James Hamilton, Director of Public Prosecutions

February 2009

Director of Public Prosecutions

Prosecutions Under the Criminal Law (Sexual Offences) Act 2006

This is a slightly revised version of a submission which I made to the joint Oireachtas Committee on child protection on 29 October 2008. It deals with the current state of prosecutions for defilement under the Criminal Law (Sexual Offences) Act 2006 and with the effects of that Act as well as discussing a number of possible amendments to the law.

In cases involving girls under the age of consent who had been raped there were a number of significant advantages in the use of the statutory rape provisions of the Criminal Law Amendment Act, 1935, rather than common law rape. It was easier to secure convictions for statutory rape and cases were likely to be less traumatic for the girl involved. It was an advantage that there was no need to prove actual lack of consent. ([1]) Other questions could become relevant where consent is in issue, such as the sexual history of the injured party, or her conduct towards the accused. For this reason statutory rape could sometimes be regarded as the preferable charge even if common law rape could have been an alternative.

Since the 2006 Act was introduced, there is now a defence of honest mistake as to age in defilement cases. As a result where the facts of a case amount to rape or sexual assault (where age is of no relevance) there is no longer in many cases a significant advantage in charging defilement. While one would still avoid the need to prove lack of consent in many cases this is offset by the need to establish that the accused knew the victim's age.

The practical impact of the loss of strict liability cannot be assessed on the basis of a simplistic comparison of numbers of prosecutions before and after section 1 of the 1935 Act was declared unconstitutional.

The unlawful carnal knowledge prosecutions which were in progress at the time of the declaration of unconstitutionality spanned the years 2000 to 2006, and were each at different stages in the criminal process. Some had been directed upon, some were awaiting trial while others had concluded and were awaiting sentence. In the event of the finding of unconstitutionality the charges under the Criminal Law Amendment Act, 1935, which had been initially directed had to be reconsidered. A small number of cases were rendered un-prosecutable, while in others alternative charges for sexual assault or for other offences were substituted on the facts of each individual case. Files are considered on the basis of the available criminal offences at the date of the offence and at the date

(1) Criminal Law Amendment Act 1935, s.1(1): An accused was precluded from raising the defence of belief that the person in question had attained the age threshold of 15.

of direction of the charge. A number of different offences may arise out of a particular set of facts and this is not peculiar to the area of sexual offences. Just as in a case which concerns a drunken brawl the prosecutor might select charges of assault simpliciter, assault causing harm, affray, violent disorder or a combination of the above, it may be open to the prosecutor in a case which concerns sexual activity between an adult and a child to consider charges for a number of different offences.

Quantifying comparative numbers of prosecutions for sexual offences involving children in the years before and after the *C.C. v Ireland* ([2]) case may give a misleading picture due to the unusual circumstances surrounding the loss of section 1 of the 1935 Act as an option. Cases which were pending when *C.C. v. Ireland* was decided were examined and where other charges were appropriate they were brought. In a small number of cases no other charges were appropriate and in some cases injured parties no longer wished to proceed. The substitution of sexual assault and other charges for section 1 charges muddies the waters from a statistical perspective in the years both before and after the finding of unconstitutionality. A further complication is that the DPP's files are classified on the basis of the year in which they are received in our office. Such files may relate to offences which took place months, years, or decades previously. They may not reach court for months or years afterwards. This creates further difficulties from a statistical standpoint if what is sought is a year by year comparative analysis.

Accordingly, we cannot definitively say that we are prosecuting either more or less child rapes now than we were previously, nor is a comparison between unlawful carnal knowledge and defilement appropriate as the new offence under the 2006 Act is broader in scope than the old section 1 of the 1935 Act.

In section 1 offences the birth certificate of the injured party was the most important proof, and the honesty or reasonableness of the defendant's belief as to the child's age was irrelevant. This meant that the charge of unlawful carnal knowledge was an attractive one from the prosecutor's point of view. The defence of consent was not open and hence the scope for cross-examination of the injured party was limited. Many cases resulted in a plea and the injured party did not have to give evidence. Cases were prosecuted using the Criminal Law Amendment Act, 1935 even though rape charges or sexual assault charges could have been preferred, as they had to be when the 1935 Act was no longer available. The maximum penalty for breach of section 1 was life imprisonment, the same as for rape.

