
[96] GDPR, art 4(8).

need to be considered in the context of the overall governance of the Barnahus services in Ireland and in line with its goal of national alignment. Currently, it appears Tusla, as the lead agency in Barnahus West, is acting as the data controller for Barnahus West. If CHI, as lead agency, in Barnahus East is the data controller of personal data processed in Barnahus East, this would suggest the way personal data is processed in each Barnahus centre depends on the lead agency appointed; this does not lend itself to a unified approach. It is recommended that an overall controller is identified for all Barnahus units in Ireland. This core controller/s for the group would be the body that determines the purposes and means of the processing of personal data. This may be the Barnahus Interdepartmental Group for the development of services for children who experience sexual abuse and their families (IDG). The IDG is chaired by the DCEIDY and includes representatives from the Department of Health (DoH), the Department of Justice (DoJ), the HSE, CHI, the Gardaí and Tusla. It needs to be determined by stakeholders who has ultimate responsibility for the implementation of Barnahus services in Ireland and governance related decisions, with documentation and systems developed accordingly. This body would act as the controller for Barnahus generated data, with each individual agency the controller for their own data. Without an identified controller or joint controllers, it is not clear where data protection responsibilities such as determining retention periods, and handling data breaches and data subject rights requests, lie.

2.2.1 Legal bases for processing

To process personal data lawfully under the GDPR, the data controller must have a valid legal basis for doing so. This must be determined, and documented, before processing begins. It is essential to identify the appropriate legal basis for distinct processing activities as it may come with specific requirements (e.g. consent must be freely given, specific, informed and unambiguous) and have consequences on individuals' rights (e.g. the right to portability only applies when the legal basis is consent or a contract). Article 6 of the General Data Protection Regulation (GDPR) sets out the six potential legal bases a data controller can rely on for processing personal data: consent; contract; legal obligation; vital interests; public task; or legitimate interests. In the context of Barnahus, we will examine those most relevant: consent, legal obligation, vital interests and public task.

Consent

Consent under the GDPR is "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." There is a common misconception that personal data cannot be shared without an individual's consent. The reality is that most data sharing does not rely on consent as the lawful basis. The use of consent as a legal basis is not appropriate in situations where there is a clear power imbalance between the controller and the individual and the individual feels they have no genuine choice, for example processing carried out by public authorities or employers. This is particularly pertinent where the data subjects are vulnerable persons such as children. Processing of this type of data can require a Data Protection Impact Assessment (DPIA) because of the increased power imbalance between the data subject and the data

controller, meaning the individual may be unable to consent to, or oppose, the processing of his or her data.[97]

In the context of Barnahus West, there appears to be a lack of clarity and confusion around where consent is being used as the legal basis for the processing of personal data and where consent is being applied as an additional safeguard under section 36 of the Data Protection Act 2018. A DPIA carried out for Tusla in relation to Barnahus West advises that consent should not be used as the legal basis for sharing personal data in this context as there is a power imbalance between Tusla and its service users. In the data protection leaflet given to parents and their families it states that personal data is being processed by Tusla as it is necessary to perform their public tasks. However, this leaflet is accompanied by a consent form which parents must sign that appears to request consent for any information processed as part of the Barnahus West service to be shared among the stated agencies. It is not made clear that this is intended to be an additional safeguard and is not the legal basis for processing, if this is indeed the intended case.

This confusion is confounded by the requirement to obtain informed consent for medical treatment and mental health supports. It appears that there is confusion between consent in the GDPR context and 'informed consent', which is required to provide interventions or supports to children such as medical treatment and counselling services.

There are also concerns around how consent is also currently being sought for the joint specialist interview, and there appears to be difference processes in place in Barnahus West and Barnahus South. Currently consent is being sought for these interviews in Barnahus West and appears to be the legal basis being relied on, however, according to some professionals interviewed it is Tusla that is managing the consent forms, not the Gardaí. In the Barnahus South region it was relayed that consent is sought by the Gardaí as part of the individual's initial statement and no specific consent is sought for the joint specialist interview.

The consent process for joint specialist interviews should be reviewed as there have been different reports provided on how consent is captured and maintained in different regions. It should also be considered if consent is the appropriate legal basis to rely on.

The consent form and/or privacy notice for the joint specialist interview should reflect that it is a joint interview and be clear on how the data will be shared and processed. While not all children will end up with court outcome, all will have protection needs, and it needs to be clear to social workers, and victims and their families, how the interview may be utilised for purposes other than a criminal statement. Currently, it remains a grey area as to what Tusla social workers should be recording on their records regarding the joint specialist interview as they will be a witness in the criminal trial and what is written is discoverable; this should be formalised and agreed with Gardaí, and detailed in the updated Good Practice Guidelines.

[97] GDPR, recital 75; and Article 29 Data Protection Working Party, *Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679* (2017) 9.

It also needs to be clarified if the Law Enforcement Directive (LED) applies here rather than the GDPR in instances where the Gardaí are involved as the purposes for the Gardaí to conduct the interview are for crime detection purposes.

Practitioners in Barnahus West have expressed concerns over the use of consent in the Barnahus context, noting that due to consent being sought on a number of occasions for different services parents and families are often unsure of what they are consenting to. The services that will operate as Barnahus East have not experienced the same issues around obtaining consent to date and believe this may be as referrals have come directly from Tusla or the Gardaí. Nevertheless, processes on dealing with these issues need to be developed and applied consistently across Barnahus services. It is noted that Tusla are currently reviewing processes around consent in relation to Barnahus, and developments are ongoing.

Legal obligation

As discussed in the previous chapter, the Children First Act 2015 places a legal obligation on mandated persons including the Gardaí to share information with Tusla in relation to child protection concerns. Tusla and the other agencies are also obligated under law to provide information to the Gardaí where there is suspicion that a sexual offence has been committed against a child. This statutory obligation gives the agencies confidence to share information, and the absence of such has caused a cautious approach with regard to sharing information with other agencies such as the HSE or CHI.

Vital interests

One legal basis that could apply for sharing personal data with agencies where there is no legal obligation to do so is that doing so "is necessary in order to protect the vital interests of the data subject or of another natural person".[98] This applies where the processing of personal data is needed in order to protect someone's life or to mitigate against a potential risk/ threat/ harm to, or endangerment of, either the data subject or a third party. The Data Protection Commission (DPC) has stated that the threshold for satisfying this legal basis will generally be lower where the processing of children's personal data is concerned as children are more vulnerable than adults and what is considered necessary to protect the vital interests of a child may be different to what is considered necessary to protect the vital interests of an adult. This legal basis is frequently relied on as the legal basis for processing for the purposes of child protection and child welfare measures.[99]

In its report, 'The Fundamentals for a Child-Oriented Approach to Data Processing', the DPC wrote: "It is of fundamental importance to emphasise that the data protection rules in the GDPR and the 2018 Act (irrespective of whether children's or adults' personal data is at issue in any given situation) are not a barrier to safeguarding, and that it is in the 'best interests' of children to be protected from violence, abuse or interference/ control by any party."[100]

[98] GDPR, art 6 (1)(d).
[99] Data Protection Commission, *The Fundamentals for a Child-Oriented Approach to Data Processing* (2021) 24.
[100] Ibid, 23.

Public task

Under Article 6(1)(e) of the GDPR, processing is lawful where it "is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller." There does not need to be a specific legal power to process personal data attributed to the controller but the task must have a basis in EU or Irish law, including common law. For example, in relation to the Barnahus context, while Tusla can exercise its official authority to safeguard children, other public bodies without official authority can process such information without that official authority if it is in the performance of a task carried out in the public interest as set down by law. The focus is on the nature of the function, not the nature of the organisation. Recital 41 of the GDPR clarifies that this does not have to be an explicit statutory provision, as long as the application of the law is clear and foreseeable. This means that it includes clear common law tasks, functions or powers as well as those set out in statute or statutory guidance. As public bodies, each of the four agencies providing Barnahus services have distinct public task functions vested in them through law.

The public task legal basis is often used for processing children's personal data in connection with health, social care or education. The DPC notes again that use of this legal basis should not be at a loss of the best interests of the child.[101] It is important to note that if public bodies are relying on the public task legal basis to share information with another public body they can no longer rely on section 38 of the Data Protection Act to do so and must now move to the Data Sharing and Governance Act 2019 framework to share information. This does not apply to special categories data, however, and will be discussed in more detail later in this chapter in the context of Barnahus.

2.2.2 Special category data

From the stakeholder engagement process an overview of the personal data processed and shared as part of the provision of Barnahus services was established. The personal data processed as part of Barnahus services includes consent forms, referral forms completed by social workers, each agency's notes from meetings, joint interview DVDs and notes, medical files, and therapy notes. Personal data flowing through the Barnahus model of service has a lifecycle that begins with the referral process and continues up until the court hearing and possible appeal, where some data such as the joint interview and notes or therapy notes may be used as part of the chain of evidence. Standardised processes need to be put in place across all Barnahus services to ensure that the level of information processed and shared, and the level of security afforded to personal data, is consistent. As a service for children who may have experienced sexual abuse, the vast majority of personal data processed will fall into the category of special category data.

Data processing activities involving special categories of personal data require an Article 9 condition for processing: explicit consent; employment, social security and social protection (if authorised by law); vital interests; not-for-profit bodies; made public by the data subject; legal claims or judicial acts; reasons of substantial public interest (with a basis in law); health

[101] Ibid, 24.

or social care (with a basis in law); public health (with a basis in law); archiving, research and statistics (with a basis in law). Special categories of data are defined in Article 9 of the GDPR as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic data and biometric data that uniquely identifies a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

It is crucial that all controllers processing special category data in the Barnahus context have identified the condition that allows them to do so for each processing activity. Much of the processing in the Barnahus context will fall under special categories data and is very sensitive data due to its nature and the fact it relates to children who are vulnerable data subjects. As these children are potentially victims of crime, there may also be data processed related to criminal offences.[102] All these factors need to be given great consideration when developing appropriate technical and organisational measures to protect the personal data processed in the Barnahus context.

Article 9(2)(h) GDPR, expressed in section 52 of the Data Protection Act 2018, provides that special categories data can be processed for the purposes of medical diagnosis, the provision of medical care, treatment or social care, or for the management of health or social care systems and services. These are likely to apply to many of the processing activities carried out by Tusla, the HSE, and CHI in the Barnahus context. In all these instances suitable and specific measures should be taken to safeguard the fundamental rights and freedoms of data subjects. Article 9(2)(c) allows for the processing of special category data where it is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent. While Article 9(2)(g) allows the processing of special category data where it is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. Other Article 9 conditions that may apply to the Barnahus setting include explicit consent from the data subject; or where processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.

Section 51 of the Data Protection Act 2018 allows for the State to make regulations for processing of either or both special categories of personal data and Article 10 data (data related to criminal offences and criminal convictions) where there is a substantial public interest concerned. Any such regulation should ensure there are suitable and specific measures taken to safeguard the fundamental rights and freedoms of data subjects in processing the personal data which is authorised by the regulations. This provides an option for the government to introduce a regulation under subsection 3 of section 51 of the Data Protection Act to authorise the processing of special category data and Article 10 data in the

[102] This falls under Article 10, GDPR. Article 10 GDPR is intended to extend the protection of the GDPR to the processing of certain criminal data that is not included in the scope of the LED.

Barnahus context. In the UK, the Data Protection Act 2018 explicitly mentions safeguarding children as a public interest condition.[103] This applies to processing that is necessary for the purposes of protecting an individual from neglect or physical, mental or emotional harm, or protecting the physical, mental or emotional well-being of an individual. Ireland doesn't specifically mention safeguarding children but it is well established in law that there is substantial interest in protecting children, and as such a similar provision to allow the processing of special category data for the safeguarding of children could be inserted.

The UK provision outlines the circumstances where processing can be carried out without the consent of the data subject. These circumstances include where the data subject cannot consent to processing; the controller cannot reasonably be expected to obtain the consent of the data subject to the processing; or the processing must be carried out without the consent of the data subject because obtaining the consent of the data subject would prejudice the provision of the protection required. [104] The Irish government should consider the inclusion of safeguarding of children as an explicit public interest condition.

Article 9(2)(g) requires that the processing be subject to the implementation of "suitable and specific measures" to safeguard the fundamental rights and freedoms of data subjects. These non-mandatory measures are standalone and should be implemented as appropriate. Section 52 of the Data Protection Act 2018, which addresses processing of special categories of personal data for purposes of Article 9(2)(h), states that it is also subject to the application of suitable and specific measures aimed at safeguarding the rights and freedoms of data subjects.[105]

These measures are detailed in section 36 of the Act, and include:

- explicit consent of the data subject for the processing of his or her personal data for one or more specified purposes,
- limitations on access to the personal data undergoing processing within a workplace in order to prevent unauthorised consultation, alteration, disclosure or erasure of personal data,
- strict time limits for the erasure of personal data and mechanisms to ensure that such limits are observed,
- specific targeted training for those involved in processing operations, and
- having regard to the state of the art, the context, nature, scope and purposes of data processing and the likelihood of risk to, and the severity of any risk to, the rights and freedoms of data subjects—(i) logging mechanisms to permit verification of whether and by whom the personal data have been consulted, altered, disclosed or erased, (ii) in cases in which it is not mandatory under the Data Protection Regulation, designation of a data protection officer, (iii) where the processing involves data relating to the health of a data subject, a requirement that the processing is

[103] UK Data Protection Act 2018 , sch 1, article 18.
[104] UK Data Protection Act 2018 , sch 1, article 18 (2).
[105] Data Protection Act 2018 s 60 (7)(o).

undertaken by a person referred to in section 52 (2), (iv) pseudonymisation of the personal data, and (v) encryption of the personal data.

This section also allows for the drafting of regulations to identify additional safeguarding measures and or to specify measures that are mandatory in respect to the processing they apply to. These measures may relate to governance structures, processes or procedures for risk assessment purposes, processes or procedures for the management and conduct of research projects, and other technical and organisational measures designed to ensure that the processing is carried out in accordance with the Data Protection Regulation and processes for testing and evaluating the effectiveness of such measures.[106] The measures identified may be different for different categories of personal data, different categories of controllers, different types of processing or categories of processing. However, the implementation of such measures will be essential to data protection compliance in the Barnahus context.

2.2.3 Personal data related to criminal offences and convictions

Article 10 data, that is data related to criminal convictions and offences, may also be shared by the Gardaí as part of their involvement in Barnahus services. This personal data may be processed under the control of official authority where one of a set of circumstances as outlined in the Data Protection Act 2018 apply. It is essential that the legal basis and purpose for this sharing is clearly identified, and suitable and specific measures are taken to safeguard the fundamental rights and freedoms of the data subject. Mixed responses were received from stakeholders on whether personal data related to a suspect's previous criminal convictions or offences is shared between agencies; this needs to be interrogated further to determine the legal bases and processes in place for this type of information sharing. This is particularly important as a failure to process this personal data in line with the law could result in a suspect to claim a violation of their data protection rights and/or their right to fair procedures.

2.2.4 Data protection principles

All processing of personal data carried out in the Barnahus context must comply with the following data protection principles as set out in the GDPR: Lawfulness, fairness and transparency; Purpose limitation; Data minimisation; Accuracy; Storage limitation; Integrity and confidentiality; and Accountability. Compliance with these principles needs to be ensured in any data sharing between the agencies.

<u>Lawfulness, fairness and transparency</u>

As discussed above it is crucial that a correct lawful basis is identified for all personal data processed and shared in the Barnahus context and that this is communicated to data subjects in a transparent way. Some of the specific rights granted to data subjects under the GDPR only apply where processing is justified by a particular legal basis. This is why it is important to clarify what processing is conducted under what legal basis and to inform data subjects of their applicable rights and how they can exercise them.

[106] Data Protection Act 2018, s 36 (2)(3).

Purpose limitation

Purpose limitation will need to be an important consideration when sharing personal data between agencies. Safeguards should be in place to ensure that personal data shared with another agency is not used for another purpose than the one identified. For example, personal data shared with an agency for child protection purposes should not be cross referenced or combined with personal data in that agency's own database to achieve a different purpose. The Data Protection Act 2018 provides for organisations to process personal data and special categories of data for another purpose other than the purpose it was collected for if it is necessary and proportionate for the preventing, detecting, investigating or prosecuting criminal offences.[107] This also applies if processing is necessary for the purposes of legal advice and legal proceedings.[108]

Data minimisation

The principle of "data minimisation" means that a data controller should limit the collection of personal information to what is directly relevant and necessary to accomplish a specified purpose. When sharing personal data with another agency, only the specific personal data required for the purpose of processing should be shared. From the stakeholder interviews, it appears this principle is being adhered to in Barnahus West, however, controls should be implemented in a formalised process to ensure only those who need the information can access it, and that is limited to only the information they require to fulfil their purpose.

Accuracy

Personal data processed should be accurate and up to date. Currently the lack of a formalised and streamlined communication process between agencies is causing delays in up-to-date information being exchanged in a timely manner. It was found in earlier reports that there were sometimes discrepancies in information stored on the systems of Gardaí and Tusla as they were not always updated concurrently.[109]

Storage limitation

Personal data should be stored for no longer than is necessary for the purposes it was processed for. Again, each agency in Barnahus will have their own retention periods for the personal data they process. If there is a scenario where one agency is processing personal data on behalf of another retention periods should be agreed upon in a formal agreement. This should also be the case for any personal data that will be stored on a shared system.

