



Fine Gael Minority Report
on
Statutory Rape

7TH May 2009

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Introduction

Fine Gael believes it is urgent that a Constitutional Referendum be held to enable the People decide whether the Oireachtas should enact new legislation to reinstate the criminal offence of statutory rape for the protection of children. Fine Gael members of the Joint Oireachtas Committee on the Constitutional Amendment on Children regret that a majority of the Committee are of the view that no such referendum should be held and that legislation is not required to provide an absolute zone of protection for children as originally favoured by the Government and all Opposition Parties. We wished to publish a Minority Report but were procedurally advised that under the Committee's terms of reference such Report cannot be published by the Houses of the Oireachtas. Fine Gael members of the Committee are concerned that our position and that of the Fine Gael Party is not clearly set out in the Report of the Committee which is published today. Accordingly, Fine Gael has decided to independently publish its Minority Report. It summarises the approach of the Fine Gael Party and its recommendations for reform in so far as they differ from a majority of the Committee. Accordingly, this report should be read in conjunction with the Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children. The views contained in the Minority Report are those of the Fine Gael members of the Committee and the Fine Gael Party.

Alan Shatter TD
Fine Gael Spokesperson on Children

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The Fine Gael members of the Joint Committee on the Constitutional Amendment on Children are:

Alan Shatter TD
Michael Noonan TD
Olwyn Enright TD
Dan Neville TD
Senator Frances Fitzgerald

Summary of what distinguishes the recommendations of the Fine Gael members from those of the Joint Oireachtas Committee

1. Fine Gael recommends that a referendum be held to constitutionally permit the Oireachtas to enact legislation to reinstate an offence of statutory rape. The Committee is of the view that the constitutional referendum to do so originally proposed by Government in February 2007 should not take place.
2. Fine Gael recommends that the constitutional amendment to be put to the people on the issue of statutory rape recognises that safeguarding children should be a constitutional principle to which priority is given. The Committee does not hold this view.
3. The legislation that Fine Gael proposes be enacted should the referendum be successful provides for an absolute zone of protection for all children under 15 years of age. It also provides for an absolute zone of protection for children between 15 and 18 years of age in respect of a person in a position of authority over a child such as a parent, a guardian, a teacher, a sports coach or a babysitter . The legislation proposed by the Committee does not provide for such an absolute zone of protection.
4. Fine Gael recommends that an offence of strict liability apply to those who engage in sexual intercourse with persons over 15 but under 17 and as a consequence the current subjective defence of ‘mistake as to age’ would be replaced by an objective defence by which an alleged offender could establish that he/she had ‘reasonable grounds for believing’ the alleged victim to be over 17. The Committee recommends that various possible legislative reforms be considered to strengthen the law in respect of sexual offences against children but does not make any final specific recommendation.
5. The Fine Gael recommendation for the holding of a constitutional referendum is to ensure that the legislation recommended by Fine Gael to provide for sexual offences of absolute and strict liability for the protection of children is constitutionally sound. Should such referendum not be held or fail to bring about constitutional change such legislation cannot be enacted. The Committee acknowledges that recommendations made by it for strengthening the criminal law may be constitutionally suspect and expresses a hope that if any such reforming legislation is brought before the Houses of the Oireachtas by Government that it will ultimately be referred by the President to the Supreme Court for a decision on its constitutionality.
6. Fine Gaels recommendations are intended to ensure that children receive the maximum protection that can be provided by legislation. The Committees recommendations with regard to amending the Criminal Law (Sexual Offences) Act 2006 are intended to do what it hopes might be possible within the current constitutional structure with the objective of avoiding the holding of a referendum on the issue of statutory rape.

