



Youth Work Ireland

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Position Paper

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“Young People and the Law on Sexual Offences”

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Introduction

We live in a rapidly changing world when it comes to the sexuality and sex lives of young people today. Similarly there have been significant advances in the field of child protection and the awareness of the cataclysmic failures of the past and the need to have the highest standards of child protection for the future. The balancing of these potentially conflicting priorities will become an increasing priority in the near future.

While the focus on this topic became quite intense a number of years ago there has been little legislative or public policy attention on this topic in recent years. This is an unfortunate aspect of certain policy areas in Ireland where rapid unexpected crises can drive decisions but long periods of inactivity are not utilised to make more sustainable and agreed progress. We believe that progress should be made in a sustainable way on these issues before another crisis drives the process.

Background to the law on sexual offences against young people in Ireland

The general law on sexual offences and the specific provisions relating to young people dates back some considerable time and is seen by many as "victorian" in some of its language and phraseology. Youth Work Ireland's submission that a consolidation of the law on sexual offences was badly needed was accepted in 2006 by the Oireachtas Committee on Child Protection established after the CC case (Para 4.5.2). However there has been little action by Government in this critical area in the intervening six years. This view that consolidation is needed has also been expressed by several leading researchers and commentators in the field such as Professor Finbarr Mc Auley. However over the last 7 years while there has been some political debate on these topics, there has been no legislation introduced even to cover areas where there was some political views that the emergency response legislation passed in 2006 was flawed.

Effectively to this day there is no dedicated law on the sexual abuse of children in Ireland. As far back as 1990 the Law Reform Commission recommended that a "new offence of 'child sexual abuse' or 'sexual exploitation' should be created..."¹ There are several statutes covering a variety of sexual offences and some of these set out specific or separate treatment of children or young people. These have evolved over the years into a complex patchwork of law and procedure which many people working with children and young people can find difficult to follow.

¹ A Law Reform Commission Report on Child Sexual Abuse 1990 (LRC 32-1990)

Until 1981 the Criminal Law (Amendment) Act 1935 was the main statute in relation to sexual relations with young people but also covered a number of other areas such as prostitution and defilement of "imbeciles". Significant overhaul of the law on sexual offences took place in the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape) (Amendment) Act 1990. However organisations such as the Rape Crisis Network believe a lot more is needed in the general framework of our laws.

The age of consent in Ireland (17) was set out in The 1935 Act prohibited sexual relations with a female under the age of 17 years. The exclusive concern at the time was the "protection of young girls".

Sections 1 and 2 of the 1935 Act created the offences of unlawful carnal knowledge or "statutory rape" of a girl under the age of 15 with a maximum penalty of life imprisonment and of girls between the ages of 15 and 17 with a maximum penalty of five years imprisonment respectively. The Act did not allow an accused to plead in his defence that he had made a reasonable mistake as to the age of the girl i.e. that he had reasonably believed that the girl was either above the age of 15 or above the age of 17. The mental element of the offence was wholly removed and the offence was one of "strict liability".

In the case of *CC v Ireland, the Attorney General and the DPP* in 2006 the Supreme Court decided that section 1 which criminalized and exposed a person without mental guilt to a maximum sentence of life imprisonment, failed to respect the liberty or dignity of the individual and constituted a failure by the state to vindicate the right of the citizen to liberty and his good name which are fundamental rights. The Supreme Court struck down the section of the Act as unconstitutional with particular reference to Article 40.3.1. Under constitutional law this had the effect of meaning the section never existed.

The CC Case brought huge attention to the issue of intention and knowledge, and the age of consent. The facts of the case were that a man was convicted under Section 1 of the 1935 Act. The section provided for the offence of Unlawful Carnal Knowledge of a girl as a strict liability offence. This meant that proof of the actual act or omission (*actus reus*) was proof of the offence without the need to prove the issue of intent/a guilty mind. The accused could be guilty even though he was ignorant of one or more factors that made his act criminal. These two elements, *mens rea* and *actus reus* are popularly understood in most high profile and well known criminal offences such as murder. The absence of *mens rea* i.e. the intent to kill in a murder case can lead to a verdict of the lesser offence of manslaughter for example.