(2) [2006] 4 I.R. 1.

Number of unlawful carnal knowledge cases prosecuted prior to the C.C. decision

Year	Number of files received	Number of prosecutions	Expressed as % of total
2003	64 (29 relating to a girl under 15, 35 under 17)	19	30%
2004	64 (29 relating to a girl under 15, 35 under 17)	20	31%
2005	75	18	24%

2007 Defilement Analysis and Statistics

Year	Number of Files received	Number of prosecutions	Expressed as % of total
2007	72	25	35%

Analysis of 25 cases of defilement ([3]) directed in 2007 shows the Criminal Law (Sexual Offences) Act 2006 is being used mainly in circumstances where there is consensual sexual activity, but where that activity clearly amounts to sexual exploitation due to such factors as a wide disparity in power. Frequently this arises where there is a large discrepancy between the ages of the suspect and the complainant. There can also be an abusive relationship arising from abuse of a position of trust or authority.

(**3**) The cases are those in which a defilement prosecution was directed on a file received between 1 January 2007 and 31 December 2007 and reflect developments which took place before October 2008. At that time a decision had been taken not to prosecute in 45 cases and a further two cases were pending direction. Where a prosecution for a different offence was directed the file would be re-classified to reflect that fact and would not be included in the 72 cases referred to above. This table builds on a preliminary analysis of 13 files which was conducted in June of this year, with broadly similar age profiles (14.3 years and 26.38 years respectively). See "Reforming the Laws on Sexual Violence - Crimes of Sexual Violence: Debates & Developments from the Prosecution Perspective," a paper delivered by the Director of Public Prosecutions at the Centre for Criminal Justice and Human Rights, UCC, June 27 2008.

Finally, I cannot emphasize too strongly that because this Act is very recent this information has to be treated with great caution. Cases of child abuse perpetrated by relatives and other persons in a position of trust frequently do not come to light until many years have passed. There is a distinct possibility that for this reason such cases are underrepresented in the cases dealt with to date under this section. It is not possible to say that trends which have been identified in the sample will continue in the long term.

Age Difference in 2007 cases which are being prosecuted

Age Difference	Number of Files	Percentage
0 – 4 years	4 files	16%
6 – 9 years	7 files	28%
10-20 years	9 files	36%
More than 20 years	5 files	20%

The **average age of the injured party at the time of the alleged offence was 14.64**, while the **average age of the accused was 28.27.** In 84.61% of the cases there was an age difference of 6 years or more.
Of the 25 cases being prosecuted, 13 are awaiting trial (52%). In one a judicial review of the decision to prosecute is pending (4%). In one a jury acquitted the accused (4%). In 10 cases pleas of guilty have been entered (40%).

As yet sentences have not been passed in a sufficient number of cases to allow for meaningful analysis.

Implications of an Absolute or Strict Liability Offence for Statutory Rape

It is of course a question of policy for our elected representatives at what age consent should be fixed and, subject to constitutional considerations, whether there ought to be an age below which absolute or strict liability attaches. The Oireachtas Committee on Child Protection had the benefit of hearing a range of views on these issues from bodies including the Crisis Pregnancy Agency, the Children's Rights Alliance, The Ombudsman for Children and Barnados and thus should be in a good position to make the necessary value judgments and to balance the need to have proper regard for the sexual and social autonomy of maturing young people with the need to ensure their protection from exploitation.

1

There are always tensions between the idea that the law should promote an ideal standard of behaviour, and the view that a law which is widely disobeyed brings the law as a whole into disrepute. It is generally accepted that the law should not attempt to impose an unreal or unattainable standard. In this connection it is perhaps worth noting that research shows that the median age of first sexual intercourse in Ireland is 17 ([4]), meaning that whilst a substantial minority under the age of 17 have had sex the majority of young people of that age have not.