7. Fine Gael believes that it was the job of the Committee to determine the appropriate wording of the constitutional amendment the Government decided in principle in February 2007 should be put to the people in a referendum and to consider the detail of the legislation to be enacted should the referendum be successful. The Committee (which includes the Minister for Justice and Law Reform and the Minister for Children) favours a reversal of the Government decision made to provide the maximum protection possible to children. In simply proposing a variety of possible legislative reforms it has abdicated its role in the hope that the Supreme Court will determine that whatever new legislation is ultimately proposed by Government falls within current constitutional constraints.
8. Fine Gael endorses the recommendation originally made by it as contained in the Report on Child Protection published in November 2006 that the age of consent should remain 17. As was the case with the 2006 Report the other members of the Committee recommend an age of consent of 16.

Background

A commitment was given on behalf of the government by the then Taoiseach, Mr Bertie Ahern on the 19th February 2007 on the publication of the 28th Amendment of the Constitution Bill 2007 to address the inadequacies of this State's Child Protection laws. He stated:-

“Over those years during which we have been legislating to protect children, and providing resources for the protection of children, it became clear to me that there is a gap in our child-protection framework. That gap is in our Constitution.”

Fine Gael is firmly committed to ensuring the maximum protection for children and agrees with the views expressed by the former Taoiseach. We fully support all necessary measures being taken to achieve a proper level of child protection. We have for many years advocated the provision of essential reform.

It was the announced intention of the government when the 2007 Bill was published to amend the Constitution to ensure that essential legislation required to protect children against sexual abuse and exploitation could be enacted. The Bill proposed that the following wording be inserted in the Constitution:-

42A.5.2. No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

The former Taoiseach on publication of the 2007 Bill referred specifically to the new proposed Article 42A.5.2 stating:-

“The second change in Article 42A.5 will be even more fundamental. It will permit the Oireachtas to implement for offences of strict or absolute liability in respect of children. The crucial need for such offences is clear. It is simply not acceptable for persons who take sexual advantage of young children to later claim that they believed the child was older, or to subject the child to harmful cross-examination by lawyers in court about how the child was dressed or may have acted. This provision will allow us take away the so-called “honest belief” defence in such cases and to provide a clear and unbendable rule – that those who sexually abuse children will be punished.

No exceptions: No loopholes: No excuses.

I am committed to putting this wording to the people, whether before the General Election or in the Autumn is a matter which remains to be decided.”

Brian Lenihan TD, the then Minister for Children also gave a commitment to constitutional change in his speech on the publication of the Bill when he stated ;-

“The amendment provides that laws which involve offences against children under 18 years of age may be offences of absolute or strict liability...

In general terms, an offence of absolute liability is one for which a defence of mistake is not allowed. Offences of strict liability require proof by the accused of reasonable mistake. In the context of this amendment, the Government will bring forward legislation which will make sexual relations with a child under the age of sixteen an offence of absolute liability. It is proposed to make sexual offences against a teenager between the ages of 16 and 18 offences of strict liability.....

To his great credit, An Taoiseach has progressed the issue of constitutional reform in this area to the point of no return. For me, this amendment is the high point of the Government's reforming programme of action in relation to children."

The then Taoiseach, Bertie Ahern T.D. asked Opposition Parties to "engage in a process of reflection and consideration" about the wording "proposed for constitutional change". The Joint Oireachtas Committee on the Constitutional Amendment on Children was formed to facilitate each political party to do so, to engage with government and to consider both written and oral presentations made to it.

Fine Gael has approached the consideration of the constitutional amendment by first considering whether the existing legislation and, in particular, the 2006 Act provides a proper level of protection for children. Fine Gael is of the view that the law, as it presently exists, does not do so. The Fine Gael members of the Committee therefore considered what legislative change is necessary to introduce a proper level of protection for children with the following primary considerations in mind :-

1. The desirability of providing a zone of absolute protection for children and of identifying the children to whom it should apply.
2. The need to ensure that the rights of defendants were properly considered and appropriately balanced having regard to children's rights.
3. An acknowledgment and recognition that children of different proximate ages have different levels of understanding and capacity.
4. A need to ensure that sexual experimentation between children of proximate age where there is no duress or coercion and where neither party is in a position of authority over the other does not result in the inappropriate application of the criminal law
5. The public interest in adults understanding and recognising that they are responsible for their own individual sexual acts and have an obligation to ensure that they do not engage in sexual relations with children.
6. The need to protect children from themselves and to protect alleged child victims of a sexual offence from being additionally and unnecessarily damaged by the criminal trial process. We had particular regard to the DPP's view of the significant advantages of having available to him a law of absolute liability by way of statutory rape provisions so as to render a prosecution less

traumatic for an alleged victim and to the reality that without the reinstatement of a law of absolute liability, it is impossible to protect a child from being cross examined in many cases in which, in the past, such cross examination would not occur.