Strict liability offences are created for certain relatively minor offences (e.g. traffic offences such as speeding where you can be convicted even though you did not know that you were speeding) or regulatory offences such as breaches of product liability law where it is considered necessary to prevent the act or deed for public policy reasons and for prohibiting certain types of occurrences or behaviour (e.g. illegal fishing). Strict liability maximizes the deterrent effect of the offence

The Government responded to the CC case by enacting the Criminal Law (Sexual Offences) 2006 Act (within ten days of the Supreme Court's decision in CC) which provided in legislation for the same offences of defilement but expressly allowing a defence that the accused "honestly believed that ...the child...had attained the age of 15 [or 17] years" The Constitutional Principle on which the CC Case is founded is the right to a fair trial which can involve a number of issues. There was much public concern and media coverage about these issues at the time. However the *A V The Governor of Arbour Hill* case removed the possibility of large scale release of those convicted under the impugned legislation.

The 2006 Act now provides that a person of either sex and of any age may be guilty of an offence if he or she engages in a sexual act with a child under the age of seventeen or attempts to do so and does not have a reasonable and honest belief that the child has attained the age of 17 years. The act is gender neutral with the exception that section 5 provides an exemption for a female child under the age of 17 years who engages in sexual intercourse.

The constitutionality of section 5 was challenged² by a male under the age of 17 (who was 15 at the time of the offence) who had been charged with sexual offences against a female under the age of 17 (who was 14 at the time of the offence) who was not charged with any offence. The accused challenged the constitutionality of section 5 arguing that it discriminated on the basis of gender against him contrary to Article 40.1 of the Constitution. However the Supreme Court upheld the section on the basis that Article 40.1 recognises that perfectly equal treatment is not always achievable and it permits the State, in its enactments to have "due regard to differences of capacity, physical and moral, and of social function". The State justified the section by a social policy of protecting young girls from pregnancy by creating a law governing under-age sexual intercourse. The Court found that the danger of pregnancy for the teenage girl was an objective which the Oireachtas was entitled to regard as relating to 'differences of capacity, physical and moral and of social function' and consequently Section 5 was not repugnant to the Constitution.

Section 249 of the 2001 Children's Act introduced the offence of Causing or Encouraging a Sexual Offence upon a Child. The Criminal Justice Act 2006 provides for a new offence of reckless endangerment of children. This offence may be committed by a person who has authority or control over a child or an abuser and who intentionally or recklessly endangers a child by:

- Causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse or
- failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation.

The Government consulted with other relevant people and admitted that there were flaws in the Act, principally that both genders were not treated equally. There were commitments given to return to the subject and give it proper attention in the near future and to ensure proper deliberation and a cross party approach. A Joint Oireachtas Committee on child protection under the chairmanship of Peter Power TD was established. The MD Case has subsequently upheld the constitutionality of the differential treatment according to gender

The Joint Oireachtas Committee Report highlighted a number of issues. The major ones it called for action on were, the consolidation of the law on sexual offences, the introduction of a system of "soft information" in the vetting of those who worked with children and young people and the need for constitutional protection for this, the need for a referendum on children's rights and the need for a referendum to restore the position on strict liability. It also recommended a reduction to 16 in the age of consent.

² M.D (A Minor suing by his Mother and Next Friend S.D.) v Ireland, the Attorney General and the DPP [2012] IESC10.

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/d1ea2511fcefc60802579ad005046d6?OpenDocument>

The Committee also highlighted issues relating to the interaction of the law on sexual assault, gross indecency and the 2006 Act. The Committee usefully suggested an offence of “child sexual abuse” or “sexual exploitation³” as recommended by the LRC in 1990 similar to that in Western Australia which would provide flexibility and the possibility to deal with the subtle and nuanced cases that can arise. Some of the committee’s recommendations on trafficking and grooming have found their way in to law. Similarly good points have been made about the language used in the law in this area but these have fallen on deaf ears.

One issue the Committee singled out was that young victims would have to take the stand to testify on issues of age and other matters. It referred to a thread in many submissions;

“That is a clear and definite sense of dissatisfaction with the idea that the availability of such a defence will lead inevitably to the cross-examination of children as to how they behaved, dressed or otherwise comported themselves. That result is indeed unavoidable, if the defence is allowed, because the only possible basis for a mistake having been made as to the age of the child is the appearance and/or behaviour of the child.”

