

Feb 20<sup>th</sup> 2007

**The 7 parts of the proposed Children's referendum are as follows:**

1. An acknowledgement by the State of the natural and imprescriptibly rights of all children.
2. Restatement of the existing protection of children and parents contained in the current Article 42.5 and the extension of this provision to all children.
3. Legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children.
4. Ensuring that all children are eligible for voluntary adoption.
5. Legal authority to secure the best interests of children in any court proceedings relating to adoption, guardianship, custody or access.
6. Legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse.
7. Legal authority to create offences of absolute or strict liability in respect of offences against or in connection with children.

### **Absolute and Strict Liability**

**What is the Absolute Liability for/about?**

The referendum is required to insert a clause into the Constitution which would allow statutory rape cases under a certain age to be conducted without the defendant having the opportunity to plead honest or reasonable mistake as to age.

**The effect of a YES to the referendum:** This would minimise the trauma you would be exposing a child witness to in our court rooms because they would not be cross examined about their conduct. (They might still be cross examined, but only to prove, if necessary, that the sexual act happened and the identity of the perpetrator, there would be no further cross examination.)

**The effect of a NO to this referendum:** If we lose this referendum Ireland will have no way to protect a minor from being cross examined to make the defendant's case that he/she made a mistake as to age. We would be the only common law jurisdiction in the world not to have Absolute Liability provisions.

**Definitions:**

**Note the government have used the terms absolute and strict liability in a very particular way. They are as follows:**

**Absolute Liability:** no defence of honest mistake as to age can be made once sexual activity with a child under the age of 16 has been established.

**Strict liability:** in the case of children 16 and 17 years old where age is an issue the onus will be put on the accused to satisfy the court that he or she had reasonable grounds for believing the child was aged 18 or over. (The children who fall into this category is dependent on the age of consent which is not being debated in this referendum)

**A child:** anyone under the age of 18

**Hard information for the purpose of Vetting:** a list of convictions only and therefore those on the sex offenders register. It is the only information that gardai can currently refer to in vetting and alerting organisations and employers of a potential employees suitability for a post working with children or vulnerable adults.

**Soft information for the purpose of Vetting:** information known about a person short of a criminal conviction, ie it might encompass being identified as a suspect in a reported incident of child abuse, being let go from a post for improper behaviour towards a child, being investigated for child abuse, being charged and going to court but not being found guilty.

### **Facts:**

**The law before the statutory rape crisis:** Before the CC case (April/May 2006) Section 1(1) of the 1935 Act dealt with under 15 and section 2(1) dealt with cases involving 15 to 17 year olds. They were both statutory rape subject to strict liability, but sentencing was different.

**The age of consent** was 17 for girls and, by implication of sexual assault legislation, 15 for boys and 17 for homosexual males.

**The CC case** involved a 19 year old male and a 13 year old girl. The accused admitted to thinking she was 16 (therefore guilty to statutory rape) because he thought that was the age of consent.

**The Mr A case involved** a 41 year old man serving three years for the statutory rape of a 12 year old who sought release from prison given the law he was charged under no longer existed following CC.

**The law now:** under the May **2006 Act**, statutory rape exists for all sexual activity with people under the age of consent but with the possibility of a defence of honest mistake as to age. The age of consent is 17 for both boys and girls. Girls are exempt from prosecution for underage sex because they risk pregnancy and the Minister did not wish to criminalise motherhood. No such consideration is given to boys and fatherhood. The 2006 Act provides that if anyone convicted under this offence is not more than 24 months older than the child under 17 years of age, they shall not be subject to the Sex Offenders Act 2001 (i.e. peer sex will not result in someone being registered as a sex offender).

**The referendum and new laws** would enable the government to enact legislation to reintroduce strict liability in sexual offence cases involving children under a certain age and to allow for the restricted sharing of soft information.

## The Strict Liability Referendum is about ensuring the child witness in a statutory rape case is protected, as far as possible, from further harm in our courtrooms, when the State prosecutes sexual offenders.

- This referendum is urgently needed to adequately protect children in sexual offences cases.
- Sexual Abuse cases involving children as vulnerable witnesses will be very hard to bring to court and prosecute without this extra measure which places a strict liability on the adults who chose to have sexual relations with young people and children.
- Without Strict liability, the decision to prosecute and hold to account alleged perpetrators must weigh up the potential harm to the child witness against the benefit to society. Given the harm is potentially significant no society can ask a child to pay that price.
- If less and less cases make it to court then not only will access to justice be limited but we will have less and less of a picture of the levels and prevalence of this type of offence.
- Without this zone of Strict liability our court rooms will remain hostile battlegrounds for our child victims.
- Therefore, without a strict liability referendum the State will struggle to hold to account those who prey sexually on young people without running the risk of causing harm to the child.

