

Advice of the Ombudsman for Children in relation to  
the Criminal Law (Sexual Offences) Bill 2006

**June 2006**

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## 1. Background

On 23 May 2006, in the case of *CC v Ireland and others*, the Supreme Court struck down Section 1 (1) of the Criminal Law (Amendment) Act, 1935 as unconstitutional.

Section 1 (1) of the Act provided for a strict liability offence of engaging in sexual relations with an underage girl. A defence of reasonable mistake as to age was not available to an accused. All that had to be proved was that the act took place and the age of the girl. The Supreme Court found that the lack of a defence of reasonable mistake as to age was unconstitutional.

As a consequence of the decision, there was no provision on the statute books rendering consensual sexual relations between an adult and an underage girl a criminal offence. The Government moved quickly in an attempt to fill this legislative gap.

On the evening of 1 June 2006, the Criminal Law (Sexual Offences) Bill, 2006 was referred to my Office for advice as per the statutory functions of my Office. I submitted my advice on the morning of 2 June 2006.

On 2 June 2006, the Criminal Law (Sexual Offences) Act 2006 was enacted, the Bill having been presented on 1 June and clearing all Parliamentary stages on 2 June.

## 1. Introduction

The Criminal Law (Sexual Offences) Bill 2006 was referred to the Ombudsman for Children today, 1 June 2006. It is understood that the Bill is to pass all legislative stages and be enacted tomorrow.

Section 7(4) of the Ombudsman for Children Act, 2002 provides that I shall, at the request of a Minister, give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

This document sets out my advice in relation to the Criminal Law (Sexual Offences) Bill 2006. This advice is grounded in and guided by the UN Convention on the Rights of the Child (CRC).

## 2. Section 2 of the Bill: Defilement of a child under 15 years of age

I welcome the extension of protection to both genders.

I recommend that express provision be made that the burden of proof lies with the defendant. I recommend that the standard of proof upon the defendant in this Section and Section 3 be expressly stated to be on the balance of probabilities.

I recommend the insertion of the words 'the court shall' in place of the words 'it falls to the court'. This will make it clear that the court must always apply an objective test.

### *Recommendation for additional sections under Sections 2 and 3*

#### *No prosecution of children under 17 years except with consent of the DPP*

I recommend that a section incorporating Section 3 (8) (a) into Section 2 be inserted to provide the same protection limiting prosecution of children under 17 as set out in Section 3.

#### *Advocacy*

A provision should be inserted allowing for the appointment of a social worker or suitably qualified person to support the child throughout the process. This should also be extended to Section 3.

*Lacuna between Section 2 and Section 3*

It would be possible for a person whose defence under Section 2 was successful but who nonetheless had sexual intercourse with a child under 17 to be cleared of any offence under the Act. Provision must be made for such persons to be prosecuted under Section 3 where their defence under Section 2 is successful.

**3. Section 3 of the Bill: Defilement of a child under the age of 17 years**

I recommend that Section 3(8)(a) – and its extension to Section 2 which I have recommended – be amended as follows:

No proceedings against a child under the age of 17 years for an offence under this section shall be commenced save with the consent of the DPP who shall make his decision based on the best interests of both children. The decision of the DPP shall be made public.

**4. Section 5 of the Bill: Act by female child under 17 years of age**

This provision is on the face of it discriminatory. Article 2 of the CRC prohibits discrimination except where there is a reasonable ground and justification for the discrimination. I would query whether such reasonable grounds or justification exist.

Should my recommendation relating to the extension of Section 3 (8)(a) to Section 2 be taken on board I consider this section to be superfluous.



## 2. Explanatory note to Ombudsman for Children's Advice on the Criminal Law (Sexual Offences) Bill 2006

My advice is in relation to this specific Bill. It is without prejudice to a wider discussion of the issues it raises at a later stage. My advice is grounded in and guided by the UN Convention on the Rights of the Child.

The principal areas of concern I have identified are as follows.

### 1. Best interests of the child

Article 3 of the CRC states that, in all actions concerning children, the best interests of the child shall be a primary consideration.

The best interests of the child principle is not incorporated into the Bill in respect of the way it treats children under 17 years who engage in sexual intercourse. Within the confines of the scheme of the Bill, I have recommended that no prosecutions for offences under the Bill be brought against children under 17, save with the consent of the DPP making his decision in the best interests of both children. While I recognise that the DPP does not normally give reasons for his decisions, I consider that in this case he should, in order to ensure that the best interests of the child are at the heart of decisions taken in this respect.

I have recommended that the provision that no child be prosecuted under Section 3 of the Act (concerning children aged 15-17), save with the consent of the DPP, should be extended to Section 2 of the Act (concerning children under the age of 15). The aim of the Bill should be to prevent adults exploiting children. Children should not be prosecuted under this Bill, unless such a prosecution would be in the best interests of the child.

