

Advice of the Ombudsman for Children on the General Scheme of the Criminal Law(Sexual Offences) Bill 2014

May 2015



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1 Introduction

- 1.1 The Minister for Justice and Equality published the General Scheme of the Criminal Law (Sexual Offences) Bill 2014 (“the General Scheme”) on 27th November 2014. The Bill proposes wide ranging reforms of the law, including stronger sanctions aimed at protecting children from sexual exploitation, child pornography and online grooming. As stated, the Bill, when enacted, will implement the EU Directive on Combating the sexual abuse and exploitation of children and child pornography as well as paving the way for Ireland to ratify the Council of Europe Convention on the protection of children against sexual exploitation and abuse.
- 1.2 Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children shall advise Ministers of the Government on any matter relating to the rights and welfare of children - including the probable effect of the implementation of proposals for legislation – when requested to do so by a Minister. The Minister for Justice and Equality has sought the observations of the Ombudsman for Children on the General Scheme and on the manner in which it seeks to address children’s interests. The following advice has been prepared in response to that request and in accordance with section 7 of the Ombudsman for Children Act 2002.
- 1.3 Given that the General Scheme addresses new forms of sexual abuse and exploitation of children and introduces new protection measures for child complainants; the proposals put forward by the Minister for Justice and Equality must be welcomed as a very significant step forward in the protection of the rights and welfare of children.
- 1.4 In particular, this Office welcomes the inclusion of new measures in the General Scheme which were recommended by the Ombudsman for Children’s Office in previous advices including: the amendment of the defence as to the age of the complainant in the offence of defilement of a child, which has now been changed from one of ‘honest mistake’ to one of ‘reasonable belief’; the inclusion of supplementary offences relating to grooming; the introduction of a legislative provision to address the issue of disclosure of third party therapy and counselling records; and a prohibition on personal cross examination of a child witness by the accused.
- 1.5 This Office believes that there are a number of areas in which the legislation could be enhanced to better serve the interests of children and conform more fully with Ireland’s international human rights obligations, namely with regard to:
 - consensual sexual acts between peers;
 - special protection measures for child witnesses; and
 - clear and precise definitions of certain provisions.

2 International Human Rights Standards

2.1 This advice has been guided by a range of international human rights instruments that have been developed by the United Nations and by the Council of Europe and the European Union; the principal standards are set out below.

2.2 United Nations Convention on the Rights of the Child (UNCRC)

2.2.1 In furtherance of the Universal Declaration of Human Rights, which proclaimed that childhood is entitled to special care and assistance; State Parties are required under the UNCRC to protect children from physical and mental harm or neglect, including sexual abuse and exploitation.

2.2.2 One of the general principles of the UNCRC is that every child has the right to life, survival and development. According to the UN Committee on the Rights of the Child, when examining the overall goal of child protection from all forms of violence, it must be considered not only in terms of the child's right to "life" and "survival" but also in terms of their right to "development"¹.

2.2.3 Under Article 19, States are obliged to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2.2.4 These special obligations have been interpreted by the UN Committee on the Rights of the Child to include an obligation to prevent violence or violations of human rights, to protect child victims and witnesses from human rights violations and to investigate and to punish those responsible². Furthermore the UN Committee has outlined that clear operational legal definitions are required of the different forms of violence which must be sufficiently usable.³

2.2.5 Pursuant to Article 34, States Parties must undertake to protect the child from all forms of sexual exploitation and sexual abuse. In particular, they are obliged to take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; and the exploitative use of children in pornographic performances and materials.

2.2.6 Sexual abuse according to the UN Committee comprises of any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law. Sexual activities are also considered as abuse when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other

¹ UN Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence* (2011) UN doc. CRC/C/GC/13 p. 23

² *General Comment No. 13* p. 4

³ *General Comment No. 13* p. 8

means of pressure. Reference is also made to sexual slavery, sexual exploitation in travel and tourism, trafficking and sale of children for sexual purposes and forced marriage⁴.

- 2.2.7 The UN Committee has also outlined the child protection risks associated with information and communications technologies (ICT). These include sexual abuse of children to produce child abuse images; the process of taking, making or permitting to take, distributing, showing, possessing or advertising indecent photographs or pseudophotographs (“morphing”) and videos of children⁵. Furthermore, reference is made to the dangers associated with children as users of ICT and that when they are in contact with others through ICT they may be coerced, tricked or persuaded into meeting strangers off-line or being “groomed” for involvement in sexual activities⁶.
- 2.2.8 Articles 35 and 36 provide further protections including: protection against the abduction of, the sale of or traffic in children for any purpose or in any form; and protection against all other forms of exploitation prejudicial to any aspects of the child’s welfare.
- 2.2.9 Other relevant UNCRC rights include Article 1 (whereby a child is defined as under the age of 18); Article 2 (non-discrimination particularly in relation to the child’s sex); Article 3 (the best interests principle), and Article 16 (protection of privacy).
- 2.2.10 The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, (the Second Optional Protocol) to which Ireland is a signatory since 2000, further extends the measures which State Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography.
- 2.2.11 Of particular note is Article 8 which requires State Parties to adopt appropriate measures to protect the rights and interests of child victims at all stages of the criminal justice process and in particular by recognising the vulnerability of child victims and requiring the adapting of special procedures to recognise their special needs, including their special needs as witnesses and providing appropriate support services to child victims throughout the legal process.
- 2.2.12 Furthermore reference is made to the principle that the best interest of the child shall be a primary consideration in the treatment by the criminal justice system of child victims. It is hoped that the enactment of the Criminal Law (Sexual Offences) Bill 2014 will hasten Ireland’s ratification of the Second Optional Protocol which has been outstanding for a number of years.