(Joint Oireachtas Committee Report 2006)

The issue of a referendum on children’s rights had gained much support around this time and Taoiseach Bertie Ahern announced in 2006 that the Government supported the holding of such a referendum. A draft wording was produced in 2007 which led to much debate. A further Oireachtas committee was established under the chairpersonship of Mary O’Rourke TD to examine a number of constitutional issues. These included the proposed wording of a referendum on children’s rights, proposals on adoption, soft information and strict liability.

The Committee decided to deliberate on the issues in sections and issued separate reports on each. It commissioned two noted expert reports on the issues of soft information and strict liability, namely Geoffrey Shannon and Prof. Finbarr Mc Auley. The latter’s report is particularly worthy of examination as a detailed analysis of strict liability.

McAuley provided a detailed analysis of the idea and legal doctrine of strict and absolute liability and noted that these concepts are often used to protect public interest, health, hygiene and morals. The doctrine is also seen as encouraging prudence and ensuring that individuals avoid risky behaviour.

The crime of manslaughter is cited as evidence that strict liability can be applied to very serious acts with very serious consequences. The report provides a detailed critique of the Act including the extension of the list of acts covered, the subsequent difficulty in accurately describing the offence (an important human rights consideration), the issue of the mistake as to age having to be “honest” (i.e. subjective). Mc Auley recommended a constitutional referendum to restore the situation relating to strict liability.

The Committee decided to deal with these issues in advance of its report on the Children’s Referendum. In its first report of September 2008 it recommended a comprehensive

³ http://www.lawreform.ie/_fileupload/Reports/rChildSexAbuse.pdf

system of soft information but notably did not feel constitutional change was necessary to achieve this.

However in its second report in May 2009 on the question of strict liability the Committee was divided over the whether to restore the position before the CC case by means of a constitutional referendum or whether to address the question through enhanced legislation. A minority report was issued by the Fine Gael representatives favouring the constitutional approach but the official report of the majority supported enhanced legislation.

Current Government Commitments

The new Government has established a cabinet level Minister for Children and Youth Affairs. There have been a number of initiatives introduced by this Department such as the introduction of a new Child and Family Support Agency, the placing of the Children's First Guidelines on a statutory footing, the introduction of legislation on failing to report abuse and the introduction of legislation for a national vetting bureau (including provision for "soft information").

Three current cabinet members were members of the Oireachtas Committee on the Children's referendum. The programme for Government provides for legislation on Children First and soft information. The Government's Legislative Programme contains a commitment to introduce a Criminal Law (Sexual Offences) Bill, "To implement recommendations in the Joint Oireachtas Committee Second Interim Report on the Constitutional Amendment on children and protect vulnerable persons against sexual exploitation and abuse" but it is well down the legislation list at this time with publication predicted in 2013. There has been limited discussion of this issue in public debate though there was some limited discussion about the discrete issue of age of consent.

The Oireachtas has passed a number of Acts and published legislation or Heads of a Bill in the general area of children and child protection since the formation of the current Government namely:

- Children First Bill (Heads Of) 2012
- National Vetting Bureau Act 2012
- The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012

Key Issues

Law and practice in this area is of concern to voluntary organisations who work with children and young people. The law is complicated and can change according to legal cases and new legislation. There is a need for clarity for everyone working in this field as frontline staff may be required to make decisions and give advice. This is very difficult at the moment and there has been a lot of legislative change even in the last year. For example what are the precise obligations on frontline workers if they come to know of a relationship between young people which could be deemed an offence under the 2006 Act under the Children's First legislation?

Section 2 of The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 provides that

a person shall be guilty of an offence if—

- a) he or she knows or believes that an offence, that is a Schedule 1 offence, has been committed by another person against a child, and
- b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence.

This covers offences under the 2006 Act which may come to the attention of youth workers through casual conversations or disclosures. Further Legislation on the issue of Strict Liability would be valuable here.

