

THE CRIMINAL LAW RELATING TO SEXUAL OFFENCES AGAINST CHILDREN

INTRODUCTION

The purpose of this submission is to set out the views of the Director of Public Prosecutions in relation to the substantive criminal law relating to sexual offences against children and generally to address issues within the committee's terms of reference. The submission does not discuss sexual offences against mentally impaired persons although such offences may be committed against children.

THE PRINCIPAL SEXUAL OFFENCES

Firstly, it may be of assistance to recall the principal elements of the substantive law relating to sexual offences against children prior to recent events.

The principal offences which were applicable prior to the *CC*¹ case are:

Rape at Common Law: This consists of sexual intercourse by a man with a woman who does not consent to it. The *actus reus* (i.e. the action which constitutes the criminal offence) is penile penetration of

¹ *C. C. v Ireland, the Attorney General and the Director of Public Prosecutions*, unreported, Supreme Court, May 23rd 2006.

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the vagina. The offence is gender specific in that it can only be committed against a woman. While only a man can commit the actual act itself a woman can be convicted as aider and abetter of such an act. The offence can be committed against a girl or woman of any age.

Sexual Assault: This offence encompasses what were formerly two separate offences of indecent assault upon a male person and indecent assault upon a female person. There is no statutory definition. The offence consists of an assault accompanied by circumstances which are objectively indecent. Consent is a defence if the complainant is 15 or over but not if the complainant is under 15. The offence is gender neutral. Prior to 1990 the law provided different penalties for indecent assaults on boys and girls.

Aggravated Sexual Assault: The offence is sexual assault involving serious violence or the threat of serious violence or which is such as to cause injury, humiliation or degradation of a grave nature. It is gender neutral.

Rape under section 4 of the Criminal Law (Rape) (Amendment)

Act, 1990: This consists of a sexual assault which includes either (a) the penetration of the anus or mouth by the penis or (b) the penetration of the vagina by any object held or manipulated by another person. Section 4(a) rape is gender specific in that the act itself can be committed only by a man, though a woman may be convicted as an

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aider and abettor. The offence may be committed against either a man or a woman. Section 4(b) rape is gender specific in that it can be committed only against a woman, but can be committed by persons of either sex.

Buggery: This offence originally penalized anal intercourse by a man with another man, with a woman, or with an animal. Consent was not a defence. After section 2 of the Criminal Law (Sexual Offences) Act, 1993, the offence was abolished except where one of the parties is under 17 or mentally impaired, or where the buggery or attempted buggery is with animals. The offence could be committed against either a male or a female. The act itself could be done by either a male or a female. A female engaging in an act of buggery with a male under 17 years would commit the offence unless, of course, the act was without her consent. The Criminal Law (Sexual Offences) Act 2006 repealed the offence of buggery contrary to section 3 of the 1993 Act, and subsumed it into the new offence of defilement of a child.

Incest: This consists of either (a) a male having sexual intercourse with a woman who to his knowledge is his mother, sister, daughter or granddaughter, or (b) a woman over 17 who with her consent permits her father, grandfather, brother or son to have sexual intercourse with her. While both sexes can commit the offence, there are important distinctions between the two. A man commits the offence regardless of whether the act is consensual. A woman commits the offence only if

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she consents to intercourse. It would appear likely that the legislator did not consider the possibility that a man could have sexual intercourse against his will or while his will was overborne as otherwise this distinction could be difficult to justify.

Gross Indecency: Up until the enactment of the 2006 Act in June of this year, an offence of gross indecency criminalized acts falling short of buggery between a male person and another male person who was under 17 years of age or a mentally impaired male person of any age. Attempted gross indecency was also an offence as was soliciting or importuning for the purposes of gross indecency. The 2006 Act has repealed the sections of the Criminal Law (Sexual Offences) Act, 1993, in which the offence of gross indecency was contained, and has left a significant lacuna. This has the effect of decriminalizing consensual behaviour which falls short of buggery involving persons over 15. Where an older man abuses a boy if the boy is over 15 it will be necessary to charge sexual assault and prove the absence of consent. Where the boy is under 15 it is not a defence to a charge of sexual assault to prove that he consented by virtue of section 14 of the Criminal Law Amendment Act, 1935.