⁴ *General Comment No. 13* p. 10

⁵ *General Comment No. 13* pp.11 - 12

⁶ *General Comment No. 13* p. 12

2.3 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25.X.2007 (The Lanzarote Convention)

- 2.3.1 The Lanzarote Convention came about as a result of a recognised need to prepare a comprehensive international instrument focusing on the prevention, protective and criminal law aspects of the fight against all forms of sexual exploitation and sexual abuse of children and setting up a specific monitoring mechanism⁷. The purpose, as set out in Article 1 of the Lanzarote Convention, is to: prevent and combat sexual exploitation and sexual abuse of children; protect the rights of child victims of sexual exploitation and abuse; and promote national and international co-operation against sexual exploitation and sexual abuse of children.
- 2.3.2 In furtherance of the protections afforded to children against sexual abuse and exploitation in the UNCRC and the Second Optional Protocol, the Lanzarote Convention provides for the criminalisation of additional offences including; engaging in sexual activities with a child where use is made of coercion, force or threats, abuse is made of a recognised position of trust, authority or influence over the child, abuse is made of a particularly vulnerable situation or a situation of dependence (Article 18); recruiting or coercing a child into pornographic performances or knowingly attending pornographic performances involving the participation of children (Article 21); intentionally causing a child to witness sexual abuse or sexual activities (Article 22); soliciting children through ICT for sexual purposes (Article 23); and intentionally aiding or abetting the commission of offences under the Convention (Article 24).
- 2.3.3 Article 18(3) of the Lanzarote Convention provides that the provisions concerning sexual activities with a child are not intended to govern consensual sexual activities between minors. This provision is expanded on in the Lanzarote Convention Explanatory Report which states that ‘it is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar age’⁸.
- 2.3.4 Article 31 provides additional measures of protection to the rights and interests of victims in particular by providing them with appropriate support services so that their rights and interests are duly presented and taken into account, and furthermore, providing for their safety as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation.
- 2.3.5 Article 35(2) requires States to take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings. Under Article 36(1) States are required to take all necessary legislative or other measures to ensure that training on children’s rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the

⁷ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25.X.2007 p. 3

⁸ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 12th July 2007 at par 129

proceedings, in particular judges, prosecutors and lawyers.

- 2.3.6 While Ireland has yet to ratify the Lanzarote Convention, the Bill, when enacted, should pave the way for ratification of the Convention.

2.4 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (Directive 2011/92/EU)

- 2.4.1 The Lanzarote Convention arguably constitutes the most comprehensive international standard for protecting children against sexual abuse and exploitation to date; however, as noted by the European Parliament, not all Member States have yet acceded to this Convention.⁹ Furthermore, Council Framework Decision 2004/68/JHA, which had been the main provision at EU level in place since 2004, had a number of shortcomings namely: a limited number of offences were provided for; new forms of abuse and exploitation using ICT were not addressed; obstacles remained regarding prosecuting outside national territories; specific needs of child victims were not met; and adequate measure to prevent offences were not provided for¹⁰. It was against this backdrop that Directive 2011/92/EU came into force which repealed and incorporated Council Framework Decision 2004/68/JHA.
- 2.4.2 The Directive introduces new provisions aimed at making existing responses to sexual abuse and exploitation of children more effective including: the criminalisation of additional offences such as, the offence of organisation of travel arrangements with the purpose of committing sexual abuse and the offence of sexual abuse and exploitation facilitated by the use of IT including on-line pornographic performances, knowingly obtaining access to child pornography and “grooming”; the introduction of new rules governing prosecutions of offences committed abroad; and the inclusion of new provisions to ensure that victims do not suffer from participation in criminal proceedings.
- 2.4.3 Additional protective measures not contained in the Lanzarote Convention include: prohibitions on offenders from activities with children; the blocking of access to child pornography on the internet; the criminalisation of coercing a child into sexual relations with a third party and child sexual abuse online; and a non-punishment clause for child victims. Article 27 of the Directive requires States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 18 December 2013. The Criminal Law (Sexual Offences) Bill largely brings current legislation in line with the requirements under the Directive.

⁹ European Parliament Legislative Observation 2010/0064 (COD) 29/03/2010 Legislative Proposal

¹⁰ Ibid

2.5 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, supports and protection of victims of crime Directive 2012/29/EU

- 2.5.1 The purpose of Directive 2012/29/EU is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. The European Commission Guidance Document requires States to 'ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or competent authorities operating within the context of criminal proceedings'.¹¹
- 2.5.2 Of particular note are Articles 22(4) which recognises child victims as having special protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation and Article 24 which provides for certain rights to protection of child victims during criminal proceedings. Directive 2012/29/EU entered into force in 2012. States are under an obligation to transpose the provisions of the Directive by 16th November 2015 with periodic reporting to the Committee set for November 2017.

¹¹ European Commission Guidance Document DG JUSTICE GUIDANCE DOCUMENT related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

3 Sexual Exploitation of Children

3.1 Part 2 of the General Scheme updates the law in relation to sexual exploitation of children. Sexual exploitation is not of itself made a stand-alone criminal offence but rather provides grounds for specific offences. The definition of sexual exploitation is essentially the same as that contained in the Child Trafficking and Pornography Act, 1998, with the addition in this definition of vulnerable persons.

3.2 Heads 3 - 8

3.2.1 Head 3 of the General Scheme provides for the offence of soliciting or paying for the purpose of sexually exploiting a child under the age of 18 and is giving effect to Article 4(5) and 4(6) of Directive 2011/92/EU. This offence had initially been drafted into the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2007. In its Advice on the General Scheme, the Ombudsman for Children's Office had raised the question of whether the provision was fully compliant with Article 34 of the UNCRC which calls on States to prevent inducement or coercion of a child to engage in any unlawful sexual activity.