Integrity and confidentiality

A cornerstone of data protection is data security. The bulk of decisions issued by the Data Protection Commission to date in relation to violations of the GDPR have been related to deficiencies in this regard that have resulted in data breaches. Applying technical and

[107] Data Protection Act 2018, s 41(b).
[108] Data Protection Act 2018, s 47.
[109] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017).

organisational measures to ensure the appropriate security of personal data is crucial to GDPR compliance. The measures implemented should be commensurate to the level of risk to the data subject if the integrity, availability, or confidentiality of the data was compromised. Personal data processed in the Barnahus context includes children's data, special category data, and data related to criminal offences. Any breach of such data would likely result in high risk for the individuals concerned, and as such robust security and governance measures should be applied. As it stands, it appears the personal data that is shared between agencies is done so in an ad hoc manner, with little oversight. Such an approach is not appropriate to the level of risk associated with this processing.

Accountability

Accountability means the controller's ability to demonstrate compliance. This can be achieved by putting appropriate technical and organisational measures in place, as discussed above, and being able to demonstrate how this was done and its effectiveness. This can include adequate documentation such as data protection and security policies, records of processing activities (RoPA), the appointment of a data protection officer, data processing contracts and data sharing agreements, and data protection impact assessments (DPIA).

As agencies are working independently, no uniform policies or procedures for personal data processed in the Barnahus context have been developed. Likewise, there is no RoPA in place. It is recommended a RoPA is first conducted to identify all processing operations that fall under the umbrella of Barnahus. As the processing carried out under Barnahus is not occasional and relates to special categories data and potentially personal data relating to criminal convictions and offences there is an obligation under Article 30 of the GDPR to maintain a Records of Processing Activities. While each agency must hold a RoPA for their own processing activities, it is recommended that a RoPA be developed specifically to monitor compliance with processing activities carried out in the provision of Barnahus services. This provides an inventory of data processing activities, and an overview of how personal data is being processed including: contact details of the controller/s; the purposes of the processing; a description of the categories of data subjects and of the categories of personal data; the categories of recipients to whom the personal data have been or will be disclosed; where applicable, transfers of personal data to a third country or an international organisation; time limits for erasure of the different categories of data, where possible; and a general description of the technical and organisational security measures, where possible. The establishment of a RoPA for Barnahus is an important first step in establishing a data governance structure for Barnahus and ensuring all processing is being conducted under an appropriate legal basis.

Further, the GDPR recommends other voluntary tools that can be applied to demonstrate compliance in certain circumstances; this includes the development of a code of conduct.[110] A code of conduct is encouraged where there are a number of organisations carrying out processing activities in a specific sector that would benefit from specific guidance on how the GDPR should be applied to the different obligations of controllers and processors in that

[110] GDPR, art 24.

sector.[111] Considering the complex data processing activities and the number of controllers involved in the Barnahus context, it is recommended that a GDPR code of conduct is developed for Barnahus that can be applied nationally. This will clarify processes around data sharing and responsibilities in relation to data protection and will be an important part of national alignment. The development of a code of conduct can take several months and will require extensive stakeholder discussions and informal engagement with the Data Protection Commission before the code is submitted formally for review. It's understood that Barnahus is currently revising referral forms for national alignment but there are differing views from a data protection perspective about the level of referral information that should be sought; this is an important example of the type of issue that can be agreed upon and clarified in the drafting of a code of conduct to ensure a consistent approach nationally. There needs to be agreement nationally on the level of information that needs to be processed and shared as part of Barnahus services and it should be clear what is expected from each agency. Individual agencies should not be left to fill the gaps as this will result in an inconsistent approach that will lead to different models of service across the country potentially resulting in inequitable outcomes for children. The development of a code of conduct is one of the core recommendations of this report and will be discussed in detail in Chapter 4.

Forensic medical examiners need clear guidance on their role in processing personal data and have expressed concerns around identifying their legal basis for doing so when they have not received a referral from Tusla or the Gardaí. It is crucial these issues are addressed by the data controller and communicated to professionals, so as not to pose a barrier to children receiving the treatment they need as there are often tight timeframes in relation to carrying out medical assessments, testing, and treatment for sexual abuse victims. This is an example of the type of child protection specific data protection concern that could be addressed in a code of conduct for Barnahus services.

Under Article 37 of the GDPR a data protection officer must be appointed if the processing is carried out by a public authority or body; the core activities of the controller or the processor consist of processing operations, which require regular and systematic monitoring of data subjects on a large scale; or if the core activities of the controller or the processor consist of processing on a large scale of special categories of data or personal data relating to criminal convictions and offences. Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size. Consideration should be given on whether it may be appropriate to appoint a Barnahus-specific data protection officer to oversee the implementation of a data protection strategy for Barnahus services. This decision will depend on how stakeholders agree the Barnahus model will be implemented on a national scale going forward.

The data protection principles apply equally to processing under the GDPR and the Law Enforcement Directive (LED). All data processed in the Barnahus context must respect these

[111] GDPR, art 40.

principles as set out in Article 5 of the GDPR. These principles need to be at the fore in the development of any uniform policies or systems, as does the principle of necessity and proportionality to ensure compliance with Article 8 of the ECHR and Articles 7 and 8 of the Charter of Fundamental Rights of the EU.

2.3 Law Enforcement Directive

The Law Enforcement Directive, transposed in Part 5 of the Data Protection Act 2018, applies where personal data is processed by a 'competent authority' for the purpose of the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against, and the prevention of, threats to public security, or the execution of criminal penalties.[112] Competent authorities may include not only public authorities such as the judicial authorities, the police or other law-enforcement authorities but also any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the Directive. Data sharing by a competent authority for specific law enforcement purposes is subject to a different regime under Part 5 of the Data Protection Act 2018, which provides a separate but complementary framework. It may apply to some processing in the Barnahus context but this is likely to be confined to processing by the Gardaí as Tusla has a clearly stated purpose to safeguard children first and foremost, even if this negatively impacts a criminal investigation. Tusla does not fit the definition of a 'competent authority' under the LED as it is not authorised by law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. As such, it's unlikely any processing conducted by Tusla or the other agencies will fall under the scope of the LED.

The LED will likely apply to much of the processing conducted by the Gardaí in the Barnahus context, however there may be some processing carried out by the Gardaí that comes under the scope of the GDPR; for example in some cases the Gardaí may share information with Tusla as they are mandated to do so i.e. in compliance with a legal obligation under the GDPR. The GDPR applies in cases where a competent authority processes personal data for other purposes than those specified under the LED. It is important to distinguish the framework being applied to each processing operation and the legal basis for doing so.

Section 73 of the Act (LED) outlines the scenarios where processing of special category data is lawful. This includes where it is necessary to prevent injury or other damage to the data subject or another individual, to prevent loss in respect of, or damage to, property, or to protect the vital interests of the data subject or another individual. Section 73 also carries over the possibility of making regulations to permit processing of special categories of personal data for reasons of substantial public interest from section 51 of the Act.[113] This

[112] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Data Protection Act 2018, s 70.

[113] Data Protection Act 2018, s 73(2).

allows for the possibility of including an explicit condition for processing special category data when it is necessary for the safeguarding of children.

There is also a requirement to carry out data logging for automated systems where data is being processed for law enforcement purposes.[114] This includes logging the collection of personal data for the purposes of such processing and the alteration of any such data; the consultation of the personal data by any person; the disclosure of the personal data, including the transfer of the data, to any other person; the combination of the personal data with other data; the erasure of the personal data, or some of the data.[115] The log should include sufficient information to establish the date and time of the consultation or disclosure; the reason for the consultation or disclosure; the identification of the person who consulted or disclosed, in so far as possible; and the identity of any recipient to whom the personal data were disclosed. Logging is also referenced in the Data Protection Act as a suitable safeguard where such measures are required to safeguard the fundamental rights and freedoms of data subjects in processing personal data under the GDPR.[116] Logging will be an important factor in the development of any shared system for Barnahus services to ensure accountability and checks.

2.4 Data Sharing and Governance Act 2019

It will also need to be established if the Data Sharing and Governance Act 2019 is applicable to any data sharing taking place between public bodies as part of the provision of Barnahus services. A granular assessment of all data sharing activities should be conducted to establish this.

The Data Sharing and Governance Act 2019 was fully commenced in December 2022 with the aim of regulating data sharing in the public sector and making this data sharing more seamless and transparent. As such, section 38 of the Data Protection Act 2018, which gives effect to Article 6(1)(e) GDPR, the public task legal basis, can no longer be relied on as a valid legal basis for data sharing arrangements between public bodies.[117] Instead, public bodies wishing to share data for the performance of a task carried out in the public interest or in the exercise of official authority vested in them must do so under the framework of the Data Sharing and Governance Act 2019. The Act provides a statutory basis to allow public bodies to share personal data and has several provisions including legislating for a consistent approach to data-sharing and providing for Data Sharing Agreements to be put in place between public bodies.

The provisions of the Act exclude the sharing of special category data, therefore public bodies cannot use the Act as a basis for sharing this type of personal data. It also does not apply to data sharing for the purposes of the prevention, detection or investigation of offences, or the apprehension or prosecution of offenders. The Gardaí are, however, not an exempted body under the Act and can share data under the Act if it is for another

[114] Data Protection Act 2018 s 82.
[115] Ibid.
[116] Data Protection Act 2019, s 36(1)(e)(i).
[117] Data Sharing and Governance Act 2019, s 6(2).

purpose.[118] Section 13 of the Act outlines the purposes for which a public body may disclose personal data to another body.[119] These include:

- to verify the identity of a person, where the first or second mentioned public body is providing or proposes to provide a service to that person;
- to identify and correct erroneous information held by the first or second mentioned public body;
- to avoid the financial or administrative burden that would otherwise be imposed on a person to whom a service is being or is to be delivered by the first or second mentioned public body were the second mentioned public body to collect the personal data directly from that person;
- to establish the entitlement of a person to the provision of a service being delivered by the first or second mentioned public body, on the basis of information previously provided by that person to the first mentioned public body (or another public body that previously disclosed the information to the first mentioned public body);
- to facilitate the administration, supervision and control of a service, programme or policy delivered or implemented or being delivered or implemented, as the case may be, by, for or on behalf of the first or second mentioned public body;
- to facilitate the improvement or targeting of a service, programme or policy delivered or implemented or to be delivered or implemented, as the case may be, by, for or on behalf of the first or second mentioned public body;
- to enable the evaluation, oversight or review of a service, programme or policy delivered or implemented or being delivered or implemented, as the case may be, by, for or on behalf of the first or second mentioned public body;
- to facilitate an analysis of the structure, functions, resources and service delivery methods of the first or second mentioned public body,

The potential application of the Act needs to be considered in the Barnahus context. To do this, the legal basis for each processing operation should be defined, and it should be noted where special categories data is processed. The establishment of a RoPA for Barnahus would help identify the processing activities within Barnahus, the purpose of each intended processing activity, and the legal basis being relied on. This would confirm if the Data Sharing and Governance Act 2019 is applicable to any processing activities. While it appears the vast amount of personal data shared within Barnahus services will be excluded from the Act as it will fall under special category data, or personal data that is being processed for crime investigation purposes; there may be some instances where pseudonymised data will be shared among the public bodies in the public interest for statistics or other purposes. The conditions most like to apply to the Barnahus context are where data is being shared between public bodies for the administration, improvement, or oversight of Barnahus services. If the DSGA is applicable, this would require the drafting of a data sharing agreement that would be subject to a public consultation process. The rules and

[118] Data Sharing and Governance Act 2019, s 10; schedule.
[119]Data Sharing and Governance Act 2019, s 13.

requirements set out in the Data Governance & Sharing Act are in addition to the general principles required under data protection law.

2.5 Recommendations

The data protection framework in Ireland, namely the GDPR, the Data Protection Act 2018, the Law Enforcement Directive (Part 5 of the Data Protection Act 2018), and the Data Sharing and Governance Act 2019 do not pose any explicit blockers to the sharing of personal data for the purposes of keeping children and young people safe, however there are many factors to consider to ensure data processing is in compliance with data protection regulations. This chapter emphasises the importance of identifying and documenting the applicable data protection frameworks, the overall controller of personal data in the Barnahus context, the legal bases being relied on for each processing activity and the need for a code of conduct to ensure a consistent and coherent approach to data protection and data sharing across Barnahus services nationally.

Recommendation 8: As discussed above, data processing in the provision of Barnahus services comes under the scope of the GDPR, the LED, the Data Protection Act 2018 and possibly the Data Sharing and Governance Act 2019. The relevant framework/s needs to be identified for all processing activities carried out in the provision of Barnahus services. Development of a Records of Processing Activities (RoPA) will allow the controller/s to document that the applicable frameworks and legal bases have been assessed for all processing and sharing of personal data.

Recommendation 9: There is confusion among practitioners around when consent is being used as the legal basis under the GDPR, when consent is being used as a safeguard under section 36 of the Data Protection Act 2018, when consent is being sought under the LED, and when consent is informed consent for medical and social services interventions. The legal basis for processing needs to be clearly communicated to practitioners, as well as children and their families to avoid confusion. Consent forms should be reviewed for all processing activities where consent is currently being sought for. It should also be assessed if consent is the appropriate legal basis for each specific processing activity it is being relied on or if it is more appropriate as an additional safeguard measure. Particular attention should also be given to the joint specialist interview from a data protection perspective as there seems to be a lack of clarity on who is the controller of this information, the legal basis for processing, inconsistency in how consent is sought for the interview, and uncertainty in how the information can be utilised by non-Gardaí.

Recommendation 10: A RoPA (Art. 30 GDPR) should be conducted to identify all processing operations that fall under the umbrella of Barnahus and ensure compliance with data protection regulations. This will identify the relevant controller, categories of data subjects, who personal data is shared with, the legal basis for processing, and the extra condition for the processing of special categories data, and data related to criminal convictions and offences, where applicable.

Recommendation 11: It needs to be established who has overall responsibility for the implementation of Barnahus services in Ireland and for determining how personal data will

be processed in this context. For alignment purposes and overall governance, it is recommended that a core controller/s should be identified as responsible for ensuring all data processed in Barnahus centres is in compliance with the GDPR. It is also important to establish controller-processor relationships among the relevant agencies, especially within the context of Barnahus East.

Recommendation 12: Current documentation, notably privacy notices and consent forms, should be reviewed in light of agreement on governance structures for Barnahus and completion of the RoPA to ensure it is transparent who is the controller/s of the data, and the legal basis for each processing activity including where consent is being used as an additional GDPR safeguard. Current Barnahus documentation has been drafted by Tusla, with Tusla designated as the data controller. Concerns were voiced during the stakeholder engagement process around how Barnahus East would operate as CHI is intended to be the lead agency there; these questions also need to be considered in terms of data protection. The data controller is the entity that determines the purposes for which and the means by which personal data is processed.

It is imperative that questions on overall controllership are addressed to ensure a consistent approach to data protection across Barnahus services.

Data subjects should also be made aware at the outset of their engagement with Barnahus of the possibility that their information could be shared with the alleged suspect and a CASP social worker if CASP is initiated, or the defendant and their legal team if the Court orders it.

Recommendation 13: At present, each agency follows their own policies and procedures and there is no uniform policy or procedure in place for data sharing within Barnahus services. A code of conduct under the GDPR should be developed to govern data processing and sharing in the Barnahus context. This would be adhered to by all agencies involved in the provision of Barnahus services and would be much more comprehensive in terms of practical application than a standard data sharing agreement alone. The development of a code of conduct can take several months and will require extensive stakeholder discussions and informal engagement with the Data Protection Commission before the code is submitted formally for review.

Recommendation 14: Consideration should be given on whether it may be appropriate to appoint a Barnahus-specific data protection officer to oversee the implementation of a data protection strategy for Barnahus services. This decision will depend on how stakeholders agree the Barnahus model will be implemented on a national scale going forward. The DPO will monitor compliance with the GDPR and the code of conduct specifically designed for Barnahus; provide tailored data protection and awareness training to all staff working in Barnahus services; and will advise on data protection issues including the need for Data Protection Impact Assessments (DPIA) as required. If it is decided against appointing a specific DPO for Barnahus services, a DPO forum for the DPOs of each agency should be established to provide a platform for the DPOs to discuss any data protection issues arising from Barnahus services.