### 2. Protection of children giving evidence – practice and procedure

I am concerned that children might be subjected to damaging adversarial procedures under the Bill. For example, questions might be asked of a child about their appearance, sexual history or behaviour. Adequate protection for children involved in court cases is not provided for in the Bill. The provisions of the Criminal Evidence Act, 1992 will apply to child witnesses involved in proceedings under this Bill. However consideration should be given to the insertion of additional protection for children in the Bill which would be constitutionally sound.

### 3. Article 2 of the CRC – non-discrimination

I welcome the extension of protection under the Bill to both genders in the overall scheme of the Bill. However, the special provision in Section 5 relating to female children is, on the face of it, discriminatory against boys. It is my understanding that this provision has been

proposed to prevent the stigmatisation or prosecution of pregnant teenagers. I consider that a provision that no prosecutions be brought against those under 17 years, save with the consent of the DPP acting in the best interests of the child, would guard against the prosecution of teenage mothers solely on the basis of their pregnancy. The prevention of stigmatisation is a matter that should be dealt with outside of the criminal law.

Article 2 of the CRC prohibits discrimination, except where there is a legitimate reason for a differentiation between children. I do not consider that such legitimate reasons arise here.

#### 4. The test relating to the defence of reasonable mistake

I recommend that the Bill expressly provide that the burden of proof in respect of the defence of reasonable mistake lies squarely with the defendant.

I also recommend that the Bill clearly state that the Court must always apply an objective test when deciding the validity of a defendant's defence. In other words, the Court must always 'look behind' a defendant's assertion that he or she reasonably believed a child to be of a certain age and query the reasonableness of such an assertion.

#### 5. Advocacy

A provision should be inserted allowing for the appointment of a social worker or other suitably qualified individual to support the child throughout the process.

#### 6. Gap in protection

It appears that there is a lacuna between Section 2 and Section 3. A person whose defence under Section 2 – that they reasonably believed the child to be 16 years of age – would be cleared of an offence under Section 2, notwithstanding the fact that they have admitted to sex with a child under 17 years of age (a crime under Section 3 of the Bill). The Bill should be amended to provide that, in such instances, a prosecution under Section 3 can be brought without any procedural difficulties.

# Appendix 1

## Criminal Law (Sexual Offences) Bill 2006

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**AN BILLE UM AN DLÍ COIRIÚIL (CIONTA GNÉASACHA)  
2006  
CRIMINAL LAW (SEXUAL OFFENCES) BILL 2006**

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*Mar a tionscnaíodh  
As initiated*

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### ARRANGEMENT OF SECTIONS

Section

1. Definitions.
2. Defilement of child under 15 years of age.
3. Defilement of child under the age of 17 years.
4. Summary trial of offences.
5. Female child under 17 years of age not guilty of offence.
6. Amendment of certain enactments.
7. Repeals.
8. Short title.

### SCHEDULE ENACTMENTS REPEALED

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[No. 27 of 2006]

ACTS REFERRED TO

Bail Act 1997	1997, No. 16
Children Act 2001	2001, No. 24
Criminal Evidence Act 1992	1992, No. 12
Criminal Law (Rape) (Amendment) Act 1990	1990, No. 32
Criminal Law (Rape) Act 1981	1981, No. 10
Criminal Law (Sexual Offences) Act 1993	1993, No. 20
Criminal Law Act 1997	1997, No. 14
Criminal Law Amendment Act 1935	1935, No. 6
Sex Offenders Act 2001	2001, No. 18
Sexual Offences (Jurisdiction) Act 1996	1996, No. 38

AN BILLE UM AN DLÍ COIRIÚIL (CIONTA GNÉASACHA)  
2006  
CRIMINAL LAW (SEXUAL OFFENCES) BILL 2006

# BILL

5 *entitled*

AN ACT TO PROVIDE FOR OFFENCES IN RELATION TO  
THE COMMISSION OF SEXUAL ACTS WITH CHILDREN  
UNDER THE AGE OF 17 YEARS; AND TO PROVIDE  
FOR MATTERS CONNECTED THEREWITH.

10 BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1. —In this Act—

Definitions.

“Act of 1990” means the Criminal Law (Rape) (Amendment) Act  
1990;

“person in authority” means—

- 15 (a) a parent, step-parent, guardian, grandparent, uncle or aunt  
of the victim,
- (b) any person who is, for the time being, in *loco parentis* to  
the victim, or
- 20 (c) any person who is, for the time being, responsible for the  
education, supervision or welfare of the victim;

“sexual act” means—

- (a) an act consisting of—
- (i) sexual intercourse, or
- (ii) buggery,
- 25 between persons who are not married to each other, or
- (b) an act described in section 3(1) or 4(1) of the Act of 1990;

“sexual intercourse” shall be construed in accordance with section  
1(2) of the Criminal Law (Rape) Act 1981.