## Will this criminalise young men who have sex with underage girls who tell them they are of age?

1. To focus on the girl's (or boy's - the legislation will be gender neutral) behaviour is wrong. Instead, we should always **ask ourselves about the adult's behaviour**. The young man in these circumstances has chosen to engage in a sexual act with a young girl. Their *choice* to act gives them a role and responsibility in that act. All adult choices carry responsibilities and risks. The risks (including criminal sanction) associated with having sex with young people are widely known. They choose to take that risk.
  - As a society we ought not shy away from or fear demanding that adults take responsibility for the choices they make around their sexual activity.
2. Notwithstanding point 1, the DPP includes public interest in his decision to prosecute cases. There is little public interest in prosecuting peer sex which apart from the underage aspect does not involve any other aspects of abuse. **Since 1935 successive DPPs have overwhelmingly chosen *not* to prosecute young men in these circumstances.**
3. We have a duty to support young people in making safe and responsible choices around their sexual conduct. They should be fully equipped to do so. The State needs to provide a fully comprehensive **mandatory sex education programme** for all stages of a child's development.

## Will it mean unfair trails for defendants?

- Asking that an adult takes more responsibility for his/her behaviour with a child than the child involved, is not too much to ask. Particularly when

you weigh up the harm to the child against the 'right' of the defendant to have no responsibility for their actions and choices and their 'right' to have sexual access to underage children.

- A defendant still has a number of other defences available to them. However, if an adult is proven to have engaged in sexual activity with a child under the age of strict liability, it is not available to him or her to argue that the fault lay with the child because the child looked, acted, pretended or lied about being over the age of consent. Protecting children from themselves if necessary is a legitimate role of the State and the Law.
- It has been recognised by many including the Minister for Justice that there is a need to rebalance the scales of justice.

### **Will this just criminalise teenage consensual sex?**

1. Any sex under the age of consent (currently 17 for both boys and girls) is against the law regardless of Strict liability laws. (The age of consent is *not* being put to referendum.)
2. In practice because we have the mechanism of DPP discretion in bringing cases to court, we do not tend to prosecute young sexually active people unless there are other elements of abuse involved.
3. Even if the parents apply pressure it is very difficult to prosecute a case if your primary witness is a reluctant witness.
4. Our prisons are not full of sexually active underage teenagers.

### **Does this referendum seek to ignore the thinking and opinion of the Supreme Court?**

**No. In fact it is a direct response to the Supreme Court interpretation of the law.** It is the role of the executive (the government) and the people to make the law not the Supreme Court.

### **Does this referendum seek to overturn the conclusion of the Supreme Court decision?**

**Yes... and this is entirely appropriate.** As servants of the law the Supreme Court judges performed the duties of their role and upheld the law, striking down statutory rape. But the Law belongs to the people it serves. A referendum on the law allows the people to transform the law as they see fit. It is entirely appropriate for the people, whose laws these are, to decide that if the effect of our current law is to make illegal this measure of child protection, then we need to change that law.

### **Will this mean all sexual activity under the age of 18 are subject to Strict liability?**

Under the wording of the referendum there is the potential for the government to enact strict liability up to the age of 18 under. The RCNI understand this wording to be necessary, not to permit the enlargement of the scope of strict liability beyond the Child Protection Committee's stated outer limit of 16, but rather because of the legal definition of a 'child' i.e a person under the age of 18. There has been no indication that any political party, and certainly not the government of the day, has any political will to enlarge the scope of strict liability beyond the bounds of the 1935 Act (which cloaked young people below 17 in the statutory protection of strict liability). Indeed all indications are that the outer limit of strict liability is to be 16 if not 15. Legislators are highly

likely to be sensitive to current social mores and being ultimately answerable to the people, they are perhaps best placed to decide these limits.

### **Could Strict liability criminalise or harm older teenager defendants who are over the age of consent but below the age of maturity – ie 17 year olds?**

The RCNI are of the opinion that this potential conflict of competing best interests of two children/young people is *not* best remedied by the non-introduction of a regime of strict liability but rather by the careful consideration of the appropriate application *of that regime in those particular circumstances*. There will undoubtedly be a number of cases which come to the attention of the authorities which lack elements of exploitation/coercion or abuse. Those same cases may in fact nevertheless have child protection issues. Other cases may require careful consideration as to disposal (diversion programmes, non- requirement of registration under the Sex Offenders Act 2001<sup>1</sup>) none of these examples negate the need for a regime that offers appropriate protection to children/young people. In addition many of the proposals of the Child Protection Committee look at how child offenders (ie those aged 17) could be treated in terms of punishment, support and child protection.

### **Will new laws under this referendum mean morally blameless people who made an honest mistake as to age are criminalised?**

To make an honest mistake as to age is not the same thing as being 'morally blameless'. If an illegal act is committed by an adult through ignorance, given the potential harm of that act, then it is reasonable that there should be some moral responsibility attached to that ignorance.

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<sup>1</sup> As is reflected in the case of close proximity in age cases under the 2006 Act.