

Submission to Joint Committee on Child Protection

**August 2006**

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# 1. Introduction

## The Ombudsman for Children

The Ombudsman for Children's Office (OCO) was established in April 2004 under primary legislation; the Ombudsman for Children Act, 2002. The Ombudsman for Children is independent of Government and other civil society actors and is accountable to the Oireachtas.

The role of the Ombudsman for Children is to promote and safeguard the rights and welfare of children and young people. The functions of the Ombudsman for Children are: to conduct investigations of complaints regarding actions by public bodies, schools and voluntary hospitals; to promote children's rights and to provide research and policy advice to Government and other bodies.

Section 7(1)(g) of the Ombudsman for Children Act, 2002 provides that the Ombudsman for Children shall monitor and review generally the operation of legislation concerning matters that relate to the rights and welfare of children.

Section 7(4) of the Act provides that the Ombudsman for Children may give advice to Government on any matter (including the probable effect on children of the implementation of any proposals for legislation) relating to the rights and welfare of children.

## Background to this submission

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

On the evening of 1 June 2006, a Bill aimed at filling this legislative gap – the Criminal Law (Sexual Offences) Bill, 2006 – was referred to my Office for advice as per the statutory functions of my Office as set out above. I submitted my advice on 2 June 2006 (see Appendix 1).

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.

Subsequently, two Special Rapporteurs on Child Protection were appointed and the Joint Committee on Child Protection was established on 6 July 2006. Both mechanisms are charged with keeping the criminal law relating to sexual offences against children under review.

In a letter dated 21 July 2006, I received an invitation from the Joint Committee on Child Protection to make a written submission to it on matters directly relevant to the Orders of Reference of the Committee. This submission has been forwarded to the Committee on foot of that request.

## 2. Overview

The Orders of Reference of the Joint Committee on Child Protection are widely drawn, in particular the first element of the Order which mandates the Committee to “review the substantive criminal law relating to sexual offences against children”.

In this submission, I will focus on the probable effects on children of the recently enacted Criminal Law (Sexual Offences) Act, 2006.

Given the short timeframe within which the Committee must report (by 30 November 2006), I will also focus on those issues which may be most pertinent to the work of the Committee, given that it is not expected that the Committee will be in a position to review all aspects of the substantive criminal law relating to sexual offences against children.

I would also refer the Committee to my advice to Government in relation to the Criminal Law (Sexual Offences) Bill, 2006 of 1 June 2006, appended to this submission at Appendix 1. I trust that, on this occasion, there will be an opportunity both for my advice of 1 June and the content of this submission to be fully considered. I remain at the disposal of the Committee should the Committee wish to seek any information or clarifications.

### 3. Special protection measures required for child witnesses

The Criminal Law (Sexual Offences) Act, 2006 leaves open the possibility that child witnesses may be required to attend trial and may be subject to cross examination. In my advice of 1 June, I noted my concern in relation to this matter and recommended that consideration be given to the insertion of additional protections for children into the then Bill.

Article 3 of the UN Convention on the Rights of the Child (CRC) states that, in all actions concerning children, the best interests of the child shall be a primary consideration. In light of this international human rights obligation, there must be provision for the consideration of the best interests of child witnesses in legislation, policy and practice under the criminal law relating to sexual offences against children.

When considering special protection measures for child witnesses, there is a well recognised and well explored balance to be struck between ensuring that both the rights of children to be protected and listened to and the fair trial rights of every accused person are respected.

In this respect it is important to acknowledge that children are automatically vulnerable within a traditional criminal trial setting. A child testifying to abuse versus a cross examining defence counsel seeking only to establish reasonable doubt is no fair match by any measure. Appropriate measures are required not only for the child's best interests but also in the interests of justice. After all, the Court is interested in gathering the best evidence in order to make decisions in the interests of justice. Comparative evidence from other common law jurisdictions indicate 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.