Recommendation 15: Consideration of including the safeguarding of children as an explicit public interest condition within the Data Protection Act 2018, similar to the UK Data Protection Act 2018, is suggested to assess its appropriateness and effectiveness. Such a change could help remove any ambiguity around processing under the public interest legal basis for child protection purposes. Safeguards for such processing could also be mandated in law. This could complement the proposed introduction of the duty to cooperate in the Child Care (Amendment) Bill 2023 by ensuring agencies share information in a secure, consistent way that respects the fundamental rights of data subjects. Appropriate safeguards could be established during the drafting of the code of conduct. Regulations could also be introduced to provide for restricting the rights of data subjects and obligations of data controllers where such restrictions are necessary for the purposes of safeguarding children.[120]

Chapter 3 Interagency sharing practices: The current state of play

3.1 Introduction

Interagency collaboration has been highlighted as a persistent weak spot in the Irish child protection system.[121] The Review of Protection for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, also known as the O'Malley Report, was published in 2020. Among its overarching recommendations was the need to improving inter-agency co-operation and exchange of information, especially in relation to services for victims.[122] Child protection is an inherently multi-disciplinary space; to work effectively, it requires input at various points from social workers, police, lawyers, judges and court staff, guardians ad litem, a wide range of healthcare professionals, as well as teachers and education welfare officers and others who come into regular contact with children.[123] Concerns around the lack of interagency sharing and the impact this can have on an investigation process have been highlighted for many years in various contexts. The importance of interagency collaboration in the best interest of the child has been repeatedly stressed by international and national experts, government reports, and indeed the relevant agencies themselves.[124] In its General Comment No 13 on the right of the child to freedom from all forms of violence, the UN Committee on the Rights of the Child repeatedly stressed the importance of inter-agency collaboration.[125] Interagency collaboration and coordination was one of the six goals of 'Better Outcomes, Brighter Futures, the national policy framework for children and young people for 2014-2020', and the DCEIDY is engaged in ongoing work on improving interagency collaboration through initiatives such as Children and Young People's Services

[120] Data Protection Act 2018, s 60 (7)(o).
[121] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2021) 14; Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 30.
[122] O'Malley Report (2020) 8.
[123] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 30.
[124] Garda Síochána, *Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children, Child Welfare* (2013) 103.
[125] Committee on the Rights of the Child, General Comment No 13 (2011) The right of the child to freedom from all forms of violence, UN Doc No CRC/C/GC/13, [42] and [50].

Committees (CYPSC).[126] Yet despite the almost unanimous agreement that interagency collaboration is pivotal to getting the best outcomes for children, in practice efforts to achieve this are still falling short. The UN Special Rapporteur on the sale and sexual exploitation of children highlighted the "fragmented nature" of the Irish government's approach to the issue of sexual violence against children and "the lack of a dedicated and integrated strategy to response to sexual violence against children".[127] The need to develop a National Strategy for Child Sexual Abuse, Child Sexual Exploitation and Online Risks to Child Safety was highlighted by the Garda Inspectorate in its 2017 report on responding to child sexual abuse.[128] It made a short-term recommendation that the Department of Justice convene an inter-departmental and multi-agency representative group to develop a national strategy. [129] An Inter-Agency Implementation Group in relation to the Garda Inspectorate Report was set up and accepted this recommendation. In its Third Progress Report it noted that particular time and consideration would have to be given to the recommendation, while the majority view of the Group was that a national approach would be required.[130] In its Fourth Progress Report, the most recent one published, it is noted that that the Inspectorate's report is the core document for a national strategy going forward and discussed the oversight mechanisms to be deployed and who would manage this.[131] It was stated that "once the appropriate oversight mechanism has been confirmed the spirit of this action can be considered implemented."[132] The Barnahus model and its implementation, as well as any interagency information sharing tools adopted as part of this process, should be given detailed consideration in the formation of a National Strategy for Child Sexual Abuse.

In his 2020 report the Special Rapporteur on Child Protection stated that there remains considerable room for improvement in the quality of interagency collaboration between Tusla, the HSE and the Gardaí and efforts need to be redoubled. He noted that the government had an important role to play in bringing together the various agencies together and ensuring that they collaborate effectively.[133] To date, any protocols in relation to interagency collaboration in the child protection context have mainly centred around the two agencies with statutory responsibility in the area - Tusla and the Gardaí. The Children First Act 2015 and the Children First Guidelines 2017 apply to a wider range of agencies, but this is specific to reporting suspected abuse to Tusla and does not facilitate an interagency working approach.

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[126] Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people* 2014-2020 (2019).
[127] Office of the United Nations High Commissioner for Human Rights, *Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (2019) [56] and [75].
[128] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017) 31.
[129] Ibid.
[130] Garda Inspectorate Report "Responding to Child Sexual Abuse – A Follow-up Review December 2017" THIRD PROGRESS REPORT OF THE INTER-AGENCY IMPLEMENTATION GROUP (23 July 2021) 3.
[131] Garda Inspectorate Report "Responding to Child Sexual Abuse – A Follow-up Review December 2017" Fourth Progress Report of the Inter-agency Implementation Group: Spreadsheet, 1.
[132] Ibid.
[133] Conor O'Mahony, *Annual Report of the Special Rapporteur on Child Protection* (2020) 31.

3.2 Agencies involved in the provision of Barnahus services

Joint working between social work and policing services involved in the investigation of child abuse is recognised internationally as providing children with a less traumatic investigation experience and better outcomes where criminal and social care enquiries run in parallel.[134] There are four core agencies that will be involved in the delivery of the Barnahus model of service in Ireland – Tusla, CHI, the HSE and the Gardaí. Each agency has its own distinct purpose, as set out in law. The Gardaí and Tusla are the key agencies empowered by law to carry out an investigation and assessment of suspected child abuse. Each agency has a different stated purpose for doing so; Tusla has primary responsibility for child protection/welfare and the Gardaí has responsibility for crime investigation. While each agency has different end goals, both agencies work together and recognise that they need to continuously review and increase the level of joint working to achieve the best possible outcomes for children. The Children First Guidance states the safety of the child is paramount and at no stage should a child's safety be compromised because of concern for the integrity of a criminal investigation.[135]

Tusla was established under the Child and Family Agency Act 2013. The specific role of Tusla is to promote the welfare of children who are at risk of not receiving adequate care and protection. The Act states, in line with the Child Care Act 1991, that the best interests of the child shall be of paramount consideration in all matters and that consideration should be given to the views of the child where they are capable of expressing them.[136] Under the Child Care Act 1991, Tusla is obliged to coordinate information from all relevant sources about a child who may not be receiving adequate care and protection. It should also facilitate and promote enhanced inter-agency cooperation to ensure that services for children are co-ordinated and provide an integrated response to the needs of children and their families.[137]

The function of the Gardaí concerning child abuse and neglect is to preserve life; vindicate the human rights of each individual; and prevent, investigate and detect criminal offences. Gardaí will deal with any criminal aspects of a sexual abuse case under the relevant criminal justice legislation.[138] For the purpose of achieving their objectives, as conferred on them in law, the Gardaí are required to cooperate with other Departments of State, as well as relevant agencies and bodies with statutory responsibility for any matter relating to these objectives.[139] The Gardaí have a policy in place in relation to child sex abuse, published in 2013, 'Garda Síochána Policy on the Investigation of Sexual Crime Against Children'. According to the Gardaí this policy is currently undergoing comprehensive review to revise

[134] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (2017).
[135] Ibid, 11.
[136] Child and Family Agency Act 2013, s 9.
[137] Child and Family Agency Act 2013, s 8(8).
[138] Garda Síochána Act 2005 s 7(1).
[139] Garda Síochána Act 2005 s 7(2).

and update its contents. It is recommended that the updated version includes a section on the Barnahus model and its implementation in Ireland.

The HSE was established under the Health Act 2004 as the single body with statutory responsibility for the management and delivery of health and social services in Ireland with the objective of improving, promoting and protecting the health and welfare of the public in the most beneficial, effective and efficient manner.[140] The Act states that it should have regard to the need to cooperate with, and coordinate its activities with those of other public authorities if the performance of their functions affects or could affect the health of the public.[141] Tusla and the HSE have a joint protocol for interagency collaboration in place for dealing with children with complex disabilities.[142] However, there is no equivalent protocol in place for the child protection context.

Children's Health Ireland was established under the Children's Health Act 2018 and is the newest of these public bodies. The object of CHI is to improve, promote and protect the health, mental health and well-being of children in a manner that embodies the values of child-centred, compassionate and progressive care provided with respect, excellence and integrity and in doing so it shall have the right and responsibility to promote the culture and traditional principles of voluntarism in the conduct of its internal and external affairs.[143] It was established to govern and operate paediatric services in Dublin as a single service across existing locations. Among its functions is to plan, conduct, maintain, manage, provide and develop paediatric services in the hospital. These include Connolly Hospital and Tallaght Hospital where specialist child sexual abuse units, St Clare's and St Louise's units, are located respectively. Laurel's Clinic, which provides paediatric medical service where there are concerns of child sexual abuse, is also located at Tallaght Hospital.

Barnahus East is not yet operational but it is intended that Barnahus East will be led by CHI at St Clare's and St Louise's in Tallaght Hospital (who operate as one service on different sites) in conjunction with the Laurel's Clinic, which provides a paediatric medical service including forensic medical exams for children under the age of 14, where there is a child sexual abuse concern. CHI will be the lead agency in Barnahus East and intends to deliver Barnahus services at these units, but they will not be exclusively a Barnahus service. They will conduct assessments that will then be shared with Tusla and the Gardaí.[144] These specialist child sexual abuse units have been operational for 30 years offering children assessment and therapeutic interventions. The input and expertise of CHI will be crucial for services to move successfully toward the implementation of the Barnahus model nationally. From our discussions with CHI representatives, it does not appear CHI envisage their involvement in Barnahus services will entail significant changes to the way they currently

[140] Health Act 2004, s 7.
[141] Health Act 2004, s 7(5)(b).
[142] HSE and Tusla, *Joint Protocol for Interagency Collaboration Between the Health Service Executive and Tusla – Child and Family Agency to Promote the Best Interests of Children and Families* (2020).
[143] Children's Health Act 2018, s 6.
[144] Children's Health Ireland, 'Specialist Child Sexual Abuse Services' <https://www.childrenshealthireland.ie/list-of-services/specialist-child-sexual-abuse-services/> accessed 10 July 2023.

work. CHI currently receive referrals from Tusla and the Gardaí for therapy services or assessments. After they conduct assessments, reports are sent to Tusla and the Gardaí with only the level of information required included. They currently link in on a case-by-case basis with individual Gardaí and social workers; and expect interaction will increase through interagency meetings which will be held as part of Barnahus services. No process for interagency meetings has been developed to date, but it is expected the Barnahus manager, who is expected to be an employee of CHI, will have responsibility for organising these. While CHI intend to provide services that meet the Barnahus Quality Standards, they do expect that there will be differences with other Barnahus services nationally.

This application of the Barnahus East model is likely to differ significantly from the Galway and Cork model where Tusla is the lead agency. The Barnahus East model will operate from different sites; children will not be able to access all services on one premises in the way Barnahus West operates. CHI does not provide an out of hours service and children over the age of 14 must attend a Sexual Assault Treatment Unit (SATU) in the Rotunda Hospital for their initial forensic exam. The Laurel's Clinic will provide follow up exams for children aged 14 and 15. Resourcing has also been identified as a challenge in the implementation of Barnahus East. While CHI had advertised the role of Barnahus manager, this process had to be paused as there is currently a recruitment embargo in place. CHI are seeking an exemption so that they can move ahead with this process and meet their target of providing Barnahus services by the end of quarter 1 2024.

The Barnahus East model as it has been presented thus far, appears to be CHI services applying Barnahus standards, as opposed to the more integrated interagency approach that has been adopted in Barnahus West. It does not meet the definition of Barnahus as it is literally translated 'children's house', as it does not provide a multi-agency centre for children to access all necessary services under one roof. It is important that Barnahus East meets the same standards as Barnahus West for equitable provision of child-centered services across the country and adequate resourcing should be provided for this in terms of staffing and physical space.

Barnahus South also has its own unique challenges. It will be led by Tusla from the Family Centre at St. Finbarr's Hospital, which was established as a specialist sexual abuse unit in 1988. Governance of the medical service at the Family Centre at St. Finbarr's is expected to be transferred from Tusla to the HSE by the end of the year. This is expected to impact on current information sharing processes as there will no longer be a medical professional attending strategy meetings. The presence of a nurse at those strategy meetings has been noted as hugely important in providing relevant information to the forensic medical examiners in doing their work. It has allowed the forensic medical examiner to advocate for a medical exam to be carried out in cases where they would not be able to otherwise as a referral had not yet been received. It's therefore crucial that the Barnahus model is implemented in some form without delay, to ensure the best interest of the child are not impacted by this structural change.

Currently, assessment services, joint interviews and the medical exam are all held at different locations. Like the Barnahus East service it does not fulfil the Barnahus aim of providing interagency services under the one roof. It is important that funding is provided so Barnahus South and Barnahus East services can provide the same standard of service as Barnahus West where children can access all services in the one location.

Overall governance of Barnahus services will be key to ensuring the services in each region are delivered in a consistent way irrespective of who the lead agency is. CHI's role in the delivery of Barnahus services needs to be clearly established, and it should be ensured they have a basis in law for all of their tasks. This should be communicated in a transparent manner, and relevant protocols such as the Good Practice Guidelines and the Joint Interview Protocol should be updated accordingly.

While the need for co-operation and coordination is recognised in the individual Acts governing Tusla, the Gardaí, and the HSE, the provisions are general. A number of government policies expand on this need for co-ordination. In the context of child protection, the main policies of relevance are the Children First National Guidance, the Joint Working Protocol for An Garda Siochana and Tusla, and the Good Practice Guidelines 2003. The Children First National Guidance states that "Joint working between Tusla and An Garda Síochána forms an integral part of the child protection and welfare service".[145] In line with this guidance a Joint Working Protocol for An Garda Siochana and Tusla was developed detailing how the agencies should cooperate in dealing with child welfare and protection concerns to ensure a two-way stream of communication between the agencies.

3.3 Joint Working Protocol for An Garda Síochana and Tusla

The Joint Working Protocol for An Garda Síochana and Tusla details how each agency should notify each other in relation to child protection concerns and sets out the role of the Liaison Management Team in oversight of the interagency liaison between the Gardaí and Tusla, ensuring the liaison is maintained and that each reported child protection and welfare concern receives an appropriate response. While the Protocol provides a framework for notification between Tusla and the Gardaí, these systems have been described as "superficial, ineffective, and under-resourced".[146] Dr Geoffrey Shannon noted "notification is not communication," and called for a greater level of cooperation and communication between the Gardaí and Tusla "to ensure a 'joined-up' and unified approach to the protection of children in these cases, to bring Irish child protection systems into line with international best practice."[147] It is essential that agencies under the umbrella of the child protection services can share information relating to vulnerable children and their families. Such free flow of communication is imperative to the proper functioning of the services.[148]

[145]Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (2017) 42.
[146] Geoffrey Shannon Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991 (2017) 111.
[147]Ibid.
[148] Ibid, 271.

He also notes the need for cultural change within the Gardaí and Tusla to respect the role of both organisations in protecting children.[149]

The 2020 Appraisal Report noted there was a lack of knowledge around the protocol.[150] While it's acknowledged that much work has taken place at local, regional and national levels in the intervening time, interviews undertaken as part of this analysis revealed that there is still some inconsistency in how the protocol is implemented across garda divisions; for example, some areas do not have a Garda Tusla liaison in place. In areas where there is no Garda Tusla liaison in place communication is not as efficient as Gardaí work on a roster basis and are often difficult to reach. The frustration owing to the divergent working hours between Tusla and the Gardaí has been noted in Garda policy.[151] Stakeholders also believe that the protocol will need to be updated to include the integration of Barnahus in the guidance. It is noted that a joint review of the 2017 joint protocol has been carried out with an updated version due by the end of Quarter 1 2024. This is a welcomed opportunity for the protocol to be updated to incorporate the implementation of the Barnahus model in the guidance. Currently, Barnahus West treats its interagency meeting like a strategy meeting (as described in the protocol), this approach may not be followed in all units, however, if not specified. Barnahus processes should be coordinated and agreed as part of the updated Joint Working Protocol.

3.4 Joint specialist interviews

Similarly, the Joint Interview Protocol between Gardaí and Tusla, which sets out guidance for conducting joint specialist interviews, will need to incorporate the Barnahus model of services. This protocol is currently being revised but to date it appears there has been no meaningful integration of Barnahus into the document.

The importance of joint forensic specialist interviews as a crucial part of interagency cooperation in decreasing the distress for children has been well established.[152] There is a body of work stretching back decades emphasising the need for liaison, the need to avoid multiple interviews of the child, and the need to formally record interagency engagements.[153] This is a core focus of the Barnahus model of services. Joint specialist interviews are conducted in cases where it is deemed necessary by both the Gardaí and Tusla, by individuals from each agency who are trained as specialist interviewers. The primary aim of the joint specialist interview for Gardaí is for evidentiary purposes, while Tusla's aim is to make an assessment of the child's protection needs. While it is described as a joint interview there have been concerns in the past that the specialist training and the interview itself is focused on meeting the Garda requirements as opposed to child protection needs.[154] In its 2017 report the Garda Inspectorate noted child specialist

[149] Ibid, 272.
[150] Sinead Hanafin, Ciaran Lynch and Elaine O'Callaghan Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up (2020) 68.
[151] Garda Síochána, Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children, Child Welfare (2013) 103.
[152] Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) 129.
[153] Mott McDonald, *National Review of Sexual Abuse Services for Children and Young People* (2011).
[154] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda*

interview training and subsequent interviews with children should not be dominated by one agency.[155] In Barnahus West, it appears a more equal approach has been adopted with both Garda and Tusla interviewers planning and preparing as an interview team and both Garda and Tusla interviewers transitioning between roles as interviewer 1 and interviewer 2. The Good Practice Guidelines sets the roles and responsibilities for each person in the interview team with the stated purpose of recording an interview that can be admissible as evidence in a trial. If the protocol is not followed the child's case may fall in court over procedural deviation. As addressed earlier, it will need to be determined if CHI medical social workers are 'competent persons' for this purpose; and the guidelines will need to be revised accordingly.