Causing or Encouraging Sexual Offence upon a Child: This new offence is contained in the Children Act, 2001. Section 249 creates an offence for persons having care or control of children of causing or encouraging unlawful sexual intercourse or buggery with a child (under 17), or causing or encouraging the seduction or prostitution of the child,

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or a sexual assault on the child. A person is deemed to have caused or encouraged unlawful sexual intercourse or buggery with any child with whom sexual intercourse has taken place. Section 17 of the Children Act, 1908, as amended by the Criminal Law Amendment Act, 1935, had contained a similar offence in relation to girls. The new offence is gender neutral.

Unlawful Carnal Knowledge (Also known as Statutory Rape)

Prior to the decision in *CC* this picture was completed by the two offences of unlawful carnal knowledge with a female created by sections 1 and 2 of the Criminal Law Amendment Act, 1935. The offences respectively penalized any person having sexual intercourse with a girl under 15 (section 1) or under 17 (section 2). Only a man could commit the act in question, but a woman could be convicted as aider and abettor. The female participant in the act could not, however, be convicted as an aider and abettor (*R v Tyrell* [1894] 1 Q.B. 710 which held that since the statute was created for the protection of girls the female cannot be convicted as a party to it).

The key feature which distinguished statutory rape from common law rape was that it was not necessary to prove the absence of actual consent. Section 1 of the Act was struck down in *CC* on the grounds that it afforded no defence to a man who had a mistaken belief that the

girl was above the age-limit provided in the section. Section 2 has now been repealed by the Criminal Law (Sexual Offences) Act 2006.

WHAT TO PUT IN PLACE OF THE STATUTORY RAPE LAW

The statutory rape law fulfilled a vital place in the scheme of criminal law relating to sexual offences against children. In principle most acts amounting to the statutory rape of a girl under the age of 15 ought also to amount to sexual assault because of the provisions of section 14 of the Criminal Law Amendment Act, 1935 under which the fact that consent has been given by the under 15 is no defence to a sexual assault². They may also amount to common law rape. However, there were a number of significant advantages in the use of the statutory rape provisions rather than common law rape which made it easier to secure convictions and which were likely to be less traumatic for the girl involved. These include:-

- No need to prove actual lack of consent. While section 14 of the Criminal Law Amendment Act 1935 provides that consent is not a defence to a charge of indecent assault on a person under 15, this would not preclude

² Section 14 of the Criminal Law (Amendment) Act 1935 is not without its interpretative difficulties, given that by definition there cannot be an assault if the complainant has consented to the acts in question. Geoghegan J. interpreted the section in *C.C. v Ireland, P.G. v Ireland*, unreported Supreme Court, July 12th 2005 at p.9 *et seq*, recognising the problematic wording. He said: "Although the draftsmanship could have been more accurate it is quite clear what the section means. Notwithstanding the absence of consent, the acts which would otherwise be an assault are to in fact constitute an assault if the complainant is under the age of fifteen years." Where rape is charged it is necessary to prove the absence of consent. In England the Court of Criminal Appeal has held that lack of consent may be proved by showing that by reason of age or lack of understanding due to mental handicap the complainant did not give consent; see *R v Howard* [1996] 1W:L.R. 13, *R v Malone* [1998] 2 Cr. App. R. 447. There appears to be no Irish case in which the issue of inability to consent by reason of age has been considered.

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an accused in a case where the victim consented from raising the defence of belief that the person in question was over that age.

- It is reasonable that there should be an age at which sex with a young person should be an offence, even if that person consents. Frequently there can be actual consent as where a young person becomes infatuated with an older authority figure who should not be permitted to take advantage of this situation. In some cases there can be a degree of ambiguity concerning the question of actual consent, particularly where drink is involved.

- Where consent is in issue then other questions can become relevant, such as the sexual history of the injured party, or her conduct towards the accused. For this reason statutory rape charges could sometimes be regarded as the preferable charge even if common law rape could have been an alternative.

For these reasons it is necessary that there be a replacement law to that struck down. Of course, the Criminal Law (Sexual Offences) Act 2006 has now been enacted but it is understood the Committee wish to review the matter afresh, in other words, to review the legal position after the CC decision as if we were starting with a blank sheet.

WHAT SHOULD A REPLACEMENT LAW CONTAIN?

Age

It is question of policy what age of consent should be fixed. There are conflicting 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. The law should not attempt to impose an unreal or unattainable standard.

It is worth noting that there appears to be a widespread public belief that the age of consent is 16 (as in Britain). Indeed, it is not uncommon for suspects when asked if they knew the girl's age to say they believed her to be 16 thereby admitting to the commission of an offence under section 2.