The effect on children of court involvement and testifying has been well documented. For example, the Child Witness Project of Ontario, Canada, reports that:

"Many children experience great anxiety about their roles as witnesses and the prospect of testifying. Anticipatory fears related to testifying and anxiety about facing the accused person in court can interfere, at least on a temporary basis, with the ability of many children to function well in their daily lives during the pre-court period. In general, the literature suggests that there are short-term negative effects on children's emotional health and that many children remember testifying as an unpleasant and frightening experience".<sup>1</sup>

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<sup>1</sup> "Child Witness in Canada: Where we've been, Where we're going", Child Witness Project, May 2002, p5.



The special protection measures set out at 3.2 below are required in order to guard against the negative effects of court involvement on children.

### 3.1 Existing protection measures in Irish statutory law

The Criminal Evidence Act, 1992 provides for:

- the giving of evidence by live television link by a person under the age of 17 years in proceedings under the Criminal Procedure Act of 1967 (ie the preliminary examination process);
- the admission into evidence of a video recording of any statement made by a child under 14 years of age during an interview with a member of An Garda Síochána or any other person who is competent for the purposes, provided that child is available at the trial for cross examination. The Court can, if it is of the opinion in the interest of justice, direct that the video recording concerned or some portion of it shall not be admitted as evidence;
- the giving of evidence that an accused was known to the witness before the date on which the offence is alleged to have been committed. In such instances, a child giving evidence by television link does not have to directly identify the accused in court; and
- the giving of evidence by a person other than the witness, that the witness identified the accused at an identification parade.

The Committee may wish to investigate whether the provisions of the Criminal Evidence Act, 1992 apply to proceedings under the Criminal Law (Sexual Offences) Act, 2006. It is my understanding that, at present, there is no statutory provision stating that they do. In order to provide a minimum level of protection at this stage, steps should be taken to ensure that the provisions do apply to the 2006 Act. However, as outlined below, I recommend that additional protection measures be adopted with a view to protecting child witnesses.

### 3.2 Recommended additional protection measures

Protection measures for child witnesses, additional to those on the Irish Statute Book have been introduced in other common law jurisdictions including Northern Ireland, Scotland, England and Wales, Canada and South Africa. These include the following measures which are expanded upon below:

- the admission of video-recorded evidence by a child as evidence in chief;
- the prohibition of cross examination by an accused;
- the presence of intermediaries;
- establishing who carries the principal duty of care to children in the court room; and
- pre-trial preparation measures and training.

I recommend that the Committee look to these and other jurisdictions in order to identify best practice and use the opportunity afforded to it over the coming months to recommend the adoption of best practice in this jurisdiction. In addition, I would recommend that these protection measures apply to all children under 18 years of age.

#### *A The admission of video-recorded evidence by a child as evidence in chief*

In the best case scenario, child witnesses should not attend court at all. Their evidence should be submitted by means of a video recording (ie a prior statement), recorded at another place and prior to the trial. This exact measure has been introduced in a number of common law jurisdictions, including Northern Ireland and Scotland (in a more comprehensive manner than the current provision in our Criminal Evidence Act, 1992).

Section 15 of the Criminal Evidence (Northern Ireland) Order 1999 provides that a video recording of an interview of the witness may be admitted as evidence in chief (the main evidence) of the witness. Section 16 provides that any cross-examination and any re-examination can be recorded by means of a video recording.

Section 271I of the Vulnerable Witnesses (Scotland) Act, 2004 provides for the taking of evidence from a child witness by a Commissioner.<sup>2</sup> The evidence is recorded and submitted as evidence without being sworn to by the witness. In addition, Section 271M provides that a prior statement by a child witness may be admitted as the witness's evidence in chief.

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<sup>2</sup> The Vulnerable Witnesses (Scotland) Act, 2004 defines a Commissioner as a person appointed by the Court to take the evidence of a vulnerable witness (Section 271I of the Act).

These legislative provisions provide for the exercise of discretion by the Courts in relation to their application.

I recommend that the Committee review these pieces of legislation with a view to recommending the adoption of similar measures in Ireland.