7. The desirability of ensuring where an individual has sexual relations with a child under fifteen years, that once this is established, the child is protected from cross examination on any other matter and does not suffer any added trauma from the court process.

Proposals for Reform

Having considered the issues and the various submissions made to the Committee, we are of the view that new legislation should be enacted to reflect the following:-

- (a) That the age of consent remains seventeen years.
- (b) That there be a criminal offence of absolute liability* applicable to engaging in sexual intercourse (and other sexual acts to which the Criminal Law (Sexual Offences) Act 2006 applies) with a person under the age of fifteen years. The recreation of this offence of absolute liability will result in a person who does so behave no longer being able to rely on a defence of mistake as to age when charged with such offence. This will provide an absolute zone of protection for children.
- (c) That it be an offence of strict liability* to engage in sexual intercourse (and other sexual acts to which the 2006 Act applies) with a person over fifteen years but under seventeen years.
- (d) That the same penalties apply to those convicted of an offence of absolute or strict liability as currently apply to sexual offences against persons under seventeen years of age in the Criminal Law (Sexual Offences) Act 2006.
- (e) That a discretion be conferred on the DPP whether or not to prosecute in circumstances in which both persons who engage in sexual intercourse or other sexual acts (as detailed in the 2006 Act) are of proximate age, no coercion is involved and neither is in a position of trust or authority with regard to the other (such as a babysitter, a sports coach etc.). This proposal is made to ensure that the criminal law is not inappropriately applied to conduct which generates moral censure but to which application of the criminal law is inappropriate (for example, where teenagers of proximate age, engaged in a relationship, sexually experiment together). There is a similar provision contained in the 2006 Act. Where a person between 15 years and 17 years of age engages in sexual intercourse or other sexual acts (as detailed in the 2006 Act) with a person who is not more than 2 years older, where no coercion is involved and neither is in a position of trust or authority with regard to the other, consideration should be given to the making of specific provision that no criminal prosecution be instituted.

***Explaining Absolute Liability and Strict Liability and “reasonable grounds” defence applicable to the latter.**

The difference between the proposed offence of absolute liability and the proposed offence of strict liability is that in respect of the latter offence it is proposed that an alleged offender can, by way of defence, establish that he/she had “reasonable grounds for believing” the alleged victim to be seventeen years or older. This defence places the onus on the alleged offender to prove such “reasonable grounds” and requires the application of an objective test. As a consequence, there would be provided greater protection than is currently available to fifteen and sixteen year olds under the 2006 Act where the “mistake as to age” defence essentially involves a

subjective test. Moreover, it is also proposed that specific provision be made within the legislation expressly excluding the “manner of dress or demeanour” of the alleged victim as a factor which can be relied upon to establish the “reasonable grounds” defence. Of course, where sexual intercourse results from duress or coercion this defence would have no application as the alleged offender would be charged with rape.

Persons in Position of Trust or Authority

It is also proposed that it be a criminal offence of absolute liability for a person in a position of trust or authority to engage in sexual intercourse or other sexual acts (as detailed in the 2006 Act) with a person under 18 years of age. Accordingly the “reasonable grounds” defence would not be available to such person.

The 2006 Act currently defines a “person in authority” as meaning –

- “(a) a parent, step-parent, guardian, grand-parent, uncle or aunt of the victim
- (b) any person who is, for the time being, *in loco parentis* to the victim, or
- (c) any person who is, for the time being, responsible for the education, supervision or welfare of the victim.”