Defilement of child under 15 years of age.

2.—(1) Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.

(2) Any person who attempts to engage in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment. 5

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years. 10

(4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances. 15 20

(5) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.

Defilement of child under the age of 17 years.

3.—(1) Any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall, subject to *subsection (3)*, be liable on conviction on indictment— 25

(a) to imprisonment for a term not exceeding 5 years, or

(b) if he or she is a person in authority, to imprisonment for a term not exceeding 10 years. 30

(2) Any person who attempts to engage in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall, subject to *subsection (4)* be liable on conviction on indictment—

(a) to imprisonment for a term not exceeding 2 years, or 35

(b) if he or she is a person in authority, to imprisonment for a term not exceeding 4 years.

(3) A person who has been convicted of an offence under *subsection (1)* shall, in respect of any subsequent conviction of an offence under that subsection, be liable on conviction on indictment— 40

(a) to imprisonment for a term not exceeding 10 years, or

(b) if he or she is a person in authority, to imprisonment for a term not exceeding 15 years.

(4) A person who has been convicted of an offence under *subsection (2)* shall, in respect of any subsequent conviction of an offence under that subsection be liable on conviction on indictment— 45

(a) to imprisonment for a term not exceeding 4 years, or

(b) if he or she is a person in authority, to imprisonment for a term not exceeding 7 years.

5 (5) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

10 (6) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.

(7) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.

20 (8) An offence under *subsection (2)* shall be an arrestable offence for the purposes of the Criminal Law Act 1997.

(9) No proceedings for an offence under this section against a child under the age of 17 years shall be brought except by, or with the consent of, the Director of Public Prosecutions.

25 **4.—(1)** The District Court may try summarily a person charged with an offence under *section 2(2)* or *3(2)* if— Summary trial of offences.

(a) the court is of opinion that the facts alleged constitute a minor offence fit to be tried summarily,

30 (b) the accused, on being informed by the court of his or her right to be tried with a jury, does not object to being tried summarily for the offence, and

(c) the Director of Public Prosecutions consents to the accused being tried summarily for the offence.

35 (2) Upon conviction of a person by the District Court of an offence under this section, the person shall be liable to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or to both.

40 **5.—**A female child under the age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse. Female child under 17 years of age not guilty of offence.

**6.—(1)** Section 8 of the Act of 1990 is amended— Amendment of certain enactments.

45 (a) in subsection (2), by the substitution of "*section 2 or 3 of the Criminal Justice (Sexual Offences) Act 2006*" for "*section 1 or 2 of the Criminal Law Amendment Act 1935*", and

(b) in subsection (5), by—

(i) the substitution of “*section 2 of the Criminal Justice (Sexual Offences) Act 2006*” for “section 1 of the Criminal Law Amendment Act 1935”,

(ii) the substitution of “*section 3 of the Criminal Justice (Sexual Offences) Act 2006*” for “section 2 of the Criminal Law Amendment Act 1935”, and

(iii) the substitution of “the said section 3 or *section 3 of the Criminal Justice (Sexual Offences) Act 2006*,” for “the said section 2 or 3”. 10

(2) Section 2 of the Criminal Evidence Act 1992 is amended, in the definition of “sexual offence”, by the substitution of the following paragraph for paragraph (iv):

“(iv) the *Criminal Law (Sexual Offences) Act 2006* or section 5 of the Criminal Law (Sexual Offences) Act 1993;” 15

(3) The Schedule to the Sexual Offences (Jurisdiction) Act 1996 is amended by—

(a) the substitution of the following paragraph for paragraph 1: 20

“1. *Criminal Law (Sexual Offences) Act 2006*.”,

and

(b) the deletion of paragraphs 2, 7 and 8.

(4) The Schedule to the Bail Act 1997 is amended by the substitution of the following paragraph for paragraph 10: 25

“10. An offence under the *Criminal Law (Sexual Offences) Act 2006*.”.

(5) The Schedule to the Sex Offenders Act 2001 is amended by—

(a) the substitution of the following paragraph for paragraph 7: 30

“7. An offence under the *Criminal Law (Sexual Offences) Act 2006*.”,

and

(b) the deletion of paragraph 8.

(6) Schedule 1 to the Children Act 2001 is amended by the substitution of the following paragraph for paragraph 4: 35

“4. Any offence under the *Criminal Law (Sexual Offences) Act 2006*.”.

Repeals.