The suspect's knowledge of the victim's age

This is the central issue on which the CC case struck down section 1. The new law must contain a provision allowing a defence as to belief concerning age, or else there must be a constitutional referendum to permit the re-enactment of a strict liability offence.

Should there be a defence as to age? There are practical difficulties attached to allowing such a defence. In the case of statutory rape by a teacher, relative or other authority figure, such a defence is not very likely to succeed. In principle it is not clear why such a defence should be allowed to persons in authority. These people will either know the injured party's age or be in a position to know it. In the case of a stranger, or a newly-met acquaintance,

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the defence is far more likely to be successful. A girl going out to a bar or disco, for example, will frequently dress so as to appear older than she is, particularly if she is hoping to buy or consume alcoholic drink, or be let into an establishment with a door policy on age. The problem is compounded if it becomes a defence to show, in a charge of having sex with a girl under 15, that she was in fact 15 or 16, even though that would itself be an offence.

The defence of belief as to age

If there is to be such a defence, then it should be tightly defined. It is suggested that in order to afford a defence the suspect's belief ought have to be both an honest one and reasonable in all of the circumstances and perhaps arrived at following reasonable enquiry. It would also be desirable to create a presumption that the accused knew the true age of the injured party (subject to consideration of any constitutional issues which might arise).

If belief as to age is to be a defence any legislation needs to take account of the situation where the accused reasonably believed the girl to be older than her actual age but where sexual intercourse with a girl of the age the accused believed her to be would still be an offence. One solution would be to create a general offence of having unlawful sexual intercourse with a girl under the age of 17 and a more serious offence of having sexual intercourse with a girl under the age of 15 years. The jury could then convict of the general offence where the accused satisfied them that he reasonably believed the girl who was in fact 14 or younger to be 15 or 16 years of age. It would also permit a

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prosecution to be taken for the general offence where, for example, a 14 year old girl told the accused she was 15 or 16 prior to intercourse.

A CONSTITUTIONAL REFERENDUM

However, notwithstanding the unanimous decision of the Supreme Court in CC I believe that a reasonable case can be made for a strict liability offence on grounds of policy as no matter how tightly an age provision is defined it is likely to be relatively easy to get around it in many cases. On the other hand it can be forcefully argued that a strict liability rule could be unfair where a girl looked over the age of consent and had lied about her age. Strict liability laws have been accepted as legitimate in other jurisdictions. It would now require a constitutional referendum to restore a strict liability rule. While a provision dealing solely with unlawful sex with young people might sit oddly in the Constitution it might be worth giving consideration to such a provision in the context of a new Article dealing with the rights of children such as was recommended by the Constitution Review Group³, although the latter recommendation was for a general statement that in all actions concerning children the best interests of the child should be the paramount consideration⁴ and such a statement with nothing more would hardly achieve the intended aim. It might, however, be appropriate to have a provision relating to sexual

³ Report of the Constitution Review Group, May 1996.

⁴ The Review Group recommended at p. 337 that a revised Article 41 should include *inter alia* "an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities, the best interests of the child shall be the paramount consideration." The Review Group had suggested at p. 329 that "any such provision might be modelled with the appropriate changes to suit an Irish context, on Article 3.1 of the CRC [Convention on the Rights of the Child]..."

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offences against children in the context of an Article setting out a list of rights applicable to children.

SHOULD THE OFFENCE BE GENDER-NEUTRAL?

The preponderance of the submissions to the Committee, I understand, argue for a gender-neutral offence. I am not at all convinced that this is a correct approach, principally for practical reasons. In essence, I do not believe, for reasons which I will develop, that a gender-neutral provision is practicable unless absence of consent becomes a defence to a charge. Once consent becomes an issue the protection of young persons, which is the purpose of the law in this area, can be seriously undermined.

The attraction of the gender-neutral approach is obvious. In an age which rightly seeks to avoid sex discrimination and gender stereotyping it seems an obvious approach. The Constitution and international human rights instruments rightly support equality between the sexes.

But equality under the Constitution does not require that all situations be treated alike – indeed that would be inequality. Like situations should be treated alike, and unlike situations unlike. The law is not merely entitled but obliged to have regard to relevant differences.

It is interesting to note that the existing laws relating to sexual offences are by no means exclusively gender-neutral. The law of rape is not gender-neutral, and I am aware of no body of opinion suggesting it should be. The law of

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incest is not gender neutral either. On the other hand, the lesser offence of sexual assault is gender neutral. The law of buggery (now subsumed into the new law in the 2006 Act) is also in principle gender neutral although in practice likely to be committed by women only in very rare circumstances.

