

Child Abuse Substantiation Procedure (CASP)

Why CASP ?

Introduction

The obligation on the Child & Family Agency under Section 3 of the Child Care Act 1991 (as amended) is to “promote the welfare of children in its area who are not receiving adequate care and protection.” Case law has interpreted that obligation as extending to unidentified children who may need protection.

The nature and extent of the duties placed on the Child & Family Agency by Section 3, were first considered in the case of MQ v Gleeson [1998] 4 I.R. 85. Mr Justice Barr said that child protection services had to take all reasonable steps to investigate the veracity of a complaint while ensuring the person subject to the allegation of abuse is afforded fair procedures. The level of due process and fair procedures to be afforded was clarified in subsequent case-law.

One of our key goals as an agency is to have a consistent, national approach in cases where substantiation is required and in circumstances where there is a requirement to share information with third parties to safe guard children from potential risk. The Child Abuse Substantiation Procedure (CASP) guides and supports staff and the agency in sharing information with 3rd parties safely and proportionately to safeguard children.

Legislative Background

Court judgments have established that Tusla should carry out substantiation investigations under Section 3 of the Child Care Act 1991 and in doing so, ensure that fair procedures are afforded to the Person Subject to Abuse Allegations (PSAA) while carrying out child protection duties. The court judgments establish the following:

- Tusla may disclose to a third-party information about a person subject to abuse allegations if this is required to protect children.
- Tusla should not disclose information to a third-party without first conducting a substantiation investigation, except where a child is at immediate serious risk.

- Tusla must conduct an investigation based on natural justice and afford fair procedures to the PSAA.
- Such fair procedures include the right to be informed of the allegations and the right to respond to them.
- Tusla must provide all relevant materials which were assembled in substantiating an allegation to the PSAA.
- The investigating social worker must remain impartial throughout the process and be mindful that a “client type” relationship does not develop
- The investigating social worker must remember that their role is to investigate the complaint and not to vindicate the Complainant or sanction the PSAA.
- The Complainant’s account is required to be stress tested and conflicts of fact addressed.
- The PSAA is entitled to be heard in his/her own defence and to have the testimony of such persons who can give testimony on his/her behalf, relevant to the allegations in issue, heard and considered by the investigator;
- The existence of a pending criminal prosecution against the PSAA does not alleviate Tusla’s duty to investigate the allegations.
- In order to establish that a complaint is “founded” the allegations must be established on the balance of probabilities, the civil standard of proof

An important issue to consider in establishing the purpose and scope of this consultation is to first establish what requirements are imposed on us by law.

[Requirement to conduct Substantiation investigations](#)

The nature and extent of the duties imposed on the Agency by Section 3, Child Care Act 1991 were first considered in the case of MQ v Gleeson [1998] 4 I.R. 85. The following case law is also relevant and is outlined below:

- MI v HSE 2010 IEHC 159
- P.D.P. v. Board of Management of a Secondary School & Another [2010] IEHC 189
- E.E. v. CFA [2016] IEHC 777
- OT v CFA [2016] 101
- TR v CFA 2017 IEHC 595
- WM v CFA [2017] IEHC 587

- FA v CFA & Others [2018] IEHC 806
- EOC v CFA & Others 2019 IEHC 843
- CD v CFA 2020 IEHC 452
- J v CFA 2020 IEHC 464

Requirement to provide Fair Procedures

In ***PDP v A Secondary School*** [2010] IEHC 189, O’Neill J listed what he believed to be the minimum requirements of natural justice required in a child abuse investigation, namely: -

- The entitlement to have made available to a PSAA all of the **relevant** material assembled and considered by the investigators into the allegations made;
- The entitlement of a PSAA to be heard in his own defence;
- The entitlement of a PSAA to have the testimony of such persons who can give testimony on his behalf, relevant to the allegations in issue, heard and considered by the investigator;

Requirement of Impartiality when conducting the investigation

In ***PDP v A Secondary School*** [2010] IEHC 189 where O’Neill J held that the HSE, as the then incumbent of the investigative function, had failed in its duty to act as an impartial investigator of the abuse allegations made. That was due to the interaction between the investigators and the complainant (and the fact that the investigators had delegated their adjudicative responsibility to an extent) that the necessary impartiality was lacking. These deficiencies tainted the whole investigation process. The Court was critical that the Complainant was being treated as if a “client type” relationship existed between her and the investigating social worker.

Requirement on CFA to be neutral in terminology used

In ***CD v The Child and Family Agency***, at para 29, Humphreys J repeated a previous criticism from his judgment in ***OT v The Child and Family Agency*** [2016] 101 in relation to the description of a PSAA as an “*alleged abuser*” in the 2014 guidance. He suggested, without making any finding, that the use of such a term may be lacking in the necessary neutrality and attempts to equate it to the use of “*alleged criminal*” in a criminal trial.

Requirement not to stray into Vindicating the Complainant / or Sanctioning the PSAA

In **J v CFA Simons J** was concerned that those performing their investigative functions firmly understand their specific purpose and neither stray into attempting “*to vindicate the complainant*” or “*to sanction the alleged abuser.*”

Requirement to Stress-test the complainant’s allegations:

The PSAA’s version of events must be put to the complainant before a conclusion is reached as to whether the complaint is founded. In both **FA v CFA** and **EOC v CFA** [2019] IEHC 843, the High Court noted that there is an obligation on Tusla to ensure that the PSAA’s version of events is put to the complainant for comment (although not always in the form of cross-examination.) McGrath J commented in **FA** that: “*it is difficult to see how the conclusion of founded was established with the necessary level of probability in the absence of a consideration of the stress testing of the complainant's evidence. As McDermott J. observed, the more serious the allegation, the more cogent the evidence required to support it.*”

Requirement to apply the correct standard of Proof

The question of what is the appropriate standard of proof for Section 3 investigations was considered in **TR v CFA**. In this case, it was argued on behalf of the PSAA that a founded conclusion “*should be made only on the basis of the criminal standard of proof beyond reasonable doubt and not on a civil standard of the balance of probabilities.*” McDermott J concluded that he was “*satisfied that it is necessary in order to establish that a complaint is “founded” that the allegations be established on the balance of probabilities, the civil standard of proof.*” McDermott J went on to define this standard as being that, on the evidence, the occurrence of the event was more likely than not. The more improbable the event the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.