3.2.2 It is a welcome development, therefore, that Head 3(1)(b) includes a further context of sexual exploitation not originally provided for in the 2007 Bill, i.e. the offence of promising a child any form of remuneration or consideration other than money. Furthermore, this Office welcomes that the fact the offence of soliciting or importuning stands isolated from the other provisions in this Head which indicates that the offence will arise whether or not payment or consideration of any kind is offered.

3.2.3 Heads 4, 5 and 6 of the General Scheme create new offences which prohibit certain forms of sexual exploitation including: inviting a child to touch for a sexual purpose; intentionally engaging in a sexual activity in the presence of a child for the purpose of obtaining sexual gratification or corrupting or depraving a child; and intentionally causing a child to watch sexual activity for the same purpose.

3.2.4 The creation of new offences which prohibit different forms of sexual exploitation of children is undoubtedly in line with the Article 34 of the UNCRC; however, a number of issues must be addressed.

3.2.5 Firstly, Heads 4, 5 and 6 of the General Scheme provide that the person committing the offence is not defined as being above 18 years. This, in effect, has the potential to criminalise relatively innocent behaviour between teenagers, a provision clearly not required by the Lanzarote Convention which provides in Article 18(3) that the provisions concerning sexual activities with a child are not intended to govern consensual sexual activities between minors. As it is currently drafted, a 17 year old who invites another 17 year old to touch him or her for a 'sexual purpose' (Head 4) or a 16 year old who shows another 16 year old a pornographic image (Head 6(1)(ii)) could be held criminally liable.

3.2.6 While this Office is of the view that the Bill should not criminalise consensual sexual acts between peers, it also acknowledges that a significant minority of sexual offences are committed by young people themselves. Therefore, while provisions must be made to

safeguard against the criminalisation of peer to peer consensual sexual acts, the legislature must also ensure that a bar to prosecution is not created for young sex offenders e.g. a 16 year old who invites a 6 year old to touch for a sexual purpose.

- 3.2.7 This issue has been addressed in the United Kingdom's Sexual Offences Act 2003 (the 2003 Act) which provides for a separate provision for certain child sex offences committed by children or young people and provides for a lower penalty.¹² The explanatory note of the 2003 Act refers to the fact that in practice, decisions on whether children under 18 should be charged with sex offences will be made by the Crown Prosecution in accordance with the principles set out in the Code of Crown Prosecutors. It states that 'in deciding whether it is in the public interest to prosecute these offences, where there is enough evidence to provide a realistic prospect of conviction, prosecutors may take into consideration factors such as the ages of the parties, the emotional maturity of the parties, whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust'.¹³
- 3.2.8 This leads on to the second point which is that all three offences provided for in Heads 4, 5 and 6, are solely indictable and carry heavy potential penalties so that not only do these offences criminalise consensual behaviour between peers, they are also creating disproportionate penalties for relatively innocent behaviour amongst them.
- 3.2.9 The final issue which must be addressed is the absence of clarity and precision of certain terms. There appears to be no definitions provided for the terms "sexual purpose", or "corrupting or depraving". This, along with the broadly defined concept of "sexual activity", further adds to the potential criminalisation of relatively innocent behaviour amongst consenting peers.
- 3.2.10 Alongside this, there is the possibility that this absence of clarity could lead to legal challenge due to the requirement of precision in the criminal law as set out by the Supreme Court in DPP v Cagney and McGrath in which Hardiman J states:

*'Crimes must be defined with precision and without ambiguity so that the criminal law is "certain and specific."'*¹⁴

- 3.2.11 Head 7 of the General Scheme amends the existing offence of meeting a child for the purpose of sexual exploitation contained in the Child Trafficking and Pornography Act 1998 as inserted by section 6 of the Criminal Law (Sexual Offences) (Amendment), Act 2007. Additional elements to the offence including: the making of arrangements with the intention of meeting; and making arrangements for a child to travel; reflect the desire to ensure that protections against sexual predatory behaviour are further strengthened and are most welcome. This can also be said of the new provision which reduces the communication with the child to one occasion (previously the accused had to communicate with the child on a least two occasions).

¹² Section 13 of the UK Sexual Offences Act 2003

¹³ Explanatory Note to Section 13 of the UK Sexual Offences Act 2003

¹⁴ DPP v Cagney and McGrath [2008] 2IR 111 at p. 121

- 3.2.12 It must be noted, however, that the points outlined above in Heads 4, 5 and 6 are also relevant to Head 7. Because this offence is not limited to an adult and furthermore, due to the broadness of how it is currently drafted, Head 7 has the potential to prohibit dating amongst peers. One way of committing this offence, for example, is for a 16 year old who intentionally meets or travels to meet another 16 year old for the purpose of doing something which would constitute “sexual exploitation” which includes in its definition ‘inviting...the child...to engage or participate in a sexual act’. If a sexual act includes some type of kissing, then the 16 year old who seeks to meet their peer for the purpose of seeking a kiss is, in fact, committing an indictable offence.
- 3.2.13 Head 8 of the General Scheme is almost entirely based on Article 6 of Directive 2011/92/EU and creates two separate offences. The first relates to the use of information and communication technology (ICT) to communicate with a recipient over the age of 17, the purpose of which is to facilitate sexual exploitation of the recipient. This offence must be committed by a person over the age of 18.
- 3.2.14 The Ombudsman for Children’s Office in its Advice on the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006, recommended that given the child protection challenges posed by new media and the Internet, supplementary sections relating to grooming online and by telephone should be included. This Office welcomes the additional offences relating to the use of ICT which the Bill will now provide for.
- 3.2.15 A further point to note, which is not directly relevant to the criminal law, but which this Office believes is of particular importance in the context of an inclusive and empowering digital agenda for children, is the need for children and young people to be centrally involved in the development of advocacy and policy initiatives to capitalise on the potential of ICTs and to minimise and respond to risks associated with them. This concept is supported by the UN Secretary General on Violence against Children Special Representative’s in their recent report, *Releasing children’s potential and minimizing risks: ICTs, the Internet and Violence against Children*.¹⁵
- 3.2.16 The second offence under Head 8, which relates to the sending of sexually explicit material to a child under the age of 17, is not limited to a person over the age of 18 committing the offence. Although this offence is prosecutable on both indictment and summarily, the point remains as above, that this offence has the potential to criminalise consenting peers for relatively innocent conduct.

