

## **Re 2<sup>nd</sup> Interim report of the Joint Committee on the Constitutional Amendment on Children - Absolute Liability in Statutory Rape Cases**

Good child protection from sexual abuse may at times require giving powers to the State or State agents, such as social workers or prosecutors, to scrutinise and intervene in a way that we would find excessive or invasive if the State acted in the same way in relation to adults.

We tolerate this statutory power because we know children are more vulnerable than adults in general, we know they are targeted for sexual exploitation and we know we have a responsibility to them for those reasons.

We have confidence in the State's measured use of those powers because the State acts transparently. We also know there are those who have the responsibility to scrutinise the careful and appropriate use of that power, regulators, ombudsmen, boards of directors and non-governmental organisations. These structures of accountability confirm our confidence.

Given the revelations we are encountering on a weekly basis revealing the lack of transparency and even morality of those in positions of power and the apparent lack of capacity of those whom we have entrusted with the task of holding them accountable, it is perhaps unsurprising that we now approach the issue of Absolute Liability in Statutory Rape cases with extraordinary trepidation.

This piece of child protection legislation would require a Constitutional Referendum extending powers to the legislature to make laws that hold perpetrators to strict standards of accountability. This is a piece of law that does not equivocate with those known to have committed an offence, regardless of their excuses.

But it would require a level of trust, today and in the future, that that power once conferred on our government will not be abused. It requires trust that the Director of Public Prosecution, once given back the tool of Absolute Liability in the context of the offence of having sex with a child, will continue to exercise his or her discretion with the fairness and insight that has been the hallmark of the use of these powers under the legislation from 1935 - 2006.

Unfortunately given the gaps we suspect exist in Irish public and civic life between the ideal and the reality, this may be a leap too far.

Before asking the public to grant such powers to the State, it is best practice and indeed our duty to look at all avenues short of that inflation of powers. And this is what the **Joint Committee on the Constitutional Amendment on Children** has done with regard the Criminal Law and the sexual exploitation of children.

One could argue that the nature of our system of law is to continuously experiment and refine, and therefore that the Joint Committee have made the right decisions. The difference here is that we already know what the problem is and we know what is and is not the solution.

The problem to be addressed is how to prosecute the sexual exploitation of children when the legal system relies so heavily on the child witness, when those children may be vulnerable or even uncooperative witnesses.

The solution is to lift the immense burden of the trial from the child and instead to let the facts of the case and the offence committed suffice for justice to be served. The solution is absolute liability in statutory rape cases involving children under a certain age. This is a solution which since May 2006 has been advocated by ourselves Rape Crisis Network Ireland, the Attorney General, the DPP, the former Taoiseach, Bertie Ahern, Minister Brian Lenihan when he was Minister for Children, the two independent Child Rapporteurs, Professor Finbar McAuley and Mr. Geoffrey Shannon, the Joint Committee on Child Protection and by Barnardos, the ISPCC and many other child and youth organisations. This cannot happen without a constitutional referendum.

But that solution has been rejected. What the Committee proposes is *not* this solution. Instead, they hope that reformed and improved laws and practice will look and operate almost as well as the Constitutional solution.

This is therefore an experiment on how well a more refined legal system copes; that is assuming the refinements are enacted and practiced. However, it is an experiment with children as the guinea pig and sexual abuse as the variable.

Moreover, it is an experiment that has no researcher assigned to it. There is no completion date, no analysis is planned, no recommendations anticipated.

What if the Joint Committee have gotten it wrong? Will we be able to tell? The truth is the impact of this mistaken decision will be very difficult to identify clearly.

As the DPP conceded, without Absolute Liability the behavior and appearance of child in a defilement case is now open to scrutiny during a trial. The State has not since May 2006, been in a position to protect children from the trauma of giving evidence. The Committee has made a number of recommendations that would indeed limit the questioning of a child about their dress or demeanor but none of these measures can achieve the effective protection offered by absolute liability. As a result it is probable that children and/or their parents will choose not to proceed. How will we count those cases? How will this impact of the absence of absolute liability be measured?

On the other hand, if there are children who have entered the legal system but whose case falls out of the system before reaching trial how will we know the cause? Already the DPP has admitted that of the cases that had to be withdrawn and prosecuted under alternative legislation in 2007, 'a small number' were not recharged. We can with some confidence say that those cases failed because of the lack of absolute liability, in the future similar cases will fall into a bigger pot of cases that did not proceed and no reasons will be given. How will we measure the impact of the absence of absolute liability then? Given the numbers being prosecuted are tiny in proportion to the levels of sexual violence committed, even a small number failing on this point is very significant.

Our Criminal Justice System, despite efforts on many levels, is not transparent. Because of the range of different laws used to prosecute offences of the sexual exploitation of children, tracking the impact of absolute liability and its absence is highly problematic. Identifying these cases it appears is like looking for a needle in a haystack. The filing systems of the various agencies within the criminal justice system are cumbersome and in some cases not electronic. Various measures, figures and statistics across the justice system are not comparable. The DPP has bemoaned the significant problems in making the analysis of prosecutorial practice in cases involving the sexual exploitation of children, visible. There is as yet little indication on a way forward in attaining meaningful transparency.

Lastly, if there are children who have experienced statutory rape but do not report the offence, how will we count them and how will we assess why they did not report?

Therefore, if children are being failed by the absence of absolute liability, it is highly likely we will not be able to formally measure that within the justice system. Instead, there will be the ignored, denied, minimised and silenced experiences of sexually exploited children who are not and will not be heard by the justice system. The sexualisation and sexual exploitation it facilitates and minimises, a problem which evidence shows is intensifying and accelerating, will become invisible to the criminal justice system.

What *will* be visible will be the teenagers and young adults who have experienced sexual exploitation who self harm, develop eating disorders, seek out harmful relationships, there will be broken relationships, low self esteem, depression, substance abuse, anger, anxiety, and mental illness. Some will pick up the phone to a rape crisis centre, many will not.

We have a long and shameful history of not acting to ensure good child protection until yet another sexual abuse scandal reveals the inadequacies of our current system. There is now little likelihood of a legal crisis involving statutory rape, not because the problem has gone away, but because we have effectively shielded ourselves from knowing about our children's exploitation.

Of course our government is free to put aside the advice of the Joint Committee and act with courage and conviction by putting this child protection referendum to the people.

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