It would be possible to have an amendment to the Constitution to permit the re-introduction of a protective regime which would reinstate strict or absolute liability in respect of persons engaging in sexual intercourse with a young person below the age of consent. This would in principle criminalise factually consensual([5]), non-exploitative teen peer sexual exploration (an objection made by the Ombudsman for Children in her submission to the committee, by the Children's Rights Alliance who believe that 'no child under 18 should be prosecuted for an offence of strict or absolute liability' and the Crisis Pregnancy Agency). The reality is that that we have always relied on prosecutorial discretion as a mechanism for keeping such cases from being prosecuted. As Professor McAuley informed the Committee in his capacity as rapporteur for the legal protection of children, the 1935 Act was somewhat 'over-inclusive' in that it did not in principle distinguish between the predatory older male and the boyfriend. I am pleased to note that Professor McAuley notes that I and my predecessor nonetheless did observe that distinction and were reluctant to prosecute in cases of sexual experimentation between people of comparable age on the basis that there was no public interest in maintaining such prosecutions. Nevertheless, it has not been uncommon for parents to seek prosecutions in such cases. It is also sometimes the case that girls claim that a consensual relationship was not in fact consensual when a parent finds out about it. I believe the analysis of our 2007 defilement cases demonstrates a continuation of prosecutorial restraint in regard to cases involving consensual sexual relations between persons of a comparable age.

However, it must be remembered that persons of comparable ages can be involved in abusive and exploitative relationships that can manifest in particular contexts and thus retaining the ability to prosecute in such circumstances can be a valuable prosecutorial 'tool'. I do however have some sympathy with the view that this is not the ideal way to deal with such matters and that it may well be preferable to deal with the circumstances of non-exploitative sexual exploration by persons of a comparable age in the context of a systematic

(4)Layte *et al*, *Irish Study of Sexual Health and Relationships* (Department of Health & Children, Crisis Pregnancy Agency, Economic and Social Research Institute and Royal College of Surgeons in Ireland, Dublin, 2006).

(5) Although not legally consensual.

review of sexual offences. Like Professor McAuley I too am strongly in favour of codification. The arguments in favour of codification appear compelling when one considers the sheer volume of relevant legislation covering sexual offences in our jurisdiction.([6])

The main advantages which would flow from the codification process are of course accessibility and comprehensibility. These advantages are important in relation to all our law, but perhaps particularly relevant in relation to sexual offences, an area of law which universally impinges on such intimate and private aspects of our humanity. Moreover the law should be informed by solid, empirical research valid in the Irish context, and should enforce and affirm the agreed values of our society.

Finally, the idea has sometimes been put forward that as well as an age below which consent is not a defence there should be a requirement of a minimum age gap between the parties in order for an offence to be committed. This would significantly reduce prosecutorial discretion. However, if defilement was not being used to any significant extent to prosecute cases where rape or sexual assault charges might also lie this would not be such a problem. The fact that we have to date not used the new section to any significant extent in this manner does not mean that we will not wish to do so in the future.

Impact of the Loss of Strict Liability on Prosecutorial Policy

The loss of strict liability means that where honest belief as to age is in issue then other questions can become relevant, such as the sexual history of the injured party, or his or her conduct towards the accused, making a successful prosecution more difficult, particularly in the case of a stranger or a newly-met acquaintance, where the defence is far more likely to be successful. A young girl or boy going out to a bar or disco, for example, will frequently dress so as to appear older than she or he is, particularly if hoping to buy or consume alcoholic drink, or be let into an establishment with a door policy on age. Of course, there is a perfectly stateable argument that some form of honest belief defence ought to be open in such cases.