Recommendations

The General Scheme should provide safeguards against the criminalisation of peer to peer consensual sexual acts, while ensuring that a bar to prosecution is not created for young sex offenders.

Clear definitions of “corrupting or depraving” and “sexual purpose” should be provided for, along with further refinement of the terms “sexual activity” and “sexual exploitation”.

¹⁵ Special Representative of the United Nations Secretary General on Violence Against Children, *Releasing children’s potential and minimizing risks: ICTs, the Internet and Violence against Children* (New York: Office of the SRSG, 2014)

3.3 Child Pornography

- 3.3.1 The amendments to the Child Trafficking and Pornography Act 1998 (the 1998 Act) from Heads 13 to 17 of the General Scheme broadly bring legislation in line with the requirements of Directive 2011/92/EU and the Lanzarote Convention.
- 3.3.2 The Ombudsman for Children's Office notes that the definition of a child is amended by Head 13 of the General Scheme from a person under the age of 17 to a person under the age of 18. This is in line with Article 1 of the UNCRC, which defines a child as being below the age of 18, and Article 34, which requires States Parties to protect the child from all forms of sexual exploitation and sexual abuse.
- 3.3.3 Furthermore, the additional provisions provided for in Heads 14 to 17 of the General Scheme increase the areas of criminal responsibility for persons involving themselves in child pornography or child prostitution.
- 3.3.4 The Office welcomes Head 14 of the General Scheme which adds a new part to section 4 of the 1998 Act which previously only provided for the offence of allowing a child to be used for child pornography. The new section 4A is expressed to be organisation etc. of child prostitution or the production of child pornography.
- 3.3.5 It is clear from Heads 15, 16 and 17 that the intention of the General Scheme in relation to child pornography, is to ensure that the scope of prohibited conduct is widened, and furthermore, to bring this area of criminal law in line with the State's international human rights obligations.
- 3.3.6 Head 15 of the General Scheme provides for the offence of participation of a child in pornographic performance, while Head 16 substitutes an earlier provision, Section 5 of the 1998 Act, and introduces a number of changes to it including: the addition of a new paragraph which prohibits the supplying or making available any child pornography to another person; the removal of the word "knowingly" from each of the offences; and the addition of new methods of passing on child pornography including "transmitting and disseminating".
- 3.3.7 Head 17 provides further scope for prohibited conduct and replaces the offence of 'knowingly possessing child pornography' with the offence of 'acquiring or possessing child pornography or knowingly obtaining access to child pornography'.
- 3.3.8 One point to note relates to the term "child pornography". A UN Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children suggests that while the term "child pornography" is the one most commonly used in legal definitions and in international policy documents, the term "child sexual abuse material" is believed to 'more accurately reflect the grave nature of the content and to challenge any notion that such acts might be carried out pursuant to the consent of the child'.¹⁶
- 3.3.9 This thinking is supported by the COSPOL Internet Related Child Abuse Material Project

¹⁶ United Nations Office on Drugs and Crime *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (United Nations Publications, Vienna, 2014) p. 10

(CIRCAMP) which advocates that a 'sexual image of a child is "abuse or exploitation" and should never be described as "pornographic"... Pornography is a term used for adults engaging in consensual sexual acts'.¹⁷ While it is accepted that the term "child pornography" is an internationally recognised one, this Office would suggest that the term "child sexual abuse material" is a universally prevailing term. This Office urges the Department to take a lead internationally by using this, or a similar term, to more accurately reflect the grave nature of the content involved.

Recommendation

The Minister for Justice and Equality should consider amending the term "child pornography" to a term that more accurately reflects the grave nature of the content.

3.4 Defilement of a child

- 3.4.1 Amendments to the Criminal Law (Sexual Offences) Act 2006 bring about a number of changes to the area of defilement of a child. While the age of consent remains at 17 years of age, a proximate age clause has been introduced, the stated aim of which is not to criminalise non-exploitative consensual sexual relationships between peers where there is no more than two years in age. Furthermore, the General Scheme provides for a new offence in relation to a person in a position of authority who takes advantage of their position to engage in sexual activity with a child.
- 3.4.2 This Office notes that the definition of a "person in authority" has been widened by Head 18 of the General Scheme which extends the categories of the current definition to include current or former guardians, foster parents, step-parents or adoptive parents as well as current or former partners of a parent. It also creates a number of new categories of persons in authority based on non-familial relationships as well as providing for a category of any person on whom the child has developed a dependent relationship. The extension of this definition is a welcome development in the protection of children from sexual exploitation carried out by those closest to them.
- 3.4.3 Article 18 of the Lanzarote Convention provides that States shall take the necessary legislative or other measures to ensure that intentionally engaging in sexual activities with a child, who, according to the relevant provisions of national law has not reached the legal age for sexual activities, is criminalised. Article 3(4) of Directive 2011/92/EU provides for a similar provision. There is no international obligation on the State to provide for a separate offence regarding engaging in sexual offences with a younger minor, however, it is noted that a more serious offence of a similar nature is also provided for the United Kingdom.¹⁸
- 3.4.4 Head 19 provides for the offence of engaging in a sexual act with a child who is under the age of 15. The significant change brought about by this amendment is that the defence of "honest mistake" as to the age of the child is now a defence of "reasonable belief". The

¹⁷ Ibid p. 11

¹⁸ Section 5 of the Sexual Offences Act 2003 Rape of a child under 13

Ombudsman for Children's Office, in its Advice on the Criminal Law (Sexual Offences) Bill 2006, recommended that an objective test of reasonable mistake be applied with the burden of proof resting with the Defendant. This amendment, is therefore, most welcome.