Age of Consent

There is often a conflation of the age of consent with the issue of strict liability under the 2006 Act. The two are quite separate in terms of legal basis and while changes to one seem to impact on the other a situation can be imagined where this would not be the case. Strict Liability provides for the need to prove the act happened for a conviction, this could be provided for at a younger age than the age of consent. There may still be a defence, for example for older young people engaged in sexual relations under the age of the current age of consent.

There appeared to be little appetite for reduction of the age of 17 as the age of consent in 2006. However an alignment of the age of consent with the legal provisions on sexual offences is desirable. Generally Ireland is seen to have a rather high age of consent by international standards however there is considerable variation in this regard between countries as there is in relation to statutory rape provisions. The view that the age should be lowered is generally supported by a “liberal” view that mores are changing and that young people engage in sexual relations earlier while the view against is that such relationships can be risky and generally young people should delay such decisions. There is also an important child protection aspect to such a debate as the Rape Crisis Network reports some 22% of all sexual offences are carried out by people under 18.

It is also worth noting that the age of consent for medical treatment is 16 and the Law Reform Commission has recommended lowering this.

Strict Liability and “Defilement”

Irish law provides for the offence of defilement. There are two offences, one for under 15s and one for under 17s.

The Criminal Law (Sexual Offences) Act 2006 makes it a criminal offence to engage or attempt to engage in a sexual act with a child under the age of 15 years. This is what is meant by the term ‘defilement’. The maximum sentence for this offence is life imprisonment.

A sexual act for the purposes of the law includes sexual intercourse and buggery between people who are not married to each other and any sexual act which could constitute aggravated sexual assault.

The 2006 Act provides that the accused may argue that they honestly believed the child was aged 15 years or over. The court must then consider whether or not that belief was reasonable. It is not a defence to show that the child consented to the sexual act.

Section 3 of the Criminal Law (Sex Offences) Act 2006 as amended by Section 5 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 makes it a criminal offence to engage or attempt to engage in a sexual act with a child under 17 years. The maximum

sentence is five years and ten years if the accused is a person in authority. A person in authority means:

- 1 A parent, step-parent, guardian, grandparent, uncle or aunt of the victim, or
- 2 any person acting in loco parentis (in place of parent or parents) to the victim, or
- 3 any person responsible for the education, supervision or welfare of the victim.

The maximum sentence is greater for a second or subsequent offence.

The accused may argue that he or she honestly believed that the child was aged 17 years or over. The court must then consider whether or not that belief was reasonable. It is not a defence to show that the child consented to the sexual act.

The consent of the Director of Public Prosecutions is required for any prosecution of a child under the age of 17 years for this offence. A person who is convicted of this offence and is not more than two years older than the victim is not subject to the requirements of the Sex Offenders Act 2001. This means they will not have their name placed on the Sex Offenders Register.

A girl aged under 17 years who has sexual intercourse may not be convicted of an offence on that ground alone.

Vetting

The National Vetting Bureau Act is now law. It is welcomed by people working with children and young people. The measures impose significant extra statutory responsibilities on individuals and organisations and this needs to be recognised by funders and policy makers.

DPP and Garda Practice

In the course of debates in 2006 and after it became clear that despite the general prohibition on plea bargaining in the Irish legal system the choice of what offence to charge and how to approach any given set of facts varies. It appears that cases where evidence was not strong could often be prosecuted under the 1935 Act. This is an important consideration. Clearly any law on sexual offences should have its own logic and rationale and not be seen as a “fall back” option when evidence is not available for another offence. Although a previous DPP has pointed to other distinctions between the offences and advantages to using the 2006 Act even when sufficient evidence is available. The issue of young people and victims generally having to testify as witnesses is also an important consideration.

Impact on Children First and the Voluntary Sector

As mentioned the need for clarity on the legal and practice environment is critical for organisations and individuals who work on the frontline with children and young people. They gain first-hand knowledge of the real life experiences of this group and increasingly are subject to regulation and indeed potentially criminal sanction due to omissions. Such clarity is the main need for such organisations at this point in time.

Conclusions

There remains much confusion in relation to the law on sexual offences and young people. There is also a certain amount of unavoidable complexity due to the need to reconcile different priorities in this area. Surveys have shown a lack of knowledge about the age of consent. Generally there is an understanding of the concept of statutory rape and that sexual relations with children of a certain age are prohibited regardless of the circumstances or respective views of the participants.