In terms of data protection, it is important to identify who is the controller/s in relation to the joint specialist interview. It appears that as it stands, this may vary depending on the Garda division involved, with a joint controller approach adopted in some cases while in others the Gardaí act as the controller determining the purposes and means of processing, and Tusla act as a processor who takes notes at these interviews, which are then provided to the Gardaí. The interviewer in the control room takes note of salient points that may need more investigation; these make up part of the criminal investigation and are criminal evidence thus why they go in the Garda file. The Tusla interviewer however has knowledge of the end result of the interview and can contact the Tusla social worker after the interview to update them on the relevant points or make their own notes on TCM. As addressed in Chapter 2 there needs to be more clarity on the detail social workers should be recording in their notes, taking into account these records are discoverable. It also should be clarified how the joint specialist interview can be utilised by social workers where no criminal case advances.

The Good Practice Guidelines 2003 is another example of an interagency policy document, governing how joint specialist interviews between agencies should be conducted with regard to the fact that the interview is part of the chain of evidence. In terms of interagency data sharing, the guidelines are cautious not to limit the extent of collaboration among relevant agencies, describing "rigid definitions of the roles and responsibilities of each of the various agencies and personnel working in the areas of child abuse and children at risk are neither practical nor desirable." "In the context of inter-agency co-operation, considerable flexibility is essential in order to secure the shared objective of child protection. The degrees of co-operation and flexibility required will vary dependant on the facts of the case under investigation."[156] While it is true a flexible approach may be required in certain cases, the roles and responsibilities of each agency need to be clear in each case. Given the limited number of cases that proceed to a prosecution, the joint interview needs to serve the broader interests of children at Barnahus. It should be clarified (i) how social workers can

Inspectorate (2017) I54.

[155] Ibid.

[156] Miriam Delahunt, *Good Practice Guidelines for persons involved in video recording interviews with complainants under 14 years of age (or with intellectual disability) for evidential purposes in accordance with Section 16(1)(B) of the Criminal Evidence Act, 1992, in cases involving sexual and/or violent offences* (July 2003) 7.

utilise the interview for child protection purposes where there is no criminal statement, and (ii) what information social workers should be recording during the joint specialist interview, taking into consideration that they may serve as a witness in the criminal trial and their notes are discoverable. These processes should be formalised and agreed with Gardai and the Good Practice Guidelines should be updated to reflect this.

In its 2017 report the Garda Inspectorate found while the use of specially trained child interviewers is embedded as standard practice, the process of joint interviewing of children by gardaí and social workers had ceased.[157] It noted that many of the same barriers to joint working between Gardaí and Tusla that had been flagged in the 2012 review had not been resolved. These included limited progress in moving policy into practice at operational levels; absence of formal meeting arrangements between senior Gardaí and Tusla counterparts to discuss child protection issues; unclear governance and accountability lines with regard to the Garda Tusla liaison; an absence of protocols between Tusla and the Gardaí for information sharing which in turn resulted in concerns about sharing data with other agencies; inconsistency in the frequency of interagency meetings; no system for communication between the agencies which would facilitate interagency working; and little evidence of structured interaction between Tusla and the Gardaí at senior managerial levels relating to child protection matters and ensuring the full implementation of Children First National Guidance.[158] The Inspectorate noted that without a fully functioning executive level forum, joint-working arrangements between Tusla and the Gardaí to deliver Children First National Guidance would be inconsistent and ineffective. This is also in line with the experience of the courts, where it's been remarked that this joint co-operation does not always take place in practice. In *CFA v R* the court expressed concern about the multiple interviews undergone by the child, suggesting joint interviewing should have occurred but did not.[159] This may have the effect of re-victimising the child victim and may also potentially undermine the evidential value of the evidence of a child abuse victim. While it's acknowledged there have been a number of substantial positive developments in this regard since then, from our stakeholder discussions some of these issues appear to persist; resourcing has been identified as a major issue in terms of carrying out joint specialist interviews, while generally the level of joint working between Gardaí and Tusla tends to vary depending on the Garda division.

3.5 Child protection strategy meetings

The HSE and CHI have a duty to report child sexual abuse suspicions to Tusla and the Gardaí, however there is no identified statutory basis for Tusla or the Gardaí to share information with the HSE and the CHI.[160] While there is no requirement under data protection law for there to be a statutory basis for sharing information outside of relying on a legal basis under

[157] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017) 20.
[158] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017) 8-12.
[159] *CFA v R* [2014] IEDC 03.
[160] Under Children First Act 2015 and Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, s 2.

the GDPR, the absence of such has left professionals unsure of what they can share with these agencies. The Joint Working Protocol sets out the process for liaison in terms of strategy meetings for Gardaí and Tusla but does not reference other agencies that may be involved.

Interagency sharing is already taking place in the child protection context among these agencies, albeit in a limited capacity. Interagency cooperation currently, includes attending strategy meetings and Child Protection Conferences organised by the Tusla social worker. The main point where interagency collaboration is currently taking place is at the strategy meeting. The purpose of a strategy meeting is to facilitate the sharing and evaluation of information between professionals. Strategy meetings have a number of objectives, including:

- to share available information;
- to consider whether immediate action should be taken to protect the child and other children in the same situation;
- to decide if section 16(1)(b) Criminal Evidence Act, 1992 interviews should take place;
- to consider available legal options;
- to plan early intervention;
- to identify possible sources of protection and support for the child;
- to identify sources of further information;
- to allocate responsibility;
- to agree as to how the remainder of the enquiry will be conducted.

In the context of Barnahus, interagency meetings are held with representatives of the core agencies to share available information relevant to the protection and welfare of the child and develop a plan for the child's progression through Barnahus. These meetings are held twice a week in Barnahus West. If a dedicated Garda Tusla liaison has been appointed this same individual will call into these meetings, if not the Divisional Protective Services Units sergeant on roster will call in. Gardaí in Barnahus West would like to see a full-time liaison appointed for Barnahus, who is located in the Barnahus office. Ideally, this person would also be trained as a specialist interviewer. Having a specially appointed Garda, who works 9-5 hours, to deal with Barnahus referrals would help streamline the communication process hugely. The appointment of a full-time Garda liaison should be considered for all Barnahus services.

The Garda Inspectorate review noted that sometimes it can be challenging to bring agency representatives together for meetings, particularly at short notice. This was reiterated by practitioners in the Barnahus context. The Garda Inspectorate elaborated that the attendance of Gardaí was important to agree and co-ordinate how the enquiry will be

managed. It said telephone calls were not the best model for information sharing and evaluation.[161] It also noted that following the meeting a joint action plan should be created by a social worker and shared with the gardaí but stated that during examinations of case files, very few copies of action plans were found. In the context of Barnahus, each agency takes their own notes and it appears there is no sharing of the agreed action plan.

3.6 Child Protection Conferences and the Child Protection Notification System (CPNS)

Ireland implements a Signs of Safety social work practice model, which is applied at every statge of Tusla's child protection and welfare work. Social workers work collaboratively with families and children to conduct risk assessments, develop a safety network, and produce safety plans to increase a child's safety and wellbeing. As part of this national practice model child participation and and parental participation is encouraged at Child Protection Conferences.

A Child Protection Conference is an interagency and interprofessional meeting, convened by Tusla, to decide whether it is necessary to put the child's name on the Child Protection Notification System (CPNS) and if so, to agree a child protection plan. Parents are generally invited to attend the Child Protection Conference unless there are concerns that to do so could put the child at further risk. Its purpose is to share and evaluate information between professionals and parents, to determine if there is an ongoing risk of significant harm to the child and consequently to formulate a child protection plan. The informed participation of professionals from health, education, justice and voluntary bodies in the decision-making process is essential.[162] On occasion, it may not be appropriate that members of the Gardaí share certain information at a Child Protection Conference, for example, when parents/guardians who are suspected of a criminal offence are present at the conference, particularly when a criminal investigation or resultant prosecution is ongoing.

When it has been determined that a child is at ongoing risk of significant harm following a Child Protection Conference, the child will be listed on the Child Protection Notification System (CPNS). Parents are notified if their child's name is on the CPNS. When it is decided that a child is no longer at ongoing risk of harm, the child's record will be changed from active to inactive. The CPNS exists to enable the effective sharing of information between professionals working with vulnerable children and families and access to the information is only available under strict protocols. The Child Protection Notification System (CPNS) is a secure database that contains a national record of all children who have reached the threshold of being at ongoing risk of significant harm and for whom there is an ongoing child protection concern. According to Tusla's most recent guidelines on the matter, access to the CPNS is strictly controlled and is confined to Tusla social workers, members of the Gardaí, hospital emergency department staff, maternity hospital and out of hours general

[161] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017) 11.
[162] Tusla, *Child Protection Conference and the Child Protection Notification System: Information for Professionals* (2015) 5.

practitioners.[163] It states that Gardaí have direct access to searching the CPNS database out of hours with procedures and protocols agreed for Gardaí to request a search through their national control centre. Likewise, it was stated in the Garda Inspectorate Report 'Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate' from 2017 that Gardaí have 24/7 access to the CPNS through the Garda Command and Control Communications Centre in Harcourt Square in Dublin. However, senior level Gardaí from the Garda National Protective Services Bureau have stated as part of this stakeholder engagement that while access to the system for the Gardaí as an external agency was planned it was never rolled out. According to them, during business hours Gardaí must make contact with the allocated social worker or CPNS chairperson and request the necessary information; outside of business hours the Gardaí must make contact with the Tusla out of hours service and request a Safety Search to be done for any relevant information concerning the child. General practitioners, hospital medical, nursing or social work staff member must contact the Tusla CPNS out of hours service directly, by telephone, to request a search of the CPNS database, according to the most recent Tusla guidelines.[164] A designated Tusla person has responsibility for updating the database.[165]

The intention of the CPNS was to allow professionals to access the system when faced with urgent decisions about the safety of a child out of hours. It is recommended the relevant government departments review how the CPNS is being deployed and confirm what agencies have access to the system and determine whether it is being rolled out as originally intended and, if not, what is the reason for this. It is important to consider why this system, which was intended to be a system accessed by professionals from relevant agencies in matters of child protection emergencies, is not being utilised as intended as this may be relevant to the development of systems for interagency sharing for Barnahus. The CPNS was intended to provide a limited system where information is shared among the core agencies involved in child protection when it is required in urgent situations after the collaborative decision is made to add the child's name to the system at a Child Protection Conference. However, it appears that the system is not being fully utilised as was originally intended and it needs to be determined if this is the result of data protection related concerns, legal challenges in relation to fair procedures, or for another reason.

HIQA has noted that in terms of compliance with national standards there has been variance in how the Child Protection Conference and CPNS systems are managed throughout the country.[166] It noted that monitoring and risk management systems needed to be strengthened in some areas to provide a consistent, safe service to all children listed on the CPNS. The inspection reports have generally found that multidisciplinary involvement and

[163] Tusla, Child Protection Conference and the Child Protection Notification System Guidelines June 2022 (2022) 33.
[164] Ibid.
[165] Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (2017) 80.
[166] HIQA, Reports of an inspection of a Child Protection and Welfare Service (2021-2022).

cooperation is being supported and promoted to ensure that the needs of children are met in a timely way.[167]

Despite, a strict policy in terms of who can access the CPNS, questions around fair procedures have again been raised before the courts in the context of whether Child Protection Conferences are amenable to judicial review. In *J.G. & Others v CFA* the parents of the children concerned brought judicial review proceedings against Tusla, claiming that their rights were breached by Tusla in relation to the convening of a Child Protection Conference, which resulted in an application to the District Court for a supervision order pursuant to the provisions of the Child Care Act 1991.[168] The judge noted that a case conference may make decisions that do not involve court applications. In particular, the decision may be made to draw up a child protection plan with the result that a child is listed on the Child Protection Notification System (CPNS). While the Court stated that a meeting, the purpose of which is to exchange information, could rarely, if ever, be a proper subject for judicial review proceedings, it placed importance on the fact that at the Conference, Tusla can take it on itself to list a child on the CPNS without any court order.[169]

Judge O'Malley stated:

"In my view, a finding by the statutory body charged with the protection of children in the State that a child is at risk to the extent justifying this measure cannot be described simply as part of an investigation process. It may be that access to the system is restricted to a small number of professional persons - however, it is, in my view, an interference with the autonomy of a family is something that very few parents would welcome. It cannot be said to be without legal effect, since it gives access to private information about the family to persons who would not otherwise be entitled to that information. I am not sure if the information leaflet is correct in stating that a child's name will remain on the system up to the age of 18, whether as "active" or "inactive", but if it is correct that emphasises the seriousness of the matter."[170]

It is of note that the judge takes issue with private information about the family being shared with those "who would not otherwise be entitled to that information", and the lengthy retention period of such information. This emphasises the importance of assigning a legal basis to all data sharing and applying the principle of data minimisation supported by robust access controls. The judge took the view that the parents must be afforded proper fair procedures in relation to the holding of such conferences but did not believe that this meant the parent was automatically entitled to full disclosure of the entire Tusla file.

In the later case of *Ms A & Others v CFA*, Justice Barrett considered the same subject matter.[171] The applicant contended that Tusla had acted in violation of both her and the

[167] Ibid.
[168] *J.G. & Others v CFA* [2015] IEHC 172.
[169] Ibid. See also analysis in Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) 147.
[170] *J.G. & Others v CFA* [2015] IEHC 172 [103].
[171] *Ms A & Others v CFA* [2015] IEHC 679.

children's constitutional rights in not allowing Ms A to bring legal representation to the Child Protection Conferences. In his judgment, Justice Barrett commented that judicial review in this type of case should be very rare, while stopping short of saying that such proceedings should never be brought. He failed to agree with the finding of Judge O'Malley *in J.G. & Others*. He took the view that the CPNS is something that is highly desirable, enabling Tusla, and the limited categories of person who are able to access the CPNS, to bring an informed and refined response to any interactions with a particular child, instead of coming afresh to that child each time they come under the radar of Tusla or the Gardaí. As outlined in Dr Geoffrey Shannon's analysis of the cases, Justice Barrett did not agree that inclusion of a child's name "gives access to private information about the family to persons who would not otherwise be entitled to that information." Again, the emphasis is on the fact that Tusla shares the information in a manner that is consistent with the obligations incumbent upon it under the Data Protection Acts. If so, it is not sharing that information with people who are unentitled to that information.[172] The Court thus declined to follow the decision *in J.G. & Others* and concluded that (a) the operation of Tusla Child Protection Conferences, as currently structured, are not typically a proper subject for judicial review proceedings, and (b) the decision to list a child's name on the CPNS is not in and of itself an action that has legal effect and thus, absent some special circumstances presenting, is not judicially reviewable. Dr Geoffrey Shannon notes that Tusla should have regard to the comments of the judiciary in both cases despite their conflicting nature and ensure that it follows fair procedures in the holding of such conferences.[173]

3.7 Recommendations

Efforts to date to facilitate interagency working have been limited in several ways:

(i) They have been agency centric, as opposed to child centric, in approach. They have largely focused on two agencies (the Gardaí and Tusla) rather than developing a more comprehensive strategy with the child's best interests at the core.

(ii) Protocols between Tusla and the Gardaí are not specific to information sharing but focus on joint working more widely. It is noted, however, that the Gardaí and Tusla have a joint Memorandum of Understanding and Data Sharing Agreement signed off in principle since May 2023 and are in the process of finalising supporting procedures to aid effective implementation. These documents should be reviewed with consideration to their impact on data sharing for Barnahus services.

(iii) Any ICT systems developed to facilitate interagency mechanisms have been limited to notification systems and according to some representatives interviewed do not allow for effective communication and sharing between the bodies. It is noted, however, that the beginnings of an electronic system commenced in December 2022 and a fuller joint integrated case management

[172] Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) 149.
[173] Ibid, 151.

system was approved in principle and is on the work plans for both Tusla and the Gardaí.

Recommendation 16: The role of CHI in the delivery of Barnahus services needs to be clearly defined, taking into account any limitations due to their lack of statutory responsibility in the area of child protection. Full consideration needs to be given to this with regard to their responsibilities within Barnahus services so as to avoid judicial complaints which could put a child's evidence at risk and result in further trauma for the child. This should inform future decisions in relation to how Barnahus will be governed and deployed nationally. It needs to be ensured that all Barnahus services across the country meet the same standards, and adequate resources and support should be allocated for this.

Recommendation 17: It is noted that the 'Garda Síochána Policy on the Investigation of Sexual Crime Against Children', published in 2013, is currently under review with the goal of updating its contents. It is recommended that the updated version includes a section on the Barnahus model and its implementation in Ireland.

Recommendation 18: Current interagency systems are focused on notification and not communications. For effective interagency collaboration communication is required. Deploying a secure information sharing system between the relevant agencies will allow for faster communication that can be logged and audited, creating a formalised process that will further help identify where the communications process is failing. It is noted that the beginnings of an electronic system commenced in December 2022 and a fuller joint integrated case management system was approved in principle and is on the work plans for both Tusla and the Gardaí. It is recommended that it is considered how this system would apply to Barnahus services, and if it could be further to developed to enhance information sharing for all agencies providing Barnahus services.

Recommendation 19: The development of a National Strategy for Child Sexual Abuse, Child Sexual Exploitation and Online Risks to Child Safety, as recommended by the 2017 Garda Inspectorate Report, should be progressed as a matter of priority. The recommendation that the Department of Justice convene an inter-departmental and multi-agency representative group to develop a national strategy, while accepted, has still not been fully implemented.