- 3.4.5 As a human rights organisation, this Office recognises the constitutional rights of an accused under Article 40.3.1 requiring the State to guarantee in its law to respect, and as far as practicable, by its law to defend and vindicate the personal rights of the citizens. The Office, therefore, supports the availability of the defence of reasonable belief as to age. However, in order to protect children involved in criminal cases from being subjected to damaging adversarial procedures, adequate protections for child witnesses must be provided for. This point will be further expanded when discussing the amendments to the Criminal Evidence Act.
- 3.4.6 Head 20 provides for the offence of engaging in a sexual act with a child who is under the age of 17. It too, amends the defence of "honest mistake" as to age of the child, to a defence of "reasonable belief". As aforementioned, the Head also provides for a new defence of consent which an accused can raise if they are less than two years older than the complainant who is 15 but under the age of 17. Further conditions must be met including: that the accused is not in a position of trust or authority; or is not a person with whom the complainant is in a relationship of dependency; and is in a relationship with the complainant that is not intimidatory or exploitative of the complainant.
- 3.4.7 The Ombudsman for Children's Office, in its Advice on the Criminal Law (Sexual Offences) Bill 2006, questioned whether the "best interests of the child" principle, pursuant to Article 3 of the UNCRC, was incorporated into the Bill. The advice pointed out that the Bill of 2006 was being enacted to prevent adults from sexually exploiting children; and that the offence of defilement of a child was not an appropriate tool for dealing with consensual sexual acts between teenagers.
- 3.4.8 Article 18(3) of the Lanzarote Convention provides that the provisions concerning sexual activities with a child are not intended to govern consensual sexual activities between minors. This provision is expanded on in the Lanzarote Convention Explanatory Report which states that 'it is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar age'.¹⁹
- 3.4.9 Furthermore, the criminalisation of consensual sexual behaviour between teenagers is not required under EU law and Recital 20 of the Introduction to Directive 2011/92/EU provides that consensual sexual activities, in which children may be involved and which can be regarded as the normal discovery of sexuality in the course of human development, falls outside the scope of the Directive.
- 3.4.10 The Office notes and welcomes that the policy intention behind Head 20, as stated, is to ensure that non-exploitative, consensual sexual relationships between peers will not be

¹⁹ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 12th July 2007 at par 129

criminalised. In order to achieve this, the Department has provided for a defence of consent and for an additional safeguard whereby prosecutions can only be brought against children under the age of 17 with the consent of the Director of Public Prosecutions.

Recommendation

The operation of this provision should be monitored to ensure the effectiveness of the safeguards against the criminalisation of non-exploitative consensual sexual relationships between peers.

3.4.11 The Office further notes that there has been no amendment to section 5 of the Criminal Law (Sexual Offences) Act 2006 which continues to solely protect female children under the age of 17 from being prosecuted for engaging in an act of sexual intercourse. In its advice on the Bill of 2006, the Office referred to Article 2 of the UNCRC, and noted that the provision is discriminatory against males under the age of 17. Furthermore, the Office understands that the intention for this provision is to prevent the stigmatisation or prosecution of pregnant teenagers; however it strongly believes that this is a matter which should be dealt with outside of the criminal law.

Recommendation

Gender discrimination should be removed from section 5 of the Criminal Law (Sexual Offences) Act 2006.

3.4.12 The fact that the term “defilement” continues to be used in the General Scheme is also worth noting. Defilement as defined suggests “make dirty, pollute, sully, desecrate”²⁰. The Joint Oireachtas Committee on Child Protection were sympathetic to the view that the ‘statutory label for a particular offence should not in any way reflect adversely on the victim of that offence’ but also went on to express the view that it was ‘important for the nature and gravity of the offence be clear from the label applied to it’.²¹ The Department may wish to consider a substitute similar to the UK offence of “rape of a child”.

Recommendation

The term “defilement” should be substituted for a more suitable term which does not in any way reflect adversely on the victim.

3.4.13 Head 21 provides for the offence of a person in authority engaging in a sexual act with a child between 15 and 18 years. While this may cause some confusion, as the offence extends to the protection of children under the age of 18, despite the age of consent being 17 years, it is welcomed by this Office as not only does it comply with international human rights standards, (Article 18 of the Lanzarote Convention), it ensures that children up to 18 years are being protected against offences being committed by persons in authority.