It seems to me that there are distinctions based on the physical difference between men and women which may validly be made, and arguably ought to be made. It is valid to regard penetrative sex as being of a different degree of seriousness for the woman who is penetrated than for the man who penetrates, even where a man engages in sexual intercourse without his full consent in the sense that his will is overborne. Indeed, for physiological reasons it must be rare indeed that a man is compelled by a woman to engage in sexual intercourse with her against his will. It is for this reason that the law of rape is not gender-neutral; it recognises that it is the woman who is penetrated and the man who penetrates, and it does not indulge in a false equation between the rape of a woman and the fate of a man who is compelled to participate in an act of sexual intercourse. The latter, of course, amounts at least to a sexual assault and is a serious offence although not carrying as serious a penalty as rape or aggravated sexual assault where the minimum penalty is imprisonment for life.

Statutory rape, the offence under the 1935 Act, is an analogue of rape, but without the requirement to prove consent, this being deemed unnecessary because of the age of the injured party. In my submission absence of the need to prove consent should be a fundamental element of any law designed

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to replace the section struck down by the Supreme Court in *CC*, and I believe the Oireachtas should be wary of the danger in pursuing a policy of gender equality at the price of reintroducing the element of consent. I will explain below why I think a fully gender neutral offence would have this consequence.

It would, however, be logical that a law for the protection of young persons should also deal with other forms of serious sexual abuse, by which I mean primarily penetrative sex, committed with young persons, without the need to show lack of consent, and should treat them with the same degree of seriousness. Anal intercourse with persons under 17 was already dealt with by the law on buggery (now included in the offence of defilement under the 2006 Act) which makes it an offence to engage in such if either party is under 17. A case might be made to include also the other offences covered by section 4 rape without the need to show lack of consent where either party is under 17 as is done in the 2006 Act. To this extent such an offence would be capable of being committed against boys as well as girls although significant overall differences between the treatment of boys and girls would remain and the offence would be gender neutral only to a limited extent.

There is a further difficulty of principle with a completely gender neutral offence. Under the old law the *actus reus* the act constituting the offence of the offences of both rape and statutory rape is penetration of the female by the male. If the offence is gender neutral, is male penetration to remain the *actus reus*? If so, and as seems to be the case under the 2006 legislation, the act of the male triggers the commission of the offence by the female. This

seems wrong in principle. If she has not consented to penetration how could the action of the male act make her guilty of an offence? Again, it is obvious that the issue of whether the woman consented to the act becomes a central issue once in principle she can be convicted of an offence.

PRACTICAL DIFFICULTIES

The most serious practical problem involved in extending the law of statutory rape to make it gender-neutral is summed up by Tom O'Malley as follows:

“To make both parties criminally liable would be counter-productive as it would greatly impede the enforcement of the law. If the person who may naturally be expected to report the offence risks prosecution herself, the level of reporting is likely to sink well beneath its present low level. The total abolition of the offence of unlawful carnal knowledge would leave an unconscionable void in the legal regime for protecting very young girls from sexual exploitation. The better option would appear to be a re-assessment of the age of consent and the circumstances in which sexual relations with a teenage girl (or boy) should be a concern of the criminal law.”⁵

If the female as well as the male who engages in under age sex commits an offence, then the girl is unlikely to come forward to complain. If she does, she may be unwilling to testify without a grant of immunity. If she is to be treated as an accomplice, is a jury to be warned about treating her evidence as unreliable? If such a law is passed, on what basis is a prosecutor to prosecute the male and not the female? If both are prosecuted, it is highly

⁵ O'Malley Thomas, *Sexual Offences: Law, Policy and Punishment*, Round Hall Sweet & Maxwell, Dublin, 1996 at p. 99.

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unlikely that either can be convicted. If only the male is prosecuted he is likely to argue in his defence that the female ought to have been prosecuted.

If the offence is made gender-neutral, it becomes necessary to provide a defence for the person who participates in the act against or without his or her consent. This must particularly apply to the girl since it is the man who does the act which makes the offence complete, and the girl must be entitled to argue that she did not consent. The effect of this is to undermine the fundamental premise of the law of statutory rape, that is, that there is an age below which consent cannot validly be given.

Finally, it may be worth noting that when the Law Reform Commission reported on this matter⁶ they did not recommend a gender-neutral provision – indeed, they did not even discuss the issue.