Existing policies including the Joint Working Protocol for An Garda Siochana and Tusla are not extensive on interagency information sharing and do not provide for a comprehensive approach to child protection. The Barnahus model and its implementation, as well as any interagency information sharing tools adopted as part of this process, should be given detailed consideration in the formation of a National Strategy for Child Sexual Abuse. In the interim and in lieu of a national strategy, it is recommended that the joint working protocol and joint interview protocol be revised with the full integration of Barnahus in same.

Recommendation 20: The operational use of the CPNS system should be reviewed to determine if the designated professionals have access to the system as originally envisaged, and if not the reasons for this. This will help identify issues that may have arisen with the implementation of what was intended to be a very limited system to allow professionals

from designated agencies to obtain information when they need to make urgent decisions about a child's safety out of hours, and may be useful to consider in relation to the implementation of systems as part of the Barnahus model.

Recommendation 21: Tusla's investigative powers need to be clarified in law, as recommended in Chapter 1. This may also help resolve the uncertain situation regarding the applicability of judicial review for Child Protection Conferences. From a judicial perspective, challenges against Tusla have been related to claims that it does not apply fair procedures. Tusla's obligations in law need to be clarified so that it does not impede their abilities to safeguard children. Potential litigation around fair procedures should be taken into account when sharing information with third parties. While sharing in Barnahus will be confined to agencies who are involved in the investigation process or treatment of the child and the context differs from CASP, where details of an allegation could be potentially shared with an employer or other member of the community, it needs to be ensured that the legal basis for processing is documented in all instances, especially where information relates to criminal convictions or offences, and only necessary data is shared with each agency to ensure there are no claims of data protection violations.

Chapter 4 A model for data sharing for Barnahus services in Ireland

4.1 Introduction

The interagency response is a core element of the Barnahus model. As such, Barnahus services in Ireland do not deal with historic child sexual abuse cases and only provide services where there can be an interagency response. This integral aspect of the service, however, has not been as well communicated as it needs to be, as according to stakeholders, there is still a misconception that Barnahus is a counselling service for child sexual abuse victims. A public awareness campaign should be carried out to communicate what Barnahus is once it is fully implemented in Ireland. Currently, Barnahus West has a senior administrator, a social work team leader, a social care leader, a Barnahus manager, doctors, nurses and a child advocate working on site. The Gardaí do not work on site but come in for appointments and conduct interviews there. Referrals tend to come through Barnahus in in two ways: through Tusla social workers or through medical services. A referral must include Garda notification through the Garda-Tusla notification system and consent from parents/guardians. If the referral comes through medical services the Barnahus senior administrator or social work team leader will need to identify the relevant social worker and make contact with them. This has been identified as a potential issue in the Barnahus East model as CHI staff will not have access to the Tusla case management system. CHI itself has not identified this as an issue as it has a process where it receives referrals inwards from the Gardaí or Tusla and then shares reports with the designated social worker or designated Divisional Protective Services Unit (DPSU) garda via the Tusla portal or registered post. It has generally found this process to be effective and they do not necessarily anticipate they will require more information under Barnahus services. While there will be a Tusla social worker employed as part of Barnahus East it was not clear to CHI representatives interviewed if this will be a liaison role or an individual working on site; concerns were expressed that physical

space may be an issue here. Tusla have confirmed that a social work team leader has been recruited to work with and support the implementation Barnahus East. This role will include liaison with Tusla, joint interviewing, and the provision of support to children and families.

A further issue of inequity arises in relation to Tusla and Gardaí communications. In areas where there is an appointed Garda Liaison, Tusla can access information as required as the liason works office hours and has sight of all referrals in their area; for areas that do not have a Garda Liaison Tusla has to try make contact with the investigating garda and sergeant, which can be difficult to do due to alternate working hours. While Barnahus West and Barnahus South have access to a Garda Liasion, CHI do not have access to a Garda Liasion and rely on relationships with the investigating Garda.

Currently, there is no formalised process for data sharing in the Barnahus context. During the stakeholder interviews it was established much of the information in Barnahus West is shared verbally at interagency meetings where each agency takes their own notes and an action plan is agreed on for the child. This is in possible contravention of the data protection principle of data minimisation and possibly the principle of accuracy, as several versions of meeting minutes are being recorded by different agencies; this appears to be unnecessary if the agencies are working together to formalise a unified action plan. It's understood this process was implemented based on a concern that there could be continuous edits by professionals when the minutes were circulated, potentially impacting the validity of decisions going forward. As this interagency meeting is where the majority of sensitive data is shared an appropriate process should be agreed on that is applied across all Barnahus services; this should include the level and detail of information to be shared by agencies. This can be reviewed as part of the code of conduct process. No plan is in place yet for interagency meetings in Barnahus East and it has not been determined if these will be held virtually or on site; the role of a senior administrator will play an important aspect in this.

In Barnahus West, information, which includes special category data, is being transferred via email or via phone calls. Currently emails are being sent between agencies that include the child's initials in the subject line and possible details of the case in the body of the email. These could be emails sent between nurses, social workers, and gardaí and pose a high risk to data subjects if an email was sent in error to the wrong recipient. This is also an ad-hoc, inefficient approach to communications that does not allow for effective accountability. Both Tusla and the Gardaí have expressed concerns in the past about delays in receiving information from each other, leading to delays in the investigation process for both agencies, ultimately negatively impacting on the child.[174] There is currently a three signature sign off process in place for a Garda notification from Tusla – social worker to team leader to principal social worker, which has been reported as causing significant delays in notifications being received. As per the joint working protocol, Tusla must notify the Gardaí of all child sexual abuse concerns. It has been suggested by some interviewees that the social worker should be able to send these notifications directly to the Gardaí after initial screening is

[174] Sinead Hanafin, Ciaran Lynch and Elaine O'Callaghan Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up (2020) 19.

completed with their team leader providing for more efficient notification. Tusla, however, maintain that to ensure appropriate governance and accountability, sign off from either the social work team leader or principal social worker is required for notifications of abuse from Tusla to the Gardaí.

CHI still process a large amount of paper files, both as part of therapy and assessment services and medical services. Medical services have a process in place where hard copies are scanned on to their electronic system and access is restricted to Laurel's Clinic staff who require access; other sections of CHI cannot even see this section. They are piloting electronic only files. CHI can send encrypted emails but cannot receive encrypted emails due to a firewall issue with its system. They use the Tusla portal, where they need to share information with Tusla, and find this generally effective despite the fact they cannot view their report once they submitted it.

Barnahus South share information via post, telephone, email and the Tusla portal. Hard copies of files, including medical files, are currently stored on site at St. Finbarr's. Security concerns have been raised in relation to this if hard copy files have to be moved between sites. It is recommended that medical files be stored electronically. Also concerns have been expressed about the storage of intimate images at St. Finbarr's. These images should be afforded the same security measures and backup facilities as Barnahus West and Barnahus East.

Again, there are significant discrepancies in how sensitive personal data is processed, stored, and secured with different systems in use by various agencies affording different levels of security measures to sensitive personal data. It will need to be determined what information needs to be stored on individual systems, and what information would be better served on a centralised Barnahus system where security measures can be applied consistently to all personal data processed as part of Barnahus services.

It's recommended that there is stakeholder discussion with all three services to ensure they have access to the same level of resources in terms of staffing, IT systems, and working space as these factors could all impact on the level and quality of information sharing applied. While it's accepted that services may be conducted from different locations at the outset and still coordinate an interagency model, there should be a clear timeline in place for services to be provided at one location, in line with the intention of Barnahus model and the current service provided at Barnahus West.

The lack of a uniform approach means the different Barnahus units may have different processes which might lead to inequity in how children are provided services. This goes against one of the four general principles of the UNCRC that all the rights guaranteed by the Convention must be available to all children without discrimination of any kind.[175] It is also in breach of Article 21 of the EU Charter of Fundamental Rights, which prohibits direct and indirect discrimination against anyone including a child including education, healthcare and social security. In line with this, the same model needs to be delivered to children across the

[175] UNCRC, art 2.

country. From a data protection and data sharing perspective, this means having formalised processes in place including a code of conduct that governs how data can be processed and shared within Barnahus services and having a secure consistent communications system to ensure effective communications and appropriate security to personal data on a national basis. This can be achieved even if there are different lead agencies in each centre, once there is a core controller/s with ultimate responsibility for data processing operations, and indeed overall governance of the services.

4.2 Developing an interagency data sharing model for Barnahus services

To date, calls for interagency collaboration and data sharing have not been backed by the development of tools to allow agencies to do this effectively, efficiently, and in compliance with the law. Some efforts to develop joint systems have been made but, as highlighted in Chapter 3, these have been more akin to notification systems rather than systems that facilitate information sharing and communications. The Children First Guidelines sets out the statutory responsibilities for mandated persons and organisations under the Children First Act 2015 and provides information about how the statutory agencies respond to reports of concerns made about children, however it is not a working protocol. Joint working protocols have been limited to two agencies and do not offer a comprehensive response to include all the relevant agencies working in the child protection space that need to collaborate in the best interests of the child. This lack of guidance and tools has led to an ad hoc approach to interagency collaboration that has been mainly dependent on the quality of interpersonal relationships.[176] Any new model for information sharing within Barnahus should be comprehensive and offer the opportunity to address the current and ongoing concerns of those involved in the implementation of Barnahus services. Generally, the main blockers to interagency information sharing currently are a lack of processes, no unified approach to information sharing, and no centralised system for sharing information. To resolve this, responsibilities first need to be identified and a data governance framework implemented accordingly.

Crucial to this, is agreement on the type of interagency working model that should be implemented across all Barnahus services. The 2020 Appraisal Report identified the different Barnahus centres in Ireland as having different models of interagency working. It suggested that the 'integration' model, where different services become one organisation in order to enhance service delivery, most closely represents its intention.[177] However, none of the centres are currently implementing this model. Barnahus West is closest to achieving this goal, while the structure in Barnahus East as is planned does not appear to lend itself to this type of model. It is important from a governance perspective that there is agreement on the nature of interagency working that is involved in Barnahus services and that this is applied consistently across all Barnahus facilities to ensure there is no inequity in the services being provided to children.[178]

[176] Sinead Hanafin, Ciaran Lynch and Elaine O'Callaghan Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up (2020) 83.
[177] Ibid, 85.
[178] UNCRC, art 2.

In order to achieve a model closer to the integration one there needs to be a national Barnahus policy developed to govern interagency information sharing and data protection more widely. The development of a robust data governance framework will be crucial to the success of interagency information sharing within the Barnahus context nationally. This means outlining the processes for managing, sharing, and protecting personal data that should be applied throughout its entire lifecycle and designating responsibilities. This should be detailed and include rules on the practical implementation of data sharing and data protection. A GDPR code of conduct, which can be governed by the designated code owner, for example the DCEIDY, who could monitor compliance with the code, would provide the foundation for this. A code of conduct that must be adhered to by all agencies involved in Barnahus services, supported by a centralised system for information sharing, will supply the necessary tools for interagency information sharing. However, overall responsibility for data governance will need to be designated with structures in place to monitor compliance. Accountability is key to effective data governance, which will in turn enhance information sharing practices among agencies as they will have the systems and knowledge to do so with effective oversight applied.

A greater cultural shift will also be required to develop a true interagency working approach as opposed to a multi-agency model where agencies are working under one roof but are still very much segregated in terms of their goals and approaches. Developing such a model will be threefold: it will require a formalised approach with joint-up processes and systems; staff training on these processes and joint awareness training among the agencies to develop a greater understanding of everyone's distinct roles in the process; and a public awareness campaign that will familiarise individuals with this new approach in a transparent and up-front way. Stakeholders have expressed concerns that currently Barnahus lacks the departmental support and promotion it requires, noting there have been poor efforts in relation to PR for Barnahus since its public 'launch' in 2019.

4.3 Data governance

Currently there is a lack of explicit commitment to interagency working, although it's noted that this should be rectified with the addition of 'the duty of relevant bodies to cooperate' in the Child Care (Amendment) Bill 2023. The 2020 Appraisal Report found that interagency working was not seen as part of the core work and as such was often not a priority. Formalising the process would require all agencies to commit to interagency sharing and cooperation. Governance will be key to cultivating a change in culture that embraces data sharing in a legally compliant way that is focused on the best interests of the child. A lack of governance appears to be contributing to the current cautious approach to interagency sharing as individuals are concerned about being held personally responsible if they share information in error. Sharing information is challenging for professionals working in the child protection context given the great number of legal instruments, case law, guidance, individual contracts of employment and professional codes of conduct that must be considered. This is compounded by an absence of data protection training specific to this unique context. This type of culture change can only happen with robust governance,

uniform policies, and appropriate training. Accountability and transparency will be key to achieving this.

From a governance perspective, it stands to reason that there should be a governing agency over Barnahus that ultimately decides how personal data is processed as part of the services to ensure a uniform approach and avoid inequity. It was agreed during the consultations that the Barnahus services should be standardised as much as possible in the three sites. The development of a Barnahus National Referrals model and a Barnahus Therapeutic Framework will form an important part of the final model proposed, and these are being developed in partnership between all regions and all agencies involved.[179] Data protection and data sharing practices need to be included in this standardisation process. It is critical that standardised data sharing processes are developed for all Barnahus services so there is no inequity in the services provided to children in different parts of the country. Currently different agencies have different policies, practices and systems; the impact of this seems to vary across different service areas, highlighting the importance of implementing unified protocols, policies and procedures nationally that should take priority over any internal processes of the individual participating agencies.[180]

The Barnahus governance structure currently consists of the IDG at the highest level, the Barnahus National Agency Steering Committee, and regional steering committees that determine their own terms of reference and provide governance to their regional branch of Barnahus. The committees are made up of representatives of each agency involved in providing services in the Barnahus context. The IDG established the Barnahus National Agency Steering Committee to oversee and co-ordinate the operational implementation of the model. While a governance framework already exists in the form of these Barnahus committees, data governance needs to be embedded into this. This could take the form of a distinct data governance council within the Barnahus National Agency Steering Committee. The data governance council would act as a steering committee within the structure of the Barnahus National Agency Steering Committee and oversee data processing and data sharing in Barnahus services. It should include members from each agency (those with expertise in data protection and governance should be recommended) and can delegate data stewards who have responsibilities to ensure compliance at a regional level. All appointed data stewards should be given training appropriate to their role.

4.4 Code of conduct for data sharing and data protection practices

Codes of conduct, under the GDPR, are voluntary sets of rules that assist members of that code with data protection compliance and accountability in specific sectors or relating to particular processing operations.[181] Adherence to approved codes of conduct may be used

[179] Joint EU-Council of Europe project, *Inception Report: Support the implementation of the Barnahus project in Ireland* (2023) 6.
[180] Sinead Hanafin, Ciaran Lynch and Elaine O'Callaghan Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up (2020) 83.
[181] GDPR, art 40; Data Protection Commission, 'Codes of Conduct' <https://www.dataprotection.ie/en/organisations/codes-conduct> accessed 25 July, 2023.

as an element by which to demonstrate compliance with the obligations of the controller.[182] Accountability tools such as these present an important opportunity to provide assurance and confidence for individuals that their data is being processed responsibly and lawfully. This is currently lacking in the implementation of the Barnahus model. A formalised process will not only enhance transparency and accountability but will lead to increased efficiency, allowing professionals to share information with confidence and achieve the best outcomes for children. Code of conducts can be submitted to the Data Protection Commission (DPC) for formal approval, this gives the added assurance that the code and its monitoring, is appropriate.[183]

The Data Protection Act 2018 states that the DPC should encourage the drawing up of codes of conduct specifically in relation to children.[184] This includes codes that are intended to contribute to the proper application of the Data Protection Regulation with regard to:

- the protection of children;
- the information to be provided by a controller to children;
- the manner in which the consent of the holders of parental responsibility over a child is to be obtained for the purposes of Article 8;
- integrating the necessary safeguards into processing in order to protect the rights of children in an age-appropriate manner for the purpose of Article 25; and
- the processing of the personal data of children for the purposes of direct marketing and creating personality and user profiles.

Codes of conduct can be drafted by controllers and processors for particular processing operations in a specific sector. The code is intended to specify the application of the GDPR in relevant areas such as:

- fair and transparent processing;
- the legitimate interests pursued by controllers in specific contexts;
- the collection of personal data;
- the pseudonymisation of personal data;
- the information provided to the public and to data subjects;
- the exercise of the rights of data subjects;
- the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained;
- the measures and procedures referred to in Articles 24 and 25 and the measures to ensure security of processing referred to in Article 32;

[182] GDPR, art 24.
[183] GDPR, recital 98 "Associations or other bodies representing categories of controllers or processors should be encouraged to draw up codes of conduct, within the limits of this Regulation, so as to facilitate the effective application of this Regulation, taking account of the specific characteristics of the processing carried out in certain sectors and the specific needs of micro, small and medium enterprises."
[184] Data Protection Act 2018, s 32.

- the notification of personal data breaches to supervisory authorities and the communication of such personal data breaches to data subjects;
- the transfer of personal data to third countries or international organisations; or
- out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79.[185]

The draft code must have a defined scope that clearly and precisely determines the processing operations of personal data covered by it, as well as the categories of controllers or processors it governs. This will include the processing issues that the code seeks to address and provide practical solutions to.[186] Codes can help organisations to ensure they follow best practice and rules designed specifically for their sector or processing operations, thus enhancing compliance with data protection law. They are developed and managed by an association or other body (the 'code owner') which is representative of a sector (or category of data controllers or processors), with the expert and sectoral knowledge of how to enhance data protection in their area. Code owners have direct input into the establishment of data protection standards and rules for their specific processing sectors. In the context of Barnahus, the DCEDIY may be in the appropriate position to act as the code owner, with the Barnahus IDG acting as the core controller responsible for compliance with the code. Again, this will need to be considered in the context of overall governance for Barnahus services but appears to be in line with the current structure where DCEDIY acts as the overall chair of the Barnahus IDG. The establishment of a code of conduct with the DCEDIY as the code owner will create a governance structure that will be consistent across units and enable oversight.