²⁰ Collins English Dictionary

²¹ Joint Oireachtas Committee on Child Protection Report on Child Protection November 2006 p. 16

4 Amendment of Sex Offenders Act 2001

- 4.1 Part 3 of the General Scheme introduces a number of amendments to the Sex Offenders Act 2001 (the 2001 Act) following a review of the management of sex offenders under the 2001 Act. The aim, as stated, is the strengthening of post-release supervision and monitoring of sex offenders. On the whole, the proposed amendments are welcomed by this Office, as they provide further protections for children against convicted sex-offenders, however, there are a number of Heads in particular that are worth noting.
- 4.2 Head 25 of the General Scheme, which sets out the provisions relating to the notification requirement of convicted sex offenders, would benefit from an additional provision currently in use in the United Kingdom. Under the United Kingdom Sexual Offences Act 2003, parents or persons in loco parentis of child sex offenders, have obligations towards the child in the supervision of compliance with their notification requirements. The court may direct a person, with parental responsibility for the offender, to comply with the notification requirements in place until either the offender turns 18 (or 16 in Scotland)²². These parental orders may be varied, renewed or discharged by the court²³.

Recommendation:

A parental supervision provision for child offenders under the 2001 Act should be included in Head 25.

- 4.3 Head 28, which provides for the assessment of risk posed by sex offenders, sets out a list of responsible persons that form the assessment team. While reference is made to the Chief Executive of the Health Service Executive and the Director of a Children Detention School, no reference is made to the Child and Family Agency, which would also clearly have a relevant role in this area.

Recommendation:

The definition of “assessment team” should be amended to include the Chief Executive of the Child and Family Agency.

- 4.4 The Ombudsman for Children’s Office welcomes the additional child protection measure provided by Head 38 which introduces a mandatory duty on the court to consider imposing a prohibition against working with children and vulnerable persons as part of the sentence process of persons convicted of certain sexual offences. The only criminal legislative safeguard which currently exists in this area is the offence of failing to notify an employer of a sexual offence conviction pursuant to Section 26. By introducing this new safeguard, this Office believes that it is a further step in the protection of children from those who may pose a risk to their safety.

²² S 89 of the United Kingdom Sexual Offences Act 2003

²³ S 90 of the United Kingdom Sexual Offences Act 2003

5 Amendment of Punishment of Incest Act 1908

- 5.1 Part 4 of the General Scheme introduces amendments to the Punishment of Incest Act 1908 including provision for the alignment of penalties for an offence committed by either a man or a woman in cases of incest.
- 5.2 An issue that requires clarification is that when the male is accused of committing the offence of incest it is explicitly stated that consent of the female is no defence; however when the female is accused of committing the offence it is not explicitly stated that consent of the male is no defence.
- 5.3 From a children's rights perspective, an example of how this could impact children is in the period of when a child is over the age of consent but remains a child under the age of 18. Where, for example, a 20 year old sister has sexual relations with her 17 year old brother, the defence of consent is open to her but not to him. The Office believes that this section, therefore, fails to comply with the non-discrimination provision set out in Article 2 of the UNCRC.

Recommendation:

The gender discrimination provision should be removed from Part 4 of the General Scheme.

6 Criminal Evidence

- 6.1 Part 5 of the General Scheme introduces a number of additional protection measures for witnesses aimed at minimising the trauma on victims of sexual offences, and in particular on child victims. Amendments to the Criminal Evidence Act 1992 (the 1992 Act) are provided for in Heads 46 to 51 while Head 52 specifically addresses the situation regarding the disclosure of third party therapy or counselling records in sexual abuse cases.
- 6.2 The Ombudsman for Children's Office has recommended in previous advices with respect to the General Scheme of the Criminal Law (Sexual Offences) Bill 2006 and the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2007; that consideration be given to the insertion in criminal law of special protection measures for child witnesses.
- 6.3 Furthermore, in its Submission to the Joint Committee on Child Protection, 2006, this Office stressed the need to acknowledge that children are automatically vulnerable within a traditional criminal trial setting. The report outlined comparative evidence from other common law jurisdictions which indicated that special measures for child witnesses can deliver both the protection of children's rights, the protection of the fair trial rights of the accused and better quality evidence serving the interests of justice.
- 6.4 Evidence from behind a screen
- 6.4.1 Head 47 provides for the giving of evidence of a person under 18 years of age from behind a screen or other device in circumstances where for any reason a live television link is not used provided the judge is satisfied that such a direction is necessary in the interests of justice. This is a welcome development as the new provision allows for situations where either a television link is not available or for situations where a child complainant may wish to give evidence in court in the presence of a jury but may be reluctant to do so if the accused is in sight.
- 6.4.2 It must be noted, however, that while Head 47 applies to a person under the age of 18, Section 13 of the 1992 Act which provides for evidence through a video-link, and section 14 which provides for evidence through an intermediary, as currently drafted, remain unchanged and only afford this protection for children under the age of 17.

Recommendation:

The age limit in sections 13 and 14 of the Criminal Evidence Act 1992 should be increased from 17 to 18 years of age for child witnesses giving evidence.

6.5 Cross Examination by the Accused

- 6.5.1 Under Head 49, there is a mandatory direction of the court to prohibit the accused from personally cross-examining a child witness under the age of 14 unless the judge is of the opinion that the proper administration of justice requires the accused to do so. However,

when the child is between 14 and 18 years of age, it is at the discretion of the court to protect against personal cross-examination.

- 6.5.2 In its Submission to the Joint Committee on Child Protection 2006, the Ombudsman for Children's Office recommended that in the event a child witness is directed to attend a trial, the accused should be prohibited by statute from cross-examining a child. While the presumptive prohibition afforded to child witnesses under the age of 14 is welcome, this Office would question why child witnesses between 14 and 18 years of age are only afforded a discretionary prohibition.
- 6.5.3 The best interests principle, pursuant to Article 3 of the UNCRC, is reiterated in Article 8(3) of the Second Optional Protocol, whereby states must ensure that, in the treatment by the criminal justice system of children who are victims of the offences outlined in the protocol, the best interest of the child shall be a primary consideration.
- 6.5.4 As a child is defined in the UNCRC as being under the age of 18; by providing a lesser protection to child witnesses between 14 and 18 years of age, this provision falls short of international standards in consideration of the best interests of all child witnesses in legislation, policy and practice under the criminal law.

