

RCNI Analysis of two Oireachtas Child Protection Reports. 15th May 2009

1. The Report of the Joint Committee on Child Protection (Nov. 2006).

- They sat for an intensive 6 months and
- strongly and unequivocally recommended a referendum to facilitate absolute liability.
- They made 62 recommendations in total

2. The 2nd Interim Report of the Joint Committee on the Constitutional Amendment on Children (May 2009)

- They sat for 18 month before making their second interim report.
- They did not recommend absolute liability and therefore, did not recommend the referendum on child protection.
- They made 39 recommendations in total (the so called children's rights aspect and soft information aspect are being dealt with in separate reports).

Summary

Of the 39 recommendations made by the later Committee only 5 recs. can be deemed 'new' –

- 20 recs are repeated word for word,
- 4 are the same with slightly different sentence structure,
- 3 are equivalent,
- 3 are non-applicable in terms of comparison,
- one may already in legislation in the format recommended here which probably isn't specific enough to achieve the objective,
- 2 are contained in the 2006 report but not given the status of a recommendation,
- 1 is not necessary to recommend.

Of the 5 'new' recs. -

- 2 are details in addition to a rec. both reports have in common,
- 1 is of concern.
- That leaves two which deal with legislation in the absence of absolute liability. One of which may be open to Constitutional challenge.

More detailed breakdown

2009 recs	Subject	2006 recs	comparison	Comment	2009 new
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by no.		by no.			recommendations count from 39 total
1	Publishing any potential legislation pre referendum	52	Same rec	Nothing new	38/39
2 - 3	Rec. regarding wording of a referendum if recommended	-	N/A as based on 2007 Bill which followed 2006 report	They don't recommend a referendum	36/39
4	Early challenge by courts if new legislation	-	N/A	This is the normal operation of the (independent) law there is perhaps some doubt as to the appropriateness or point of an Oireachtas Committee making such a recommendation	35/39
5 - 9*	Legislation that would enhance strict liability if absolute liability (AL) were absent		N/A The committee recommended AL	*See table below for more detail 3 out of 5 not new	32/39
10	Codification of SO and a child abuse offence	1 + 5	Same. 2009 report acknowledges 2006 report re this rec (10.2)	There is nothing new here	31/39
11 - 30	Training and specialisation of all criminal justice personnel. Fully resourcing special measures designed to reduce trauma and	31 - 50	Word for word In 11.1 2009 report acknowledges same	Nothing new here - the RCNI have continually demanded an audit of the progress of the 2006	11/39

	improve investigation and prosecution at every level of the CJS			recommendations repeated in 2009. While we have noted some developments here does this repeat mean that these recs are all still fairly much at the same stage as in 2006?	
31	Person in authority - age of child raised to 18	21	Same rec slightly different wording	There is nothing substantively new here	10/39
32	Rec that, who a person in authority is should include 'trainer'	Described in 5.6.1		The 2006 made the broad rec and did not go into this detail	10/39
33	Rec that of who a person in authority is should include a person who has gained access as a result of auth. position	Described favourably in 5.6.2 but not a listed recommendation		The 2006 made the broad rec and did not go into this detail	10/39
34 - 35	Prosecutorial discretion in peer sex and specific listing of non-prosecutorial circumstances	24 + 27	equivalent	Nothing new	8/39
36	See below	Not rec	Not rec	A possibly objectionable recommendation	8/39
37	Exemption of marriage	Not rec		Any legislation dealing with statutory sex would have to	7/39

				accommodate those who marry below that age, as the law permits same - there is no suggestion that that law will be repealed therefore this rec should go without saying.	
38	Repeal gender discrimination	30	same	Nothing new	6/39
39	Age appropriate non-penal responses for child offenders	28 +29	same	Nothing new	5/39

***Recommendations regarding limiting defence as to cross examination of witness to promote a mistake as to age defence, therefore, enhancing strict liability.**

5	Raise the level which the accused must reach in proof the existence to a mistake when using this defence	Described favourably in 5.5.1 but not a listed recommendation	This rec needs to be more specific about exact mechanism by which level of proof was to be raised – to what level by what mechanism, measurability?
6	Onus of proof falls on defendant	This rec is not explicit enough	May already be contained in 2006 SO Act in this non explicit manner
7	Apply appropriate presumptions, exclusions and inferences, as a		This is positive

	matter of the law of evidence		
8	Exclude relying on child's dress and/or demeanour, 'consent' or previous sexual history of a child in raising the defence of honest mistake.	Described favourably in 5.5.8 but not a listed recommendation	May be open to Constitutional challenge - this would achieve the same effect as absolute liability and therefore may require a referendum to secure. This would not enhance levels of strict liability without a referendum
9	Draw adverse inference from defendant failure to mention this defence when questioned by Gardaí		This is positive

If these recommendations were enacted there is no security that the measures enhancing strict liability would stand Constitutional challenge thus leaving us back at square one.

Recommendations 36.

36. The Committee recommends that consideration be given to the possibility of specifying by law an age below which a person might not be prosecuted for the offence of engaging in a sexual act with another child. (*Chapter 13*)

The RCNI has concerns about this recommendation. Currently the age of criminal liability in the case of the most serious crimes against the person, (defined as murder, manslaughter, rape and aggravated sexual assault) is 10 or 11. This is as an exception to the general age of criminal responsibility, 12 years, for all other offences. (Section 52 of the Children Act 2001 as amended by Section 129 of the Criminal Justice Act 2006.). This recommendation seems, therefore, to envisage making an exception for sexual offences committed by children in terms of criminal liability.

The committee's thinking and rationale here needs further scrutiny.