In the Barnahus context, while not all agencies have statutory responsibilities in relation to investigating child sexual abuse, all agencies are public bodies. Unlike the private sector, a public sector Code does not require that a monitoring body be appointed to oversee the code.[187] The Code, however, must still propose effective mechanisms for monitoring the compliance of stakeholders who undertake to apply it. This could be achieved by appointing a data protection officer specific for Barnahus services and adapting existing audit requirements to include monitoring of the code.[188] This role could be added to the functions of the Barnahus National Agency Steering Committee or a data governance sub-committee.

A GDPR code of conduct is similar to the concept of a joint working protocol but specific to data protection and data sharing and, importantly, is approved by the DPC. A code of conduct could be developed for Barnahus to govern data sharing among the agencies and clarify roles and responsibilities for the various processing operations throughout the

[185] GDPR, art 40(2).
[186] European Data Protection Board, *Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679* (2019) [23].
[187] GDPR, art 41(6).
[188] European Data Protection Board, *Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679* (2019) [88].

lifecycle. Due to the complexities of the different agencies involved and the sensitive subject matter a code of conduct would be beneficial from a compliance and governance perspective. The DPC is the supervisory body for the LED and the GDPR and will consider codes of conduct under either legislation. The DPC has previously engaged with the Gardaí on several occasions in respect of its programme to modernise core technology platforms.[189] In the Barnahus context it appears most data sharing, and hence the bulk of the code of conduct, will be covered by the general processing provisions under the GDPR. Developing the code will also help distinguish these processing activities.

In the UK, statutory codes of practice have been established for organisations sharing data under the GDPR and those sharing data under the law enforcement processing regime. The new Data Protection and Digital Information (No. 2) Bill is also including a provision on law enforcement processing and codes of conduct.[190] The same level of detailed guidance has not been provided in Irish law. As detailed in Chapter 2 it is recommended that relevant stakeholders lobby for the Data Protection Act 2018 to be amended to include an explicit substantial public interest condition to allow for the processing of special categories data and criminal offence data for the purposes of safeguarding children. This will enable agencies working in child protection to share information where necessary and proportionate with the confidence of being able to reference an explicit provision in the Data Protection Act 2018. Section 36 of the Data Protection Act 2018 allows for the drafting of regulations to identify additional safeguarding measures and or to specify measures that are mandatory in respect to the processing they apply to. Measures determined under code of conduct could be made mandatory in law for child protection processing. There may also be scope for a Barnahus law in the longer-term to address wider issues that go beyond information sharing such as mandated reporting to Barnahus services. However, legislative change is a lengthy process and doesn't always provide the practical guidance that is needed at an operational level. A formal code of conduct supported by the DPC will clearly define the responsibilities of each agency and give professionals working under the code of conduct the confidence they are acting in compliance with data protection laws. A code of conduct will require consultation with the DPC and should be publicised for transparency. This will also help with the publicising of Barnahus generally, so the public are clear on what services it provides and how it operates.

A code of conduct can ensure data protection principles are upheld and data subject rights are facilitated. It can offer clear tailored guidance for matters of concern in the Barnahus context, such as those related to consent. During the stakeholder engagement process we found that there is confusion around what is a data protection obligation and what is an obligation stemming from elsewhere. This was particularly notable in relation to consent and informed consent. The code of conduct should include a section specific on consent to clarify where GDPR consent is required as a legal basis and where it is being used as an additional safeguard, as well as the process for liaising with parents/guardians to outline

[189] Data Protection Commission, *Annual Report* (2019) 59.
[190] Data Protection and Digital Information (No. 2) Bill (updated 9 June 2023), s 21 Law enforcement processing and codes of conduct.

where consent is not required. It could also include a dispute resolution for scenarios where parents refuse to consent to the processing of their child's personal data.[191]

It will be important to engage with professionals working within Barnahus to ensure all appropriate data protection concerns are covered in the code of conduct and that guidance is practical and presented in an accessible way that can be understood clearly by all agencies and professionals providing Barnahus services.

Codes can be an effective tool to earn the trust and confidence of data subjects. They can address a variety of issues, many of which may arise from concerns of the general public or even perceived concerns from within the sector itself, and as such constitute a tool for enhancing transparency towards individuals regarding the processing of their personal data.[192] Concerns over whether appropriate measures are being adopted in relation to sensitive data could be allayed by the existence of an approved and detailed code. Professionals working in the health and social work sector also must follow individual codes of practice as set down by the regulating bodies of their profession.[193] These codes state the practices to be followed in relation to informed consent and confidentiality of information. Compliance with these codes while sharing information was highlighted as a concern in the Barnahus appraisal report. Professionals reported being afraid of being held personally liable for an error in relation to data protection and data sharing resulting in a cautious approach. The guidelines acknowledge that there may be cases that professionals need to share confidential information in compliance with a legal obligation or in the public interest. The proportionate provision of information to the statutory agencies necessary for the protection of a child is not a breach of confidentiality or data protection. CORU's code of conduct and ethics for social workers state that professionals should inform service users of the limits of confidentiality and the circumstances in which their information may be shared with others. CORU develops code of conducts specific to each profession. CORU is currently working to introduce regulation to the psychology sector and expects to open the register for the specialisms of clinical, counselling and educational psychology in spring 2025.[194]

Staff need clear policies and procedures in relation to data sharing so they can be confident they are not in breach of professional codes. The development of a DPC code of conduct would help assure professionals they are acting in line with the law. It would allow all agencies to share information confidently in compliance with a code developed by the designated oversight body with consideration to the professional obligations of individuals working in the sector and approved by the DPC. The code would include detailed procedures and processes for practical implementation and not just vague commitments to data

[191] GDPR, art 40(2)(k).
[192] European Data Protection Board, Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 (2019) [16].
[193] CORU, *Social Workers Registration Board Code of Professional Conduct and Ethics* (2019); NMBI, *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives* (2021); Irish Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Professionals* (2019).
[194] CORU, 'Update on Statutory Regulation of Psychologists' July 2023 < https://www.coru.ie/about-us/registration-boards/psychologists-registration-board/update-on-statutory-regulation-of-psychologists/> accessed 1 September, 2023.

protection. It should confirm the level and detail of information that should be processed as part of Barnahus services, and the level and detail of information that should be shared in different circumstances. All staff working in Barnahus services should receive tailored training and education on the implementation of the code.

Codes of conduct are particularly useful in scenarios such as the Barnahus context that involve several controllers with various purposes for processing and where such processing involves very sensitive personal data. Parameters of the code of conduct can be clearly set in line with the requirements of Barnahus. The code also offers a framework that allows for audit on any implemented technical and organisation controls as well as overall GDPR compliance. The Data Protection Act 2018, as discussed earlier, provides a mechanism to ground aspects of this code of conduct in law if required.

4.5 A centralised system for information sharing

Children are a vulnerable group and require particular consideration and care when they are the subjects of data processing activities. The GDPR explicitly states that children's personal data merits specific protection. As discussed previously, the DPC have explicitly stated in its guidelines that the best interests of the child should prevail, and data protection law should not be used as a blocker to achieving the best outcomes for the child in a child protection context. Consideration to the fact that personal data relates to children needs to be taken when determining the appropriate technical and organisational measures to apply to personal data processed as part of Barnahus services and when developing systems and processes for sharing this information. Data protection by design and default should be embedded into the development of these.[195] This means implementing technical and organisational measures at the earliest stages of the design of the processing operations, in such a way that safeguards privacy and data protection principles right from the start; while ensuring that only the personal data necessary should be processed for a defined storage period with limited accessibility, so that by default personal data isn't made accessible to an indefinite number of persons.

It is evident that there is an immediate need to reorganise and reform internal communications for the provision of Barnahus services, and within the child protection system more widely as has been highlighted by the several expert reports referenced throughout this analysis. It may be of benefit for the DCEIDY and the IDG to consider the recommendations in this report on a wider scale, as recommendations such as a code of conduct and an interagency communications system could be applied to the child protection sector more widely, and it may be a timely discussion to have in line with the relevant proposed legislative provisions under the Child Care Amendment Bill 2023 that propose to place a duty to cooperate on agencies working in the child protection context.

As addressed above the code of conduct will offer a framework for data governance in the Barnahus context increasing compliance and accountability. This needs to be supported by the development of a centralised system that will facilitate interagency information sharing in an efficient manner that promotes transparency and accountability. Currently,

[195] GDPR, art 25.

communication methods are fragmented, which can lead to a lot of frustration among individual agencies and delays for children. A centralised auditable system should be developed that allows agencies to engage on Barnahus cases. The current process leaves too much to chance, time is wasted trying to chase up people who are on shift work, and the use of email for communicating sensitive information is high risk. The proposed system should connect all stakeholders to a central hub and allow them to share necessary information with those who require it, streamlining the decision-making process.

A centralised cloud-based system could help improve the referrals process by allowing the different agencies to communicate and track the progress of a Barnahus referral. For example, instead of chasing down investigating Gardaí – the investigating Garda would be able to log the necessary information on the system for the designated Tusla social worker to access. Such a system could be used for all communication in relation to a case, instead of communicating in an ad-hoc manner via email and phone which is proving inefficient and presents a heightened risk for the data subject as an email could be inadvertently sent to the wrong recipient. It would also allow for consistent notes to be taken at interagency meetings by a designated individual and uploaded to the system along with the agreed action plan for the child.

It is for the DCEIDY and stakeholders to consider how such a system will best complement their work. This will depend on the degree of interagency working that is agreed upon as discussed earlier in this chapter, for example a cooperation, collaboration, coordination or integration model. These models have been explained in detail in the 2020 Appraisal Report. From a governance perspective, there must be agreement on the nature of interagency working involved in Barnahus services and this needs to be applied consistently. An integration model best represents the aim of the Barnahus model but this must be agreed upon by all parties and communicated clearly that this is the intention.

Having Barnahus specific information on one system will create a more integrated process. If the minutes of interagency meetings were uploaded to the Barnahus system, it may not be necessary to upload them to TCM or any other system. While it's understood that each agency will most likely need to have case files on their own systems, the Barnahus interagency system could store shared information and allow agencies to upload any necessary information about a case to the relevant case file. It should be considered that if Tusla workers in Barnahus services were in a position to upload information related to Barnahus case files to a Barnahus system instead of TCM, there would be some assurance in at least the files would be stored on a different system and could not be accessed for other purposes without following due process. The stakeholders will need to consider if the work carried out in Barnahus needs to be on each of their individual systems, and what level of information is required if this is the case, or if one centralised system confined to Barnahus services is better suited.

It will be important to develop a strict retention schedule to ensure personal data is not being retained on any system longer than it is required for its purpose. The Barnahus system will need to be governed by policy, which can be agreed upon as part of the code of conduct.

This will ensure professionals using the system are aware of what information and level of detail should be processed on the system and will avoid duplicating information. Responsibilities can be defined to ensure that information is only uploaded to the system once and cannot be altered without going through an appropriate process.

Such a system should be developed with privacy by design at the forefront and include robust technical and organisational measures including role-based access controls; identity and access management (IAM) policies to control who can access, modify or delete documents; multifactor authentication; logging and auditing of all activity on the system; data loss prevention mechanisms to prevent sensitive data being leaked both inside and outside the cloud environment; and data classification and segmentation. All use of the system will be timestamped, and role-based access controls can be implemented, as well as measures to ensure information is not removed from the system. Each agency will still maintain their own individual systems but will be able to communicate and share information on a centralised communications system. This allows agencies to exercise control over information that they are the data controller of on their systems, but to collaborate when necessary, in an efficient way. Having one system that allows for collaboration in relation to Barnahus will allow for a more joint-up process. The system will apply the GDPR principle of data minimisation in the sense that only information that needs to be shared will be shared with the appropriate person; this can be achieved by implementing robust authorisation policies and access controls. Strict retention periods can also be applied in line with the principle of storage limitation and purpose limitation. This centralised system should be governed by the designated controller of Barnahus services in Ireland. The core controller should take responsibility for this system as a neutral body, granting access to each agency as required and maintain national oversight of the system. The same body should have overall responsibility for data management and interagency working in Barnahus.

Future system plans within individual agencies should also be considered when developing this system; for example, it may be of benefit if the Barnahus system is interoperable with the HSE's plans for electronic health records and any other agencies' plans for cloud-based storage. It is recommended such a system meets relevant international security standards for information security management, for example ISO 27001, and is rolled out nationally.

A centralised system for interagency information sharing within Barnahus would enable more effective communication processes resulting in better outcomes for the child with a more efficient delivery of services and an auditable trail of communication. However, before the development of a proposed system a Data Protection Impact Assessment must be carried out to assess and mitigate any risks to data subjects arising from the development of such a system. This will help to identify risks and develop solutions to ensure that concerns are addressed appropriately. Implementing such a system to replace current ad hoc methods will provide for more efficient communication between agencies and increased transparency in how the communications process is conducted, which can be governed and audited in line with the code of conduct. If there are gaps in communications, issues can be escalated to Barnahus committee level. It also removes the risk that comes with sending external emails.

Practitioners should be consulted with when developing this system to ensure that it is user-friendly and effective. Tusla currently has a portal in place that can be used for encrypted communications with other agencies, while some individuals interviewed noted the benefits of the system others felt it was not being fully utilised due to several functionality issues.

4.6 Recommendations

In order to successfully develop and implement a cohesive model for data sharing for Barnahus services, stakeholders need to agree and document what level of interagency working is desired for Barnahus services and put clear governance structures in place. The level of interagency of working in Barnahus West should be the standard for other services to meet and build on to ensure that all Barnahus services enable child-centred and effective, collaborative actions. It is only when this is finalised that the designated controller, who is responsible for determining the purposes and means of processing, can make decisions on the development of a code of conduct and systems for information sharing.

Recommendation 22: Data governance structures need to be developed within Barnahus to establish responsibilities at all levels and ensure services are delivered consistently across the country. It is recommended that a data governance council is established within the structure of the Barnahus National Agency Steering Committee and data stewards are designated at the services level. Monitoring and oversight of processes will be key to ensuring data sharing is in compliant with data protection laws.

Recommendation 23: There needs to be clear agreement on the type of interagency working model intended for Barnahus services. There appears to be a lack of consensus on what Barnahus is, whether it is a model or a service, and how it will be applied nationally. While Tusla have stated that Barnahus is an interagency process and not a service, it is described as a service in its own literature.[196] It needs to be concretely agreed what Barnahus is and how it will be deployed nationally in a consistent way; this needs to be communicated to all agencies and employees working to implement the Barnahus model, as well as the wider public. This will also influence the direction of the code of conduct as well as the type of centralised system that is most appropriate for the needs of Barnahus .

Recommendation 24: A Barnahus-specific code of conduct should be developed to govern information sharing among agencies as part of the delivery of Barnahus services. The code will be a comprehensive document that will address specific concerns of individuals from all agencies working in Barnahus in relation to data protection and information sharing, and will require engagement from all stakeholders as well as the Data Protection Commission. The code should then be submitted to the Data Protection Commission for formal approval This will ensure data protection and data sharing processes are clearly developed, consistent across services, and auditable for compliance. All staff working to deliver Barnahus services should receive appropriate training based on the code.

Recommendation 25: The development of a centralised system for information sharing or integration of current systems should be considered to allow agencies working in Barnahus

[196] Tusla, Barnahus

services to communicate with one another securely and effectively. The type of system will depend on the type of interagency model agreed, but there is an appetite from a number of practitioners interviewed working within Barnahus for a more centralised system to facilitate efficient working arrangements. It's envisaged this would also assist with evaluation of Barnahus services allowing for the collation of statistics and production of quarterly reports in an efficient manner. When agreement is finalised on the model of interagency working to be applied, stakeholders should discuss appropriate systems to facilitate an efficient and secure approach to information sharing between agencies. A privacy by design approach, promoting privacy and data protection compliance from the start, should be adopted when developing any new system. The implementation of a new system and processes should be preceded by a Data Protection Impact Assessment (DPIA) to identify and mitigate any risks that may arise with its implementation.

Chapter 5 Conclusion

5.1 Introduction

The current legal frameworks governing the response to child sexual abuse in Ireland pose some challenges to the full implementation of the Barnahus model nationally; legislative clarity is needed in a number of areas including in relation to Tusla's statutory investigation powers; and a stronger legislative provision placing a duty on all agencies to cooperate and coordinate in child protection investigations would put the model on a stronger footing. It is noted that legislation is currently being drafted to address these issues and this provides an important opportunity to ensure provisions are drafted with consideration to the implementation of the Barnahus model.

In practice this is a complex and challenging area to navigate. The absence of a clear national strategy and governance framework poses a greater obstacle to interagency coordination and information sharing as no one is taking responsibility for steering a coordinated response. The need for interagency collaboration in the response to child sexual abuse has long been stressed by child protection experts and the appetite for doing so appears to exist among all relevant stakeholders. Without a defined framework in the form of clear governance structures and appropriate accountability tools agencies are left to navigate this complex space themselves, leading to inconsistency in processes and uncertainty among professionals working in the sector.