Clearly the difficulty today is reconciling this clear understanding with the younger age at which sexual relations begin. Many are uncomfortable with the idea of “criminalising” young people for what are seen as “consensual” relationships. This issue is not exclusive to Ireland and many other jurisdictions struggle with it. The notion of consensual relationships involving young people is fraught with difficulty.

There can also be issues as to the level of understanding and maturity present as this clearly varies between all young people. Similarly people’s perspective on events can change according to the passage of time (both long and short term). Other parties can become involved in these contentious areas. It is well documented that in some prominent cases it was disclosure by young people to their parents that led to involvement of the Gardai and to prosecutions. Obviously perspectives on events can change due to relationship breakdown and the emotional stress sometimes associated with these matters in young people’s lives.

Recognising sexual activity happens at a younger age does not necessarily mean whole scale change to our law is required. Indeed much research says for a variety of reasons we should as far as possible discourage such activity at a young age particularly on a public health basis.

There can be little doubt that there is a need for the strongest possible protection for those at very young ages. Thus strict liability should be reintroduced for those under 15. A more subtle approach may be needed for 15 and 16 year olds. The Act already includes a provision regarding positions of authority and a two year age gap and this may be helpful. It should also be noted that the Act adds a number of new acts to the definition of sexual relations and that anecdotally some of these may be more common amongst younger people.

While there is an understandable desire to avoid “criminalising” young people we also need to avoid the creation of any loopholes or provisions that could be exploited to facilitate abuse or other acts. There are a number of innovative legal developments which we rarely see in Irish law that could usefully be deployed here such as alternative dispute resolution and community sanctions. There have been developments in restorative justice programmes north and south of the border which might be helpful if there was an absence of coercion or violence in a conviction. The legal concept of *de minimus* where little real harm occurs could also assist particularly if “experimentation” between teens in some form of relationship was established

Increasingly simple age limits are featuring less and less in the regulatory environment surrounding young people’s lives for example the development of the “Gillick Competences” in relation to birth control and the Law Reform Commission’s proposals on young people and medical treatment. Such an approach may have merit in this area. It should also be noted that broad consultation with young people about these issues found little agreement on the age of consent after the events of 2006. Thinking in this area is

moving towards the concept of sufficient maturity, mental understanding and intelligence rather than age alone.

Other elements that may be useful is to include the concept of discretion when it comes to prosecutions and the generally accepted approach in juvenile justice that custodial sentences should be a last resort.

While there is some logic to the treatment of females in the 2006 Act it is argued by many that all provisions should be gender neutral. If a defence of mistake as to age is to remain in law it should be litigated on the basis of an objective rather than subjective test.

Recommendations

The General Law on Sexual Offences

1. There needs to be an urgent consolidation of all law in this area.
2. With the exception of the recommendations below the 2006 Act should continue.
3. The law should be gender neutral.

Age of Consent

4. The mental capacity and maturity of a young person should figure in any law in this area.
5. Any changes must be proceeded with slowly and involve a full audit of the child protection implications.

Objective Test

6. An objective test should be applied to any defence involving mistake as to age.

Strict Liability

7. The strict liability offence of statutory rape or child rape should be re-introduced for victims under the age of 16 as recommended by the 2006 Oireachtas Committee.

Relationships of Similar Age

8. A more nuanced approach is needed for relationships of equal age based on the following.
9. A general prohibition where there is an age gap of more than two years. Cases within this range may be referred to an Alternative Dispute Resolution mechanism convened by a Juvenile Liaison Officer.
10. Mental Capacity and Maturity to be taken into account in any such process.
11. Where the results of such a process indicate force, exploitation or any other aggravating factors the JLO shall refer the case to the DPP.

Sentencing

12. As with all juvenile offences custodial sentences should be a last resort and age appropriate sanctions should be developed as recommended by the Oireachtas Committee in 2006.
13. Enhanced sentences should be provided for people in position of authority.

The Gardaí and DPP

14. All cases should be conducted with the rights of the child as that paramount concern.