It is proposed that (c) be amended to read “any person who is, for the time being, responsible for the education, supervision, training or welfare of the victim”. The word “training” is inserted to ensure persons involved in sport and other types of coaching/training activities are included as being persons in a position of “trust or authority”.

Constitutional Amendment

In the context of the Supreme Court judgement in the CC case, which has been discussed at length by the Committee, Fine Gael fully agrees with the view originally expressed by the government that to reinstate an offence of absolute liability for under 15s requires a constitutional amendment. Fine Gael also notes that the government was also of the view that to provide for an offence of strict liability, a constitutional amendment is required and notes that the Committee has been repetitively advised by Counsel appointed to the Committee that any legislation that might be enacted to provide a strict liability regime, in the absence of constitutional change, would be constitutionally suspect and at risk of being struck down by the Supreme Court. It is accordingly the view of Fine Gael that it is necessary to hold a Referendum to ask the People to amend the Constitution.

The original wording in the Constitutional Amendment proposed by the government in February 2007 is more extensive than is necessary.

Fine Gael proposes that the wording should be amended to read:-

“No provision in this Constitution invalidates any law providing for sexual offences of absolute or strict liability committed against a child under 18 years of age.”

Fine Gael agrees that, in advance of any referendum, the Government should publish the Bill proposed to be enacted following the referendum, if the referendum vote should result in constitutional change.

It is noted that neither Fianna Fáil nor the Labour Party favour the reinstatement of a law of absolute liability and that instead they are proposing possible legislative amendments which we believe would in effect provide for a law of strict liability and that both Parties favour the publication of such legislation by Government, its passage through the Dail and Seanad and advocate that the Bill so passed should ultimately be referred by the President to the Supreme Court pursuant to Article 26 of the Constitution. Fine Gael does not agree with such approach for the following reasons:

- (a) It seems to us this approach is intended to seek to do what it is hoped might be possible within the current constitutional structure, rather than seeking to ensure that children receive the best protection to which they are entitled.
- (b) No proposal is made for a law of absolute liability for children of any age no matter how young simply to avoid the necessity for a Referendum.
- (c) There is an abdication of legislative responsibility to the Supreme Court depriving Irish citizens of the right to determine the extent of the Constitutional protection that should be afforded to children.
- (d) Should the legislation be struck down as unconstitutional following an Article 26 reference, we will be back where we started.
- (e) The constitutional testing of a Bill referred by the President to the Supreme Court under Article 26 has the disadvantage of lacking a factual context and if such Bill survives an Article 26 challenge, it is constitutional in perpetuity despite any new circumstances that might arise from later individual cases. Such a constitutional determination brings certainty at the cost of subtlety and excludes later Defendants in unexpected circumstances in a changed legal environment from constitutionally challenging the provisions of any such legislation.

Such approach will substantially add to the time-frame required for the enactment of badly needed legislation to protect children. It creates the possibility that following the Government drafting legislation; both Houses of the Oireachtas debating and amending such legislation; should the legislation be referred under Article 26 to the Supreme Court, it could be found unconstitutional by the Supreme Court and we would be back where we started off.

We have substantial concerns about the constitutional propriety of a Committee of the Houses of the Oireachtas recommending, suggesting or implying that the President make an Article 26 reference to the Supreme Court of legislation not yet drafted by Government and the extent to which any such recommendation violates one of the independent discretions conferred on the President by the Constitution. We are further concerned that should both Houses of the Oireachtas seek to pass a Bill in circumstances where it is known to be constitutionally questionable, the Houses of the

Oireachtas would be acting in violation of their constitutional duties under Article 15.4 of the Constitution. An additional concern is, that should the President determine not to so refer the Bill, its very enactment would open the door to a series of constitutional challenges should any prosecutions be taken under it and any such new law could become unworkable for between 2 to 3 years and the resultant delay in criminal trials could substantially add to the distress and trauma of alleged victims.

DATED THE 7TH DAY OF MAY 2009

FINE GAEL