Recommendation:

The mandatory direction of the court to prohibit personal cross examination by the accused provided for in Head 49 should be extended to all children under the age of 18.

6.6 Admission of video-recording as evidence

- 6.6.1 Head 50 amends the current provision for the admission of video-recording as evidence of any statement made during an interview with a member of the Garda Síochána and now covers a statement in relation to a sexual offence, made by a person other than the accused, who is under the age of 18. The Ombudsman for Children's Office recommended in its Submission to the Joint Committee on Child Protection that the evidence of a child witness be submitted by means of a video-recording i.e. a prior statement, recorded at another place and prior to the trial. The extension of this provision to cases involving sexual offences, is welcome, however, it must be noted that the child complainant is only afforded this protection if they are under the age of 14.
- 6.6.2 Article 35(1)(2) of the Lanzarote Convention provides that states shall take the necessary legislative or other measures to ensure that all interviews with the victim (defined as a child subject to sexual exploitation or sexual abuse) or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings. This protection is further provided for in EU law pursuant to Article 20(4) of Directive 2011/92/EU and Article 24(1)(a) of Directive 2012/29/EU. This Office notes that Head 50, therefore, does not fully comply with international standards as it fails to provide protective measures to child victims/complainants between 14 and 18 years of age.

Recommendation:

The admission of video recording as evidence at trial, provided for in Head 50, should be extended to all child witnesses, to include child complainants under the age of 18.

6.7 Additional Protection Measures for Child Witnesses

- 6.7.1 While the additional protection measures for child witness provided for in the General Scheme are a welcome development, the Ombudsman for Children Office notes that a number of protection measures, recommended in its Submission to the Joint Oireachtas Committee on Child Protection and in its advice on the Criminal Law (Sexual Offences) Bill, 2006, have not been introduced into the General Scheme.
- 6.7.2 The first of these protection measures missing from the General Scheme is provision for the appointment of a suitably qualified person to support a child throughout the legal process. As noted in previous advices, legislation in a number of jurisdictions, including South Africa²⁴, Northern Ireland²⁵ and Scotland²⁶, provide for the presence of an intermediary or support person to assist a child witness.
- 6.7.3 Pursuant to the Second Optional Protocol, states are obliged to adopt appropriate measures to protect the rights and interests of child victims.²⁷ Article 8(1)(a) requires states to recognise the vulnerability of child victims and to adapt procedures to recognise their special needs, including their special needs as witnesses, furthermore, Article 8(1)(d) requires states to provide appropriate support services to child victims throughout the legal process.
- 6.7.4 This obligation is echoed in the Lanzarote Convention which provides in Article 31 that states shall take the necessary legislative or other measures to protect the rights and interests of victims (any child subject to sexual exploitation or sexual abuse), including their special needs as witnesses, at all stages of investigations and criminal proceedings. In particular, Article 31(1)(d) sets out that appropriate support services must be provided so that their rights and interests are duly presented and taken into account. This Office believes that by not providing for the appointment of a support person for a child witness, the state fails to comply with its international obligations in this regard.

Recommendation:

A provision should be inserted into the General Scheme allowing for the appointment of a suitably qualified person to support a child witness through the legal process.

²⁴ S 170A(1) of the Criminal Procedure Act 51 of 1977

²⁵ S 17(1) of the Criminal Evidence (Northern Ireland) Order 1999

²⁶ S 271L of the Vulnerable Witness (Scotland) Act, 2004

²⁷ Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

- 6.7.5 A second protection measure that has not been included in the General Scheme is pre-trial preparation services for children who are required to attend court. Such protection measures are in place in other common law jurisdictions such as Scotland²⁸ and Canada²⁹. As outlined in the Submissions to the Joint Committee on Child Protection, this Office believes that pre-trial preparation measures including: court room familiarisation; explaining the role and functions of different personnel; preparing a child witness for a possible acquittal; and question and answer role plays, when done properly and in close collaboration with the prosecution and judiciary, can lead to children being in a position to provide their best evidence and this can only be in the interests of justice.
- 6.7.6 As outlined above, the Second Optional Protocol and the Lanzarote Convention require states to ensure appropriate support services are provided to child victims throughout the legal process. Of particular note is Article 8(1)(b) of the Second Optional Protocol under which states are obliged to adopt appropriate measures to ensure child victims are informed of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases.

Recommendation:

The General Scheme should be amended to provide for pre-trial preparation services for children who are required to attend court.

- 6.7.7 The final measure that has not be included in the General Scheme which has been recommended by this Office in previous advices relates to the training of all people working with children in the criminal justice system including: training in cognitive development skills of children; communication skills; and the practical implication of children's rights, including the right of children to be heard pursuant to Article 12 of the UNCRC and Article 42A of the Constitution as inserted on the 28th April by the Thirty-First Amendment to the Constitution (Children) Act 2015.
- 6.7.8 Article 36(1) of the Lanzarote Convention requires states to take the necessary legislative or other measures, with due respect for the rules governing the autonomy of legal professions, to ensure that training on children's rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the proceedings, in particular, judges, prosecutors and lawyers. This obligation is also found in Article 25 of Directive 2012/29/EU.

Recommendation:

The General Scheme should make provision for the training of all people working with children in the criminal justice system including: training in cognitive development skills of children;

²⁸ The Victim Information and Advice Service, Scotland. <http://www.victimsofcrimeinscotland.org.uk/support-and-advice-for-victims-and-witnesses/other-sources-of-advice/victim-information-and-advice/>

²⁹ Child Witness Project, Ontario, Canada. <http://www.lfcc.on.ca/cwp.htm>

communication skills; and the practical implication of children's rights, including the right of children to be heard pursuant to Article 12 of the CRC and Article 42A of the Consitution.