This report makes several recommendations from a legislative and policy perspective that align with the Barnahus quality standards.[197] While legislative changes are important for closing gaps and strengthening the response to child sexual abuse these changes take time and the scale-up of Barnahus in Ireland should not be delayed unnecessarily in the meantime. In the longer-term it is recommended that stakeholders petition for a change in law to explicitly call out safeguarding children as a public interest condition and specifiy in

[197] Promise Barnahus Network, 'The Barnahus Quality Standards' (in particular, standards 2, 5 and 10) <https://www.barnahus.eu/en/the-barnahus-quality-standards/> accessed 29 July, 2023.

law measures that should be applied to such processing in line with those developed in the Code of Conduct for Barnahus.

Law alone, however, won't change culture or give clarity to individuals working on the ground on how to navigate interagency information sharing from a practical perspective. Governance structures need to be put in place now to build a solid foundation for the implementation of Barnahus services nationwide. This report reiterates the importance of recognising and assigning responsibilities in the Barnahus model from a data protection perspective and ensuring a legal basis is identified for all personal data processed. A Records of Processing Activities should be developed as a first step in ensuring all processing is in compliance with the GDPR. When governance structures are clear the next step should be to draft and submit a Code of Conduct, which has appropriate monitoring mechanisms in place, to the DPC for approval. The code will essentially provide a rulebook for all agencies working to deliver Barnahus services, ensuring a consistent approach to data protection and data sharing nationally. This should be drafted in line with the development of a centralised system for Barnahus services to provide an efficient and secure way for agencies to share information. The absence of such a system has led to an ad hoc approach to information sharing that lacks consistency and increases risk from a data protection perspective. A data protection impact assessment should be conducted prior to the implementation of any new system and processes, and the system should be developed with privacy by design at the fore. It is also recommended that consideration is given to the appointment of a data protection officer specifically for Barnahus services in Ireland due to the extremely sensitive nature of personal data processed and the number of public authorities involved with their own appointed DPOs. This will again help to enhance accountability and consistency in data protection and interagency sharing practices. If it is decided against appointing a specific DPO for Barnahus services, a DPO forum for the DPOs of each agency should be established to provide a platform for the DPOs to discuss any data protection issues arising from Barnahus services.

Existing policies and protocols should also be updated with the Barnahus model in mind. Currently, agencies are following outdated policies in many instances, notably the Good Practice Guidelines published in 2003. These need to be reviewed to include legislative, policy, and technological changes that have occurred in the time since and to provide for future changes in the child protection context. The implementation of the Barnahus model of service provides an opportunity for government to update the child protection policy framework accordingly. This could include developing a national strategy on child sexual abuse that provides a coordinated, strategic framework for preventing and responding to child sexual abuse, which also incorporates a commitment to the implementation of the Barnahus model nationwide and the proposed tools to facilitate interagency information sharing.

The overall aim of this report was to identify areas that may prove as an obstacle to the implementation of the Barnahus model as its scaled up, and in particular to interagency information sharing as part of the model. Some of these areas have been identified with potential solutions offered to resolve or reduce these challenges; detailed consideration of

these recommendations should involve widespread engagement from all relevant stakeholders in the Barnahus model.

5.2 Chapter 1 summary of recommendations

The recommendations in Chapter 1 centre around where legislative or policy clarity is needed for more efficient processes to be in place. The adoption of these recommendations will strengthen the legal and policy framework Barnahus operates in. For example, the recommendation to place a strong legal obligation on agencies to share information for the purposes of child abuse investigations will give agencies confidence that there is a statutory footing for information sharing in this context, however it will need to be supported with practical measures and resources for implementation.

Clarification of Tusla's investigative powers in law would help address questions around fair procedures in the substantiation process that has led to the introduction of CASP. In the meantime, there needs to be further engagement between CASP teams and Barnahus teams to ensure concerns in relation to CASP are heard and addressed. This should be progressed as a matter of priority to ensure the perception of CASP does not impact information sharing within Barnahus.

More guidance should be provided on the interpretation of section 16(1)(b) of the Criminal Evidence Act 1992 in relation to the definition and context of 'competent persons'. This should be clarified as soon as possible to determine if CHI medical social workers could accompany Gardaí in joint specialist interviews if they received appropriate training. The Good Practice Guidelines need to be updated to clarify who they can potentially apply to, who can provide the specialist interviewer training, and how training standards should be monitored. The Good Practice Guidelines should also be revised in full to incorporate changes that have been made in criminal justice law, child safeguarding, and data protection, as well as technological advancements and changes in practice that have occurred in the last 20 years. As this document is very much relied on by professionals conducting specialist interviews, and there are a number of areas of uncertainty related to who is competent to conduct interviews, it is important that this policy is updated as a matter of priority.

Additionally, policy and procedures need to be put in place in relation to the use of intermediaries both in the courts and during the specialist interview. This is timely as the first cohort of trained intermediaries are now available and registered with the Department of Justice.

5.3 Chapter 2 summary of recommendations

Chapter 2 provides recommendations related directly to the implementation of data protection processes. These are important to ensure all processing is in compliance with applicable data protection regulations. The adoption of these recommendations will ensure that Barnahus services can demonstrate accountability and compliance with data protection laws. They will also provide clarity in areas that appear to be still murky such as the identity of the overall controller and the legal bases being relied on for processing. Having these specifics agreed and documented is not only necessary for compliance with the GDPR, but

will provide a necessary foundation from a data protection and governance perspective for Barnahus services going forward.

Recommendations 8-11 need to be implemented as priority so that the governance structures are clearly identified, and accountability can be demonstrated. This will involve stakeholder discussions to determine the governance framework that will be in place and who will act as overall controller for Barnahus services in Ireland. At this point a RoPA should be established for Barnahus West, as a starting point, to establish a detailed inventory of current processing activities, the applicable frameworks, and the legal bases being relied upon. If a decision is made to follow Recommendation 14 and appoint a data protection officer specifically for Barnahus services then the DPO can assist with implementing these recommendations. Once these decisions have been made the next steps will be to draft up-to-date privacy notices and consent forms for data subjects – taking into account that the data subjects are children and notices should be age-appropriate – and developing a code of conduct for Barnahus services. The development of a code of conduct can take several months and will require extensive stakeholder discussions and informal engagement with the Data Protection Commission before the code is submitted formally for review.

A longer-term recommendation is to lobby for specific data protection regulations to be established in law for safeguarding children, including the identification of suitable measures to protection the fundamental rights of data subjects; essentially grounding the code of conduct or aspects of it in law.

5.4 Chapter 3 summary of recommendations

Chapter 3 highlighted that, to date, approaches to interagency working in the child protection sector have been agency centric, as opposed to child centric. Protocols need to be updated to integrate Barnahus services and include all relevant agencies. A national strategy on child sexual abuse should be developed to ensure consistency across agencies. It is noted that there have been persistent calls for a national strategy on child sexual abuse to no avail. However, the introduction of Barnahus services at national level provides a timely opportunity to lobby once more for such a strategy, which could incorporate guidance on the role and intended impact that Barnahus services will have on the child protection sector.

Systems for interagency communications have been limited to notification systems and joint protocols in place have not focused on information sharing. There are lessons to be learned here that should be applied to the governance of Barnahus services. A code of conduct specific to information sharing that includes all of the relevant agencies and clearly defines their roles and responsibilities, supported by a centralised system for sharing information and oversight measures will provide a solid foundation for interagency information sharing. Oversight and effective monitoring mechanisms need to be embedded at the beginning of this process to ensure the code is applied consistently and systems are being used in the way they are intended.

The uncertain situation regarding the applicability of judicial review for Child Protection Conferences again highlights the need for clarification in law of Tusla's investigative powers. Likewise, careful consideration needs to be given to the role of CHI as lead agency in

Barnahus East before its launch and any limitations it may face as a body with no statutory responsibility to assess child protection concerns. Processes need to be in place within Barnahus services to ensure that consideration is given to fair procedures and this is balanced with the rights of the child and other fundamental rights including the right to data protection and the right to respect for private and family life. Consideration of fundamental rights and the complexities that can arise when rights conflict should be given important consideration in the development of a code of conduct.

5.4 Chapter 4 summary of recommendations

The recommendations in Chapter 4 to develop a code of conduct for Barnahus services and a centralised system for information sharing are the core recommendations of this report from an information sharing and data protection perspective. These can only be implemented, however, after governance and model structures are finalised and recommendations from Chapter 2 in relation to data protection accountability and the development of a RoPA are complete.

Work on the code of conduct and the development of a centralised system for information sharing will take time and will depend on the level of resources provided for this. It is envisaged that there may be many practical, structural and policy issues to be overcome in implementing governance, IT, and other changes. Nonetheless it is important that work in this direction begins without delay as it is imperative to:

(i) ensure all processing carried out in Barnahus services is in compliance with data protection laws and respects the fundamental rights of individuals involved;
(ii) provide employees with clear processes to follow, supported by robust security measures, for interagency information sharing;
(iii) establish that all Barnahus services are standardised, meaning children receive the same high quality of services regardless of what part of the country they are located in;
(iv) and most importantly to ensure that children are afforded child-friendly justice in an equitable way, with their best interests at the forefront of all decisions made in relation to them.

If the issues raised in this report are not addressed from the outset, it will be more challenging to rectify them when individual structures and systems are in place. The State must carefully consider its international obligations to:

(i) protect children from sexual abuse and secondary victimisation;

(ii) undertake a rigorous investigation of complaints that is prompt and thorough;

(iii) provide the necessary measures to support victims in their physical and psycho-social recovery;

when allocating resources across various services and ensure the deployment of Barnahus services nationally in an equal way is a priority. The importance of fulfilling data protection obligations and applying a data protection by design approach must again be emphasised in

light of the high-risk processing of vulnerable data subjects that is an essential part of the provision of Barnahus services.

Annex 1 List of recommendations

Below is the complete list of recommendations made in the report, ordered in terms of where they appear in the report.

Recommendation 1: The Child Care (Amendment) Bill 2023 should provide a clear and strong legal obligation on agencies to work together and share information for the purposes of child abuse investigations. It is recommended the wording of Head 10 duty to cooperate is strengthened in line with recommendations from the pre-legislative committee, and that the obligation to collaborate includes the planning, delivery and funding of services and activities, as well as information sharing. The inclusion of this legal obligation would give agencies in the Barnahus model a legal mandate to share information removing ambiguity in this area, and ensure that agencies work together to ensure an efficient and consistent delivery of Barnahus services.

The application of the Barnahus model should be considered under Head 10 with consideration to how this provision could strengthen interagency collaboration within Barnahus and any limitations of this provision with regard to its application to Barnahus services. However, such a legal provision alone would not be enough as it does not offer a model of how such data sharing would work and would need to be supported by other measures that make careful consideration of the wide range of systemic, professional and political issues encountered in inter-agency working.

Recommendation 2:

Tusla's investigative functions should be clearly set out in law. While section 3 of the Child Care Act 1991 is currently used as the statutory basis for Tusla to assess allegations of abuse, the Department is proposing to reorient this section and to locate amendments in relation to the authority of the Agency to receive and assess reports of harm in the Children First Act. The DCEDIY are currently drafting this legislation and it has been through pre-legislative scrutiny. The proposed amendment to the Children First Act 2015, as set out in Head 44, has been met with concern from the Special Rapporteur of Children and the OCO, however, as it still leaves Tusla's processes open to be dictated by case law.

The amendment in relation to Tusla's investigative powers should be within the parameters established by the Constitution and the ECHR. It should include, in line with comments from former Special Rapporteur Conor O'Mahony, consideration to the nature of Tusla's obligation to investigate complaints; the procedural requirements that such an investigation should adhere to; and the steps that Tusla may take in the event that a complaint is substantiated. Frequent litigation in this area can cause additional trauma for the complainant due to the investigation being dragged out over the extended period of time involved with High Court proceedings. The current CASP process may be a deterrent for victims to come forward and does not appear to be in line with the ethos of child friendly justice or the Barnahus model.

It has also been identified by some practitioners as impacting the level of information they record and share.

It is recommended in line with advice from child protection experts that further consideration be given to how Head 44 can be strengthened so Tusla's processes are not left to be continuously determined by case law.

Recommendation 3: It is noted and welcomed that a working group has been established to look at CASP and Barnahus to ensure that there is a clear mechanism for CASP requesting relevant information. As CASP is new, it's implementation in practice should be reviewed regularly to ensure it is being applied in a way compatible with the aims of Barnahus. It is recommended that further engagement is held with all Barnahus stakeholders, including staff on the ground, to ensure concerns in relation to CASP are heard and addressed. An educational piece is necessary to ensure any perceived barriers in relation to CASP are urgently addressed.

It is also recommended that the DPIA for Barnahus considers the risks associated with sharing personal data with CASP around the principle of purpose limitation and it is transparent to Barnahus service users from their initial engagement with the service that their personal data could be used in this way.

Recommendation 4: The definition of 'competent persons' under section 16 of the Criminal Evidence Act 1992 needs to be thoroughly explained in an unambiguous manner as it is becoming widely interpreted by different agencies. There also needs to clear context around the way Section 16 (1b) is used to ascertain if 'competent persons' can only carry out this interview under section 16 with Garda involvement. This should be considered in relation to CHI before they take on the role as a joint specialist interviewer. There also needs to be guidance in relation to investigative interviews conducted with children (especially where Barnahus is involved), regardless of if they are conducted by a Garda/ non garda; and a standard and equal opportunity for all children to be interviewed the same, in line with best practice, where there is no criminal statement. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana.

Recommendation 5: The Good Practice Guidelines should be revised in line with developments in criminal justice law, child safeguarding, and data protection, as well as technological advancements and changes in practice that have occurred in the last 20 years. They should clarify who are the 'competent persons' to conduct a specialist interview and the context, as well as the accepted level of training required to carry out this role. The guidelines should also be reviewed in line with a more holistic approach to child sexual abuse reflecting the Barnahus context and clarifying all potential persons and agencies who the guidance may apply to. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana.

Recommendation 6: The use of intermediaries is at the discretion of the Courts for these measures to be granted. There should be clear guidance in place on the use of intermediaries in the court setting. There also needs to be a national procedure developed for accessing an intermediary for specialist interviews. This recommendation should be carefully discussed in a clear consultative manner with key stakeholders including the Department of Justice and An Garda Siochana**.**

Recommendation 7: Recognising the independence of the judiciary and that the Criminal Evidence Act 1992 already provides for the acceptance of video recordings of statements by children who have been sexually abused as evidence and facilitates cross examination by live TV link where this is deemed appropriate by the Courts, it is recommended that there would be an engagement process with the relevant stakeholders to explore any areas for improvement in the best interests of the children.

Recommendation 8: As discussed above, data processing in the provision of Barnahus services comes under the scope of the GDPR, the LED, the Data Protection Act 2018 and possibly the Data Sharing and Governance Act 2019. The relevant framework/s needs to be identified for all processing activities carried out in the provision of Barnahus services. Development of a Records of Processing Activities (RoPA) will allow the controller/s to document that the applicable frameworks and legal bases have been assessed for all processing and sharing of personal data.

Recommendation 9: There is confusion among staff around when consent is being used as the legal basis under the GDPR, when consent is being used as a safeguard under section 36 of the Data Protection Act 2018, when consent is being sought under the LED, and when consent is informed consent for medical and social services interventions. The legal basis for processing needs to be clearly communicated to staff, as well as children and their families to avoid confusion. Consent forms should be reviewed for all processing activities where consent is currently being sought for. It should also be assessed if consent is the appropriate legal basis for each specific processing activity it is being relied on or if it is more appropriate as an additional safeguard measure. Particular attention should also be given to the joint specialist interview from a data protection perspective as there seems to be a lack of clarity on who is the controller of this information, the legal basis for processing, inconsistency in how consent is sought for the interview, and uncertainty in how the information can be utilised by non-Gardaí.

Recommendation 10: A RoPA (Art. 30 GDPR) should be conducted to identify all processing operations that fall under the umbrella of Barnahus and ensure compliance with data protection regulations. This will identify the relevant controller, categories of data subjects, who personal data is shared with, the legal basis for processing, and the extra condition for the processing of special categories data, where applicable.

Recommendation 11: It needs to be established who has overall responsibility for the implementation of Barnahus services in Ireland and for determining how personal data will be processed in this context. For alignment purposes and overall governance, it is recommended that a core controller/s should be identified as responsible for ensuring all

data processed in Barnahus centres is in compliance with the GDPR. It is also important to establish controller-processor relationships among the relevant agencies, especially within the context of Barnahus East.

Recommendation 12: Current documentation, notably privacy notices and consent forms, should be reviewed in light of agreement on governance structures and the model of service delivery for Barnahus and the completion of the RoPA to ensure it is transparent who is the controller/s of the data, and the legal basis is required to clearly explain the controllers involved in data processing, the legal basis for each processing activity including where consent is being used as an additional GDPR safeguard. Current Barnahus documentation has been drafted by Tusla, with Tusla designated as the data controller. However, it appears in the case of Barnahus East, CHI will act as the data controller. It is imperative that questions on overall controllership are addressed to ensure a consistent approach to data protection across Barnahus services.

Data subjects should also be made aware at the outset of their engagement with Barnahus of the possibility that of their information could being shared with the alleged suspect and a CASP social worker if CASP is initiated, or the defendant and their legal team if the court orders it.