7.—The enactments specified in the *Schedule* are repealed to the extent specified in *column (3)* thereof. 40



**8.**—This Act may be cited as the Criminal Law (Sexual Offences) Short title. Act 2006.

**SCHEDULE**

**ENACTMENTS REPEALED**

	Number and Year	Short title	Extent of Repeal
	(1)	(2)	(3)
5	No. 6 of 1935	Criminal Law Amendment Act 1935	Sections 1(2) and 2
10	No. 20 of 1993	Criminal Law (Sexual Offences) Act 1993	Sections 3 and 4

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**AN BILLE UM AN DLÍ COIRIÚIL (CIONTA GNÉASACHA)  
2006**

**CRIMINAL LAW (SEXUAL OFFENCES) BILL 2006**

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**EXPLANATORY MEMORANDUM**

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*General*

1. The primary purpose of the Bill is to restore, in updated form, the offence of unlawful carnal knowledge against a girl under 15 years of age which was struck down by the Supreme Court in a judgment of 23 May 2006 in the case of C.C. (Appellant) and Ireland, the Attorney General and the Director of Public Prosecutions (Respondent). New offences created in sections 2 and 3 of the Bill protecting children against sexual abuse contain a defence of honest belief that the child had attained 15 years (section 2) or 17 years (section 3), in accordance with the Supreme Court judgment.

*Summary*

2. *Section 1* defines expressions used in the Bill. "Person in authority" is defined so that where such a person sexually abuses, or attempts to sexually abuse, a child under 17 years of age, that person will be subject to a higher penalty on conviction for an offence under section 3 of the Bill. Such a provision is unnecessary in relation to an offence under section 2 (Defilement of a child under 15 years of age) as that offence carries a maximum penalty of life imprisonment on conviction.

3. The offences created in sections 2 and 3 criminalise engaging or attempting to engage in sexual acts with a child. This section defines "sexual act" for that purpose. It includes sexual intercourse and buggery between persons who are not married to each other and any act described in sections 3(1) or 4(1) of the Criminal Law (Rape) (Amendment) Act 1990. Any such act would be a sexual assault with particularly aggravating circumstances.

4. The definition of "sexual intercourse" is taken from section 1(2) of the Criminal Law (Rape) Act 1981.

5. *Section 2* creates a new offence of engaging or attempting to engage in a sexual act with a child who is under 15 years of age. It replaces section 1 of the Criminal Law Amendment Act 1935 (carnal knowledge of a girl under 15 years of age) and section 3(a) and (b) of the Criminal Law (Sexual Offences) Act 1993 (buggery of persons under 15 years of age). The new offence is gender neutral. The defence introduced for this offence, in accordance with the Supreme

Court judgment, is for the defendant to prove that he or she honestly believed that the child against whom the offence was committed had attained 15 years of age. It is for the court to decide whether the defendant honestly believed that the child had attained 15 years of age and it will have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances. This section also confirms that it is not a defence to prove that the child consented to the sexual act. The maximum penalty on conviction on indictment for this offence is life imprisonment, the same as for the offence of carnal knowledge of a girl under 15 years of age, which the Supreme Court struck down.

6. *Section 3* replaces section 2 of the 1935 Act and section 3(c) and (d) of the 1993 Act. It criminalises engaging or attempting to engage in a sexual act, as defined, with a child under 17 years of age. The penalty structure is the same as the analogous provisions in the repealed sections of the 1935 and 1993 Acts but if the offences are committed by a person in authority, the maximum offences are higher. The defence provisions in section 2 are also incorporated into section 3. No proceedings for an offence under this section against a child under 17 years of age can be brought except by, or with the consent of, the Director of Public Prosecutions. This will ensure consistency in prosecution policy.

7. *Section 4* allows the District Court to try summarily a person charged with an offence under sections 2(2) or 3(2) (attempts to commit the offences in those sections) if the conditions set out in the section are met. This is a continuation of the law in respect of the analogous offences as set out in section 5 of the 1935 Act.

8. *Section 5* ensures that a female under 17 years of age cannot be guilty of an offence under section 1 or 2 by reason only of her engaging in an act of sexual intercourse. This is being introduced primarily to protect females in that age group who might be pregnant although it has wider scope. It will be clear to such females that they have nothing to fear from the criminal law.

9. *Section 6* makes necessary consequential amendments to various enactments. Thus, for example, it will be possible to convict a person indicted under this Bill with another serious sexual offence where the evidence for the offence under this Bill does not warrant a conviction. Other amendments will ensure, for example, that a person convicted of an offence under this Bill will be obliged to notify the Gardaí of his or her name and address and any changes to those details, in other words, to register on the sex offenders register and also a person who commite analogous offences abroad can be tried for those offences in Ireland.

10. Section 10 and the Schedule provide for the repeals. These include the archaic offence of gross indecency between males.

11. Section 8 gives the short title of the Bill.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí Meitheamh 2006.*

Wt. Letter. 669. 6/06. Cahills. (X49547). Gr.30-15.