6.8 Disclosure of third party records in sexual offence trials

- 6.8.1 Head 52 addresses the issue of access to counselling or therapy records by an accused and provides for a judicially-based process in which third party counselling or therapy records may be disclosed to the defence in sexual offence trials. Where a defendant seeks production of a relevant record, the appropriateness of disclosing such records will be a matter for the court via a pre-trial hearing. In the event that an order is made for disclosure, conditions may then be imposed by the court including: redaction of certain parts and personal information in the records; restrictions as to who can view the records; and the circumstances in which they can be viewed.
- 6.8.2 The issue of access to therapy notes relating to children who have been sexually abused, and the use of information contained in them, in the context of criminal prosecutions, has been raised by this Office on numerous occasions with the Minister for Justice and the Director of Public Prosecutions. This Office requested that consideration be given to addressing the matter in primary legislation which would provide greater clarity in balancing the interests of protecting victims of abuse and supporting prosecutions. This issue was also highlighted in our 2011 and 2012 Annual Reports.
- 6.8.3 In discussing whether a complainant's therapeutic records should be disclosed, an examination must be had of the competing rights of the accused to a fair trial and the privacy rights and fair procedure rights of the complainant. The right to a fair trial, enshrined in Article 6 of the ECHR, has been considered by the ECtHR in the context of a principle of "equality of arms" which requires that both the defence and prosecution must be afforded a fair opportunity to present their case. While the ECtHR has ruled that prosecution authorities should disclose to the defence all material evidence in their possession for or against the defendant;³⁰ they have also held that entitlement to disclosure is not an absolute right and that in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or safeguard an important public interest right³¹.
- 6.8.4 In addition to privacy rights enshrined in Article 8 of the ECHR and Article 21 of Directive 2012/29EU; complainants are also afforded a right to protection from re-victimisation pursuant to Article 18 of Directive 2012/29/EU. However, the right to privacy is a qualified right which can be overridden if it is held to interfere unduly with the rights of a defendant in a criminal trial. With regard to the specific rights of children, the right to protection of privacy is enshrined in Article 16 of the UNCRC and Article 8 of the Second Optional Protocol. However, as stated in Article 8, the measures which are adopted by states to protect this right to privacy shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

³⁰ Rowe and Davis v United Kingdom (2000) 30 E.H.R.R.

³¹ Dowsett v UK (2004) 38 E.H.R.R. 1

- 6.8.5 In light of the above, the Ombudsman for Children's Office recognises that a blanket prohibition on the admissibility of complainant's records would be unlikely to survive a constitutional challenge which could ultimately impact on the prosecution of sex offence cases.
- 6.8.6 In that respect, a judicially-based process to regulate access to therapeutic records is a welcome development, however; while Head 52(9)(d) refers to the potential prejudice to the right to privacy of any person to whom the record relates as a factor that the court must take into account during the disclosure hearing, the Head fails to provide for the personal dignity of the complainant in the factors which the court must consider. Since this provision follows broadly the Canadian Criminal Code Model,³² which does provide for the potential prejudice to the personal dignity of any person whom the record relates as one of the eight factors that a trial judge should take into consideration,³³ it seems unusual that this factor has not been included in Head 52(9).
- 6.8.7 By failing to provide for this right, which is provided for in Article 18 of Directive 2012/29/EU, this Office believes that sufficient measures have not been adopted to fully protect the rights and interests of child victims.

Recommendation:

Head 52(9) should be amended to include the potential prejudice to the personal dignity of any person whom the record relates as one of the factors which the court must take into account.

- 6.8.8 A further consideration which must be addressed, in relation to the disclosure process, is whether the provision goes far enough to incorporate the best interests principle of the child in the process.
- 6.8.9 The requirement to make the best interests of the child a primary consideration in proceedings that affect him/her is one of the general principles of the UN Convention on the Rights of the Child, as outlined above. This principle has also found expression in Article 42A of the Constitution, and while it refers to specific family law proceedings, the UN Committee has indicated that States' obligation to implement the best interests principle applies without restriction to all judicial proceedings and relevant procedures concerning children.³⁴
- 6.8.10 The Ombudsman for Children's Office, in its advice on the General Scheme of the Child and Family Relationships Bill, 2014, recommended that consideration be given to extending the application of the best interests principle so that it applies to all relevant proceedings and processes that have an impact on children.
- 6.8.11 While the pre-trial determination, provided for in Head 52, is a welcome development in this

³² s 278 of the Canadian Criminal Code as amended by *Bill C-46, An Act to amend the Criminal Code*

³³ S 278.5 (2) of the Canadian Criminal Code

³⁴ UN Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention: Concluding Observations - Ireland* CRC/C/IRL/CO/2 (29 September 2006), para 23

area, it is uncertain as to which person is representing the rights and needs of child complainants, needs which have been recognised as requiring special consideration pursuant to Article 8 of the Second Optional Protocol. It could be argued that the Director of Public Prosecutions; whose duty it is to serve the people; is not in a position to represent the child complaint's right to privacy and personal dignity. This leaves open the question as to whether the best interest principle is incorporated into this provision. The Ombudsman for Children's Office believes that with further development of appropriate ancillary court services for children involved in the judicial process, the rights of child complainants in pre-trial determinations for third party disclosure could be adequately protected.

Recommendation:

Provision should be made for the development of appropriate ancillary court services for children to ensure that the best interest principle is incorporated into the General Scheme.