Recommendation 13: At present, each agency follows their own policies and procedures and there is no uniform policy or procedure in place for data sharing within Barnahus services. A code of conduct under the GDPR should be developed to govern data processing and sharing in the Barnahus context. This would be adhered to by all agencies involved in the provision of Barnahus services and would be much more comprehensive in terms of practical application than a standard data sharing agreement alone. The development of a code of conduct can take several months and will require extensive stakeholder discussions and informal engagement with the Data Protection Commission before the code is submitted formally for review.

Recommendation 14: Consideration should be given on whether it may be appropriate to appoint a Barnahus-specific data protection officer to oversee the implementation of a data protection strategy for Barnahus services. This decision will depend on how stakeholders agree the Barnahus model will be implemented on a national scale going forward. The DPO will monitor compliance with the GDPR and the code of conduct specifically designed for Barnahus; provide tailored data protection and awareness training to all staff working in Barnahus services; and will advise on data protection issues including the need for Data Protection Impact Assessments (DPIA) as required. If it is decided against appointing a specific DPO for Barnahus services, a DPO forum for the DPOs of each agency should be established to provide a platform for the DPOs to discuss any data protection issues arising from Barnahus services.

Recommendation 15: Consideration of including the safeguarding of children as an explicit public interest condition within the Data Protection Act 2018, similar to the UK Data Protection Act 2018, is suggested to assess its appropriateness and effectiveness. Such a change could help remove any ambiguity around processing under the public interest legal

basis for child protection purposes. Safeguards for such processing could also be mandated in law. This could complement the proposed introduction of the duty to cooperate in the Child Care (Amendment) Bill 2023 by ensuring agencies share information in a secure, consistent way that respects the fundamental rights of data subjects. Appropriate safeguards could be established during the drafting of the code of conduct. Regulations could also be introduced to provide for restricting the rights of data subjects and obligations of data controllers where such restrictions are necessary for the purposes of safeguarding children.

Recommendation 16: The role of CHI in the delivery of Barnahus services needs to be clearly defined, taking into account any limitations due to their lack of statutory responsibility in the area of child protection. Full consideration needs to be given to this with regard to their responsibilities within Barnahus services so as to avoid judicial complaints which could put a child's evidence at risk and result in further trauma for the child. This should inform future decisions in relation to how Barnahus will be governed and deployed nationally. It needs to be ensured that all Barnahus services across the country meet the same standards, and adequate resources and support should be allocated for this.

Recommendation 17: It is noted that the 'Garda Síochána Policy on the Investigation of Sexual Crime Against Children', published in 2013, is currently under review with the goal of updating its contents. It is recommended that the updated version includes a section on the Barnahus model and its implementation in Ireland.

Recommendation 18: Current interagency systems are focused on notification and not communications. For effective interagency collaboration communication is required. Deploying a secure information sharing system between the relevant agencies will allow for faster communication that can be logged and audited, creating a formalised process that will further help identify where the communications process is failing. It is noted that the beginnings of an electronic system commenced in December 2022 and a fuller joint integrated case management system was approved in principle and is on the work plans for both Tusla and the Gardaí. It is recommended that it is considered how this system would apply to Barnahus services, and if it could be further to developed to enhance information sharing for all agencies providing Barnahus services.

Recommendation 19: The development of a National Strategy for Child Sexual Abuse, Child Sexual Exploitation and Online Risks to Child Safety, as recommended by the 2017 Garda Inspectorate Report, should be progressed as a matter of priority. The recommendation that the Department of Justice convene an inter-departmental and multi-agency representative group to develop a national strategy, while accepted, has still not been fully implemented.

Existing policies including the Joint Working Protocol for An Garda Siochana and Tusla are not extensive on interagency sharing and do not provide for a comprehensive approach to child protection. The Barnahus model and its implementation, as well as any interagency information sharing tools adopted as part of this process, should be given detailed consideration in the formation of a National Strategy for Child Sexual Abuse. In the interim

and in lieu of a national strategy, it is recommended that the joint working protocol and joint interview protocol be revised with the full integration of Barnahus in same.

Recommendation 20: The operational use of the CPNS system should be reviewed to determine if the designated professionals have access to the system as originally envisaged, and if not the reasons for this. This will help identify issues that may have arisen with the implementation of what was intended to be a very limited system to allow professionals from designated agencies to obtain information when they need to make urgent decisions about a child's safety out of hours, and may be useful to consider in relation to the implementation of systems as part of the Barnahus model.

Recommendation 21: Tusla's investigative powers need to be clarified in law, as recommended in Chapter 1. This may also help resolve the uncertain situation regarding the applicability of judicial review for Child Protection Conferences. From a judicial perspective, challenges against Tusla have been related to claims that it does not apply fair procedures. Tusla's obligations in law need to be clarified so that it does not impede their abilities to safeguard children. Potential litigation around fair procedures should be taken into account when sharing information with third parties. While sharing in Barnahus will be confined to agencies who are involved in the investigation process or treatment of the child and the context differs from CASP, where details of an allegation could be potentially shared with an employer or other member of the community, it needs to be ensured that the legal basis for processing is documented in all instances and only necessary data is shared with each agency to ensure there are no claims of data protection violations.

Recommendation 22: Data governance structures need to be developed within Barnahus to establish responsibilities at all levels and ensure services are delivered consistently across the country. It is recommended that a data governance council is established within the structure of the Barnahus National Agency Steering Committee and data stewards are designated at the services level. Monitoring and oversight of processes will be key to ensuring data sharing is in compliant with data protection laws.

Recommendation 23: There needs to be clear agreement on the type of interagency working model intended for Barnahus services. There appears to be a lack of consensus on what Barnahus is, whether it is a model or a service, and how it will be applied nationally. While Tusla have stated that Barnahus is an interagency process and not a service, it is described as a service in its own literature. It needs to be concretely agreed what Barnahus is and how it will be deployed nationally in a consistent way; this needs to be communicated to all agencies and employees working to implement the Barnahus model. This will also influence the direction of the code of conduct as well as the type of centralised system that is most appropriate for the needs of Barnahus.

Recommendation 24: A Barnahus-specific code of conduct should be developed to govern information sharing among agencies as part of the delivery of Barnahus services. The code will be a comprehensive document that will address specific concerns of individuals from all agencies working in Barnahus in relation to data protection and information sharing, and will require engagement from all stakeholders as well as the Data Protection Commission. The

code should then be submitted to the Data Protection Commission for formal approval. This will ensure data protection and data sharing processes are clearly developed, consistent across services, and auditable for compliance. All staff working to deliver Barnahus services should receive appropriate training based on the code.

Recommendation 25: The development of a centralised system for information sharing or integration of current systems should be considered to allow agencies working in Barnahus services to communicate with one another securely and effectively. The type of system will depend on the type of interagency model agreed, but there is an appetite from a number of practitioners interviewed working within Barnahus for a more centralised system to facilitate efficient working arrangements. When agreement is finalised on the model of interagency working to be applied, stakeholders should discuss appropriate systems to facilitate an efficient and secure approach to information sharing between agencies. A privacy by design approach, promoting privacy and data protection compliance from the start, should be adopted when developing any new system. The implementation of a new system and processes should be preceded by a Data Protection Impact Assessment (DPIA) to identify and mitigate any risks that may arise with its implementation.

Annex 2 Proposed legislative changes

A small number of recommendations in this report suggest the consideration of legislative change. These are outlined below and should be discussed in careful consultation with all relevant stakeholders to ascertain the appetite and feasibility of such changes. The aim of these proposed legislative changes is to strengthen the footing of agencies to carry out their duties and share information with the confidence that there is a clear legislative basis for doing so.

Recommendation 1

Recommendation 1 states that the Child Care (Amendment) Bill 2023 should provide a clear and strong legal obligation on agencies to work together and share information for the purposes of child abuse investigations. Recommendation 1 is made in line with the current legislative reform of the Child Care Act 1991, which has among its aims the goal of enhancing inter-agency collaboration. The General Scheme to amend the Child Care Act 1991 includes provisions to encourage co-operation between relevant bodies. It is recommended the wording of Head 10 'duty to cooperate' is strengthened and that the obligation to collaborate includes the planning, delivery and funding of services and activities, as well as information sharing, in line with recommendations from the Joint Committee on Children, Equality, Disability, Integration and Youth in its pre-legislative scrutiny of the General Scheme. The application of the Barnahus model should be considered under Head 10 with consideration to how this provision could strengthen interagency collaboration within Barnahus and any limitations of this provision with regard to its application to Barnahus services.

Rationale behind the proposed legislative change and potential barriers to Barnahus implementation

Individuals from all agencies interviewed as part of this stakeholder engagement process expressed concerns over the absence of a specific law governing information sharing between all agencies. This process of reform provides a timely opportunity to strengthen the legal framework for the Barnahus model and the application of the Barnahus model should be considered in the review of the Act. If Head 10 is strengthened and can be applied specifically to Barnahus, it would not only place a legal obligation on the bodies to share information where it is required to improve the development, welfare, and protection of children but would also oblige the relevant bodies to cooperate in the planning, delivery and funding of Barnahus services.

The inclusion of this legal obligation would give agencies in the Barnahus model a legal mandate to share information removing ambiguity in this area, and ensure that agencies work together to ensure an efficient and consistent delivery of Barnahus services.

Stakeholder engagement

In its pre-legislative scrutiny of the General Scheme of the Child Care (Amendment) Bill 2023, the Joint Committee on Children, Equality, Disability, Integration and Youth noted that the stakeholders they interacted with as part of this process almost unanimously agreed the provision should be further strengthened; this included Tusla and the Ombudsman for Children's Office.

While a full consultation with Barnahus stakeholders was not carried out as part of this analysis in relation to this specific proposed amendment to the Child Care Act 1991, it was found throughout our engagement with practitioners that there is a longing among individuals from across the various agencies for a clear legal obligation to be in place for agencies to share information for child welfare and protection purposes.

This recommendation should be carefully discussed in a clear consultative manner with all key stakeholders. Further consultation should be held with stakeholders involved in Barnahus to determine how Head 10 can be best drafted to incorporate the needs of Barnahus with regard to information sharing and the delivery of a multi-disciplinary service.

Recommendation 2 and Recommendation 21

Recommendation 2 and Recommendation 21 both hold that Tusla's investigative powers should be clarified in law. It's noted that legislation that addresses this is being drafted and has undergone pre-legislative scrutiny. The proposed amendment to the Children First Act 2015, as set out in Head 44, was met with concern from the Special Rapporteur of Children and the OCO during this process, however, as it still leaves Tusla's processes open to be dictated by case law. It's recommended that these concerns, and the previous work of former Special Rapporteur Conor O'Mahony are given careful attention when drafting this provision to ensure it achieves the desired aim.

Recommendation 21 reiterates that Tusla's investigative powers should be set out in law as it may also help resolve the uncertain situation regarding the applicability of judicial review for Child Protection Conferences and the Child Protection Notification System (CPNS).

Rationale behind the proposed legislative change and potential barriers to Barnahus implementation

The Child Abuse Substantiation Procedure (CASP) initiated by Tusla following litigation in relation to fair procedures in the substantiation process and in the absence of defined legislation has been identified by some practitioners as potentially impacting the level of information they record and share due to concerns that that information may be later shared with the alleged suspect. CASP affords the suspect the opportunity to request the child be interviewed again as part of a reliability and accuracy check and to put any questions or comments the suspect has to the child. This current process may be a deterrent for victims to come forward and does not appear to be in line with the ethos of child friendly justice or the Barnahus model where the aim is to avoid re-interviewing and retraumatisation of the child. Likewise, questions around fair procedures have been raised before the courts in relation to Child Protection Conferences and the Child Protection Notification System. Frequent litigation in these areas causes additional trauma for the complainant due to the investigation being dragged out over the extended period of time involved with High Court proceedings.

Tusla's powers of investigation should be set out clearly in law so that they do not remain in a precarious position whereby practice and policy will continue to be influenced by the Courts' interpretation of Tusla's obligations. This should include, in line with comments from former Special Rapporteur Conor O'Mahony, consideration to the nature of Tusla's obligation to investigate complaints; the procedural requirements that such an investigation should adhere to; and the steps that Tusla may take in the event that a complaint is substantiated.

Stakeholder engagement

The pressing need for legislative reform in this area was highlighted in the annual report of the Special Rapporteur on Child Protection for 2021, where it was underlined that CASP was only intended as a holding measure. The Special Rapporteur for Child Protection, at the time, Conor O'Mahony stated that asserting Tusla's investigation powers in legislation would limit the scope for successful judicial reviews of investigations, and thus strengthen Tusla's hand in carrying out effective investigations. He added that if the procedure for investigating complaints of abuse were placed on a clear statutory footing, the bar for a successful judicial review of an investigation would be raised significantly higher than it is under the current arrangements as legislation carries the presumption of constitutionality.

While a full consultation with Barnahus stakeholders was not carried out as part of this analysis in relation to this proposed legislative change, many practitioners interviewed as part of the stakeholder engagement process expressed concerns about the current CASP procedure and would generally welcome legislative backing for Tusla to conduct its investigations. This recommendation should be carefully discussed in a clear consultative manner with all key stakeholders. Full stakeholder engagement consultations should be held by DCEIDY with Tusla and all relevant stakeholders to determine how Tusla's investigative powers can best be clarified in law to ensure the agency has a clear statutory basis for carrying out child protection investigations.

Recommendation 15

Recommendation 15 states that consideration should be given to lobbying for an amendment to the Data Protection Act 2018 to specify the safeguarding of children as an explicit public interest condition similar to the UK Data Protection Act 2018. This would remove any ambiguity around processing under the public interest legal basis for child protection purposes.

Safeguards for the processing of personal data in the Barnahus context could also be mandated in law. Section 36 of the Data Protection Act 2018 allows for the drafting of regulations to identify additional safeguarding measures and or to specify measures that are mandatory in respect to the processing they apply to. These measures may relate to governance structures, processes or procedures for risk assessment purposes, processes or procedures for the management and conduct of research projects, and other technical and organisational measures designed to ensure that the processing is carried out in accordance with the Data Protection Regulation and processes for testing and evaluating the effectiveness of such measures. Appropriate safeguards for processing in the Barnahus context identified during the drafting of the code of conduct could be later specified under law, if stakeholders found such a requirement would be beneficial.

Under Section 60 of the Data Protection Act 2018 regulations can also be introduced to provide for restricting the rights of data subjects and obligations of data controllers where such restrictions are necessary for the purposes of safeguarding children. The Act specifies that regulations can be made by a Minister to restrict the rights and obligations outlined in the GDPR if the application of those rights and obligations would be likely to cause serious harm to the physical or mental health of the data subject, and in relation to personal data kept for, or obtained in the course of, the carrying out of social work by a public authority, public body, a voluntary organisation or other body. During the development of the code of conduct for Barnahus it should be considered if it is necessary to introduce regulations around the same.

Rationale behind the proposed legislative changes and potential barriers to Barnahus implementation

The rationale behind the proposed legislative changes is again to ensure stakeholders have a clear basis in law for data processing and remove any ambiguity around identifying the correct legal basis for processing. Further, specifying the safeguards to be deployed while processing personal data in the Barnahus context in law will ensure agencies are clear on what technical and organisational measures to deploy to protect this highly sensitive data and the same measures are applied consistently across the country. This could complement the proposed introduction of the duty to cooperate in the Child Care (Amendment) Bill 2023 by ensuring agencies share information in a secure, consistent way that respects the fundamental rights of data subjects. Likewise specific regulations for restricting the rights of data subjects and obligations of data controllers where such restrictions are necessary for the purposes of safeguarding children will offer agencies a clear legal basis for doing so and remove any uncertainty around this.

Stakeholder engagement

The need for an amendment to the Data Protection Act 2018 to specify the safeguarding of children as an explicit public interest condition similar to the UK Data Protection Act 2018 should be carefully discussed in a clear consultative manner with all key stakeholders. The development of a Records of Processing Activities for Barnahus will help determine if this legal basis is currently being relied upon by agencies and any concerns agencies may have with regard to relying upon it as the legal basis for processing. The need for any specific regulations for Barnahus under the Data Protection Act should be discussed with consideration to the finalised provision in relation to 'the duty to cooperate' under the Child Care (Amendment) Bill 2023. The addition of regulations related to specific safeguards to be put in place and where rights can be restricted may assist with the practical implementation of this duty to cooperate with regard to information sharing.

Again, while there has not been detailed consultation on this proposed legislative change with stakeholders, practitioners have expressed generally that they are favourable to the introduction of laws that remove any uncertainty around information sharing processes. Child protection is, and should be, the priority of practitioners working in Barnahus and they should not have to delay providing child protection measures or treatment to children because they are unsure about the legal basis for processing or sharing personal information.

Annex 3 Endorsement by IDG

DEPARTMENT / AGENCY	ENDORSEMENT
DEPARTMENT OF HEALTH	Endorse
DEPARTMENT OF JUSTICE	Endorse
DEPARTMENT OF CHILDREN, EQUALITY, DIVERSITY, INTEGRATION AND YOUTH	Endorse
AN GARDA SIOCHANA	Endorse
HEALTH SERVICE EXECUTIVE	Endorse
CHILDREN'S HEALTH IRELAND	Endorse with reservation
TUSLA	Endorse with reservation
CHAIR BNASC	Endorse

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