The task of prosecuting in such cases is now immensely more difficult as the 2006 Act does not require a belief as to age to be objectively reasonable. The accused need only raise the issue and it appears that the onus is on the

(6)In reverse order they include: Criminal Law (Sexual Offences) (Amendment) Act 2007, Criminal Law (Sexual Offences) Act 2006, Sex Offenders Act 2001, Child Trafficking and Pornography Act 1998, Criminal Law (Incest Proceedings) Act 1995, Sexual Offences (Jurisdiction) Act 1996, Criminal Law (Sexual Offences) Act 1993, Criminal Law (Rape) (Amendment) Act 1990, Criminal Law (Rape) Act 1981, Criminal Law Amendment Act 1935, Incest Act 1908, Offences Against the Person Act 1861.

prosecutor to show that the accused did not have an honest belief that the child had attained the age of consent. Whilst the court is to have regard to the presence or absence of reasonable grounds in deciding whether the accused in fact honestly believed the other party was of full age an honest belief, even if unreasonable, will still apparently afford a defence.

I should add that in the light of the *C.C.* case we have taken the view that the proper interpretation of section 2 of the 1935 Act is that it does permit a defence of honest mistake as to age. Since there is a current constitutional challenge to that section before the courts in which the interpretation of the section is in issue I do not think it appropriate to say any more about this issue.

Similarly, there is a constitutional challenge to section 3 of the Criminal Law (Sexual Offences) Act 1993, the offence of buggery of a minor ([7]). I am arguing the position that section 3 does not create an offence of absolute liability and that the normal *mens rea* requirement applies as it is always open to an accused (at least in principle) to raise a defence as to mistake of age.

Alternatives to the Reintroduction of Strict Liability

Strong arguments have been advanced in favour of not reintroducing absolute liability in respect of an offence that is serious and carries such a high level of stigma and potential punishment. Such arguments are necessarily less strong in respect of the re-introduction of strict as opposed to absolute liability particularly in relation to younger children, for example those below 13. A further possibility would be to create an offence of strict liability to apply to persons in authority who may be reasonably expected to know the age of their charges. This of course would require what Prof. Tom O'Malley referred to as 'a more finely tuned set of offences than is currently envisaged'. ([8]) The question arises to what extent the law could be strengthened by statute without running foul of the Constitution or the European Convention on Human Rights. Would it be constitutional, for example, to reverse the burden of proof on to an accused who sought to assert a belief as to age? Would it be constitutional to require such a belief to be objectively reasonable as well as honest? If the burden is shifted, should the accused have to prove that belief on the balance of probabilities or would it be sufficient for the accused to raise a doubt?

---

(7)*J.P. v. D.P.P.*

(8)A paper given by Tom O'Malley, "Criminalising Child Abuse and Protecting Constitutional Values", Centre for Criminal Justice and Human Rights, UCC, June 27 2008.

Such a legislative regime could be seen by many as providing a reasonable balance and moreover could avoid the need for a constitutional amendment. Whilst such legislation could be vulnerable to challenge, a referral under Article 26 could decisively settle the matter.

One possible reform which I strongly advocate is to deny accused persons the right to cross-examine an injured party in person. Either the accused should have a lawyer or if unrepresented questions should be put through the judge. Finally, there is a need to rely more on the possibility of giving evidence by videolink. The facilities to do this are now in place.

Concluding Comments

The operation of the Criminal Law (Sexual Offences) Act 2006 is, as yet, in its infancy. We do not yet know the full implications of the change in the law. Over half of the 2007 cases currently being prosecuted are not yet concluded - 52% of them are awaiting trial.

Before the change in the law proof of the unlawful sexual intercourse coupled with proof of age fulfilled the burden of proof on the part of the prosecution in prosecutions under the 1935 Act and in many cases the child did not have to give evidence. Since the change in the law the behaviour, demeanour and appearance of the child are all likely to be open to scrutiny and assessment in a courtroom if the child is required to give evidence.

Under the old law, we were generally in a position to protect the child from the trauma of giving evidence. Usually now the child must give evidence. As a result, it is open to the jury to decide whether the accused made an honest mistake as to the age of the child. In a trial which unavoidably takes place some years after the commission of the offence no matter what steps may be taken the jury will see a person considerably older than at the date of the commission of the alleged offence and this may colour the jury's approach.