

Protecting Children and Respecting the Rule of Law – A New ICCL Paper Outlines the Options

Strict Embargo – 10.00am – 7 May 2009

The Irish Council for Civil Liberties (ICCL) has today made available a detailed “options paper”, outlining the ways in which the Government could amend legislation to enhance child protection without resorting to a referendum on the issue of strict / absolute liability.

The paper – ***Protecting Children and Respecting the Rule of Law*** – has been prepared at the ICCL’s request by Roisín Webb BL, a practicing barrister specialising in children’s and criminal law.

It restates the Supreme Court’s view that to criminalise a person who is mentally innocent is a grave injury to a person’s dignity and sense of worth and constitutes a failure, on the part of the State, to respect, defend and vindicate the rights to liberty and to good name of the person, contrary to the State’s obligation under Article 40 of the Constitution.¹

On this basis, in the 2006 case of *C.C. v Ireland*, the Supreme Court struck down as unconstitutional section 1 of the Criminal Law Amendment Act 1935 (which rendered it an offence for a man to have “unlawful carnal knowledge” of a girl under the age of 15), because it did not provide for a defence of honest mistake as to the age of the girl in question.

Following the *C.C.* judgment, the Oireachtas enacted the Criminal Law (Sexual Offences) Act, 2006, which, in limited circumstances, allows defendants charged with sexual offences against children to argue that they had made an honest mistake as to the age of a child.

The paper includes a human rights analysis of the Government’s abortive attempt to restore a provision equivalent to section 1 of the 1935 Act, through the Twenty-Eighth Amendment to the Constitution Bill 2007. It identifies a number of human rights issues arising from the very broad wording of the proposed amendment in relation to strict / absolute liability. These include the failure fully to respect rights arising from the Constitution (the right to a good name; the right to liberty; the right to a trial in due course of law and the presumption of innocence) and under international human rights

¹ *C.C. v Ireland*, (Second Judgment), [2006] 4 I.R. 1, at 78.

law (Articles 6 (fair trial) and 8 (private and family life) of the European Convention on Human Rights).

It is possible to protect children from exploitation in a more robust manner than under the current law, without trampling upon fundamental principles of justice and fairness. This could be done by amending the Criminal Law (Sexual Offences) Act, 2006, rather than by resorting to a referendum in an effort to render the unconstitutional constitutional.

Protecting Children and Respecting the Rule of Law outlines the following five options for legislative amendment:

Option 1 – introduce an objective test for age mistake

The 2006 Act includes a defence that the person charged honestly believed that the child in question had reached the relevant age. However, the presence of such honest belief is to be judged subjectively, which means that the jury must attempt to discern the defendant's thoughts at the time of the alleged offence. If the Act were to be amended to introduce an objective test, a jury would be entitled to consider whether a reasonable person could have formed such a belief.

In its current form, the Act does provide that a court shall have regard to the presence or absence of reasonable grounds for a defendant's belief and all other relevant circumstances, but this is not as strong as providing an objective test. Child protection could be enhanced if the 2006 Act were to be amended to subject the age mistake defence to an objective test, requiring that a defendant's belief be both honest and reasonable.

Option 2 – clarify that the legal burden of proof shifts to the accused

The wording of the 2006 Act states that it is a defence for the defendant "to prove" his honest belief. However, it fails to make clear whether this shifts the legal burden of proof, or simply the evidential burden of proof.

If the evidential burden of proof shifts to the defendant, and the defendant presents some evidence on which to base his defence, it is for the prosecution to disprove that defence beyond a reasonable doubt. If the legal burden of proof shifts, then the onus remains on the accused person to establish the defence on the balance of probabilities. In other words, shifting the legal burden of proof places a more stringent requirement on the accused person.

Placing the evidential burden of proof on an accused is constitutionally acceptable, and there is no clear case law to suggest that shifting the legal burden of proof onto a defendant would be unconstitutional. In the interests of child protection, it is open to the Oireachtas to amend the 2006 Act to make it clear that both the legal and evidential burden rests on the accused to prove the defence of mistake as to age.

Option 3 – require due diligence

A due diligence requirement could be introduced so as to ensure that the person charged could not rely on the age mistake defence unless they could show that they

took all reasonable steps to ascertain the age of the child. Provisions to this effect already exist in other common law jurisdictions, including Canada and New Zealand.

Option 4 – alter the age categories for offences / introduce age gap provisions

The Oireachtas could consider altering the age categories in relation to the defence of defilement of a child and creating distinct offences in relation to children under 13 or 14 and offences relating to children under 16 (i.e. lowering the so-called “age of consent”) or 17.

Altering the age brackets would allow for provision to be made for consensual, non-exploitative sexual activities between children to be exempt from prosecution in relation to the older category of children. So-called age gap provisions which exist in other jurisdictions, such as Canada, could be considered in this regard.

Option 5 – apply even stricter standards to persons in authority

Consideration should be given by the Oireachtas of making it an offence for a person in authority to engage in a sexual act with a young person of either sex. This would be consistent with the recommendation made by the Director of Public Prosecutions (DPP) in his submission to the Oireachtas Committee on Child Protection. As the DPP suggested, such a law could deal with a wide range of authority relationships, including those between teachers and pupils, doctors (and other medical personnel) and patients, youth leaders, workers in children’s homes, clergy, sporting coaches and trainers, and other persons in loco parentis towards children.

The Oireachtas could consider creating strict liability offences in such cases, given that such persons would be in a position to know the age of the young person concerned. However, given that it would be very difficult indeed for this category of persons to show that they honestly believed the young person was over the age of 17, it may be unnecessary to remove the defence of mistake as to age in relation to such an offence.

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There are a range of other measures which ought to be taken to enhance the protection of children giving evidence in criminal trials, and these are also outlined in ***Protecting Children and Respecting the Rule of Law***.

In this respect, the report emphasises that many of the sensible measures proposed by the Joint Oireachtas Committee on Child Protection in November 2006 have yet to be implemented. These relate to the protection of children at both the investigative stage (establish specialist child protection units within An Garda Síochána; improve facilities for child witnesses at Garda Stations; consider allowing social workers to participate in Garda interviews of child complainants; provide training and education to key actors on child psychology, child development and the reaction of children to incidents of sexual abuse) and during court proceedings (improve facilities for video-recording

evidence and enhance the possibilities for children to give evidence in the hearing but not in sight of the defendant).

Amending the Criminal Law (Sexual Offences) Act, 2006 and improving the position of children giving evidence in criminal trials can significantly enhance child protection without undermining the fundamental rights of persons accused of crimes.