SHOULD THERE BE AN AGE DIFFERENCE PROVISION

One of the proposals put forward from time to time has been that in addition to one party being under the age of consent the other party should have to be older than him or her, perhaps by two or three years. Such a rule exists in some other jurisdictions. The Law Reform Commission, despite its initial hesitation, recommended an age difference rule of five years⁷.

⁶ Law Reform Commission Report on Child Sexual Abuse, LRC 32-1990, September 1990

⁷ *Ibid* at paragraph 4.12, where the recommendation of the Review Group is that “in the case of a girl between the ages of 15 and 17, sexual intercourse or sexual conduct falling short of intercourse ... should be a criminal offence where the male participant is “a person in authority”... Similarly, it should be an offence to have sexual intercourse with a girl between

Under the 1935 legislation a boy of 13 having sexual intercourse with a girl of 16 would commit an offence, although the girl would not. In most circumstances this would rightly be seen as unfair. The traditional way of overcoming such problems was by the use of prosecutorial discretion. In such a case as that described above, in the absence of any aggravating factor, the boy would not be prosecuted and it would not be regarded as in the public interest to take such a prosecution. The prosecutor would always have regard to such issues as disparity in age between the parties and their respective maturity in making a decision. Other relevant considerations would include whether the alleged offence was committed within an ongoing relationship between the parties or whether there was any abusive element in what happened. The 1935 Act provisions could be used to prosecute what was in essence a rape and in such circumstances the fact that the male was younger would not be a mitigating factor. Another advantage of an age difference rule is that it would be possible to structure such a provision as a gender-neutral one, since only the older party would commit the offence and the practical difficulties relating to accomplice evidence would not arise. But this would not deal with the situation where the chronological age of the parties did not match their maturity or where there was some other abusive element to the case.

Not fixing age difference rules has the benefit of flexibility, but has the disadvantage of a lack of precision in the rules. If there were to be an age

the ages of 15 and 17 when the perpetrator is, at least, 5 years older than the girl in question."

difference provision then the law could not be used where a younger man targets an older girl who is perhaps less intellectually developed, as well as the more extreme case where the act is in essence a rape but where proof of lack of consent may not be compelling.

Persons in Authority

The Law Reform Commission also recommended a law making it an offence for a person in authority to have sexual intercourse with one of their charges in circumstances where another person would not commit an offence⁸. I see no reason why there could not be a law making it a specific offence for a person in authority of either sex to have sexual intercourse with a young person of either sex and why such a law should not deal with a range of behaviour falling short of penetrative sex. 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. I think such a provision would be likely to deal with very many of the cases where there is abuse of a boy by an older female.

THE SCOPE OF THE LAW

For the reasons already advanced my preference would be for any law replacing the impugned provisions of the 1935 Act to concentrate on sexual intercourse and possibly other forms of penetrative sex. Widening the scope

⁸ *Ibid* at paragraph 4.11

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beyond this would risk inappropriately criminalizing consensual sexual experimentation between young people who are close to each other in age. In my opinion the law on sexual assault and the former law on gross indecency would be adequate and appropriate to deal with less serious sexual abuse. Just as the offences of common law rape and section 4 rape are used for the most serious offences the offence should not be downgraded by including less serious forms of behaviour within its ambit.

The Criminal Law (Sexual Offences) Act 2006 widens the ambit of the law to include section 4 rape offences and aggravated sexual assault. I do not see the inclusion of aggravated sexual assault as presenting a problem, since only the person who commits such an assault commits a criminal act. However, it will still be necessary to prove that the act in question was an assault, since if the act was consensual it would not be an assault. The inclusion of acts which amount to aggravated sexual assaults in the definition of "sexual act" in the 2006 Act does not, therefore, seem to add anything useful which was not already contained in the 1990 legislation.

However, while section 5 of the 2006 Act provides that a female under the age of 17 shall not be guilty of an offence under the Act "by reason only of her engaging in an act of sexual intercourse" it seems to follow that she may commit an offence if she is orally or anally penetrated. This distinction seems to be anomalous. It cannot be the law that a girl commits an offence if such an act is carried out against her will, but again it undermines the effectiveness of the law if her consent can become an issue.

Finally, if there are to be provisions in the law which are not gender-neutral it would be desirable that the rationale for any distinctions made on grounds of sex are clear. The present structure of the 2006 Act, under which section 2 is couched in gender-neutral terms, followed by an exclusion of females from criminal liability in certain cases by virtue of section 5, gives the appearance of being contradictory and has been criticised as arbitrary. It should be possible to couch the law in a manner which would not give an impression of arbitrariness.

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