It should be noted that video-linking or live CCTV linking is another measure which can be used to shield children somewhat from court proceedings. This measure is provided for in the Criminal Evidence Act, 1992. However, I recommend that video-recorded evidence be used as this provides a higher degree of protection for child witnesses.

#### *B Prohibition of cross-examination by an accused*

The negative impact upon a child of the prospect of facing an accused in court has been documented. The aforementioned Child Witness Project reports that, among children with whom they worked, facing the accused was one of the most significant stress factors they experienced.<sup>3</sup>

In the event that a child witness is directed to attend a trial, the accused should be prohibited by statute from cross-examining the child witness. Such a prohibition already exists in Northern Ireland.<sup>4</sup>

I recommend the adoption of a similar statutory measure here. As regard the constitutionality of such a measure, Judge Kinlen in the case of *AW v DPP* rejected the argument that the Constitution confers a direct right to confrontation (see note below which recognises that this ruling has not yet been tested at the Supreme Court).<sup>5</sup>

The prospect of cross-examination of a child witness by an accused was mooted by members of the Government and others as one of the more pressing potential consequences of the enactment of the Criminal Law (Sexual Offences) Act, 2006.

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<sup>3</sup> Reducing the System Inducted Trauma, Child Witness Project, 1991.

<sup>4</sup> See the Criminal Evidence (Northern Ireland) Order 1999, Section 23(1).

<sup>5</sup> *AW v DPP*, 1995, 2 Irish Reports at page 268. In the case, the accused was facing charges of sexual assault and rape committed against a young boy. The prosecution intended to introduce the boy's evidence by means of a live television link. The defence sought an Order preventing this on the grounds that it would violate the accused's constitutional rights to fair procedures and, in particular, it would deny him the implied right to confront witnesses against him. The Court rejected the argument that the Irish Constitution confers such a direct right to confrontation but, recognising that this point had thus far been undecided by a Superior Court in Ireland, the Judge indicated he was fortified by the descending opinion of Blackmun J. in a case of *Coy –v– Iowa* and a further case in which the majority opinion of the Court in *Maryland –v– Craig* held in effect, that a compelling social interest could override a claim to a direct face to face confrontation. Judge Kinlen therefore refused the defence's application.

The Committee now has an opportunity to recommend a prohibition which would close off this particular vista.

### *C The presence of intermediaries*

Legislation in a number of jurisdictions, including South Africa, Northern Ireland and Scotland provide for the presence of an intermediary or support person to assist a child witness.

In South Africa, a child witness can participate in a trial from an 'Intermediary Room' speaking through an intermediary. From the intermediary room located adjacent to the court room, the child cannot see the court room and all communications are through the intermediary. This system, established under Section 170 A(1) of the Criminal Procedure Act 51 of 1977 was subject to a constitutional challenge in the case of *K v Regional Court Magistrate NO and Others*.<sup>6</sup> The challenge failed. Amongst its reasons for so finding, the Court held that, although cross-examination through an intermediary may be blunted it does not mean that the accused is denied a fair trial. The intermediary system may assist the Court in establishing the truth as the child witness is in a better position to participate in the proceedings. The child witness is protected and this addresses the imbalance between the child and skilled counsel.<sup>7</sup>

There is provision for a 'Supporter' in Scotland, see Section 271 L of the Vulnerable Witnesses (Scotland) Act, 2004<sup>8</sup> and an intermediary in Northern Ireland, see Section 17(1) of the Criminal Evidence (Northern Ireland) Order 1999.

In its 1990 report on Child Sexual Abuse, the Law Reform Commission indicated that a trial judge could at her/his discretion allow a 'support' person to sit in close proximity in the case of very young children, provided there was no communication between them.<sup>9</sup> In my view, this does not go far enough, particularly in light of developments in neighbouring jurisdictions.

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<sup>6</sup> 1996(1) SACR 434(E) (note – at the time of the case, the interim Constitution of South Africa was applicable).

<sup>7</sup> See further paper by Rita Blumrick, Deputy Director of Public Prosecutions in the Province of Kwazulu-Natal in "Respecting Child Witnesses and Delivering Justice", edited by Justice for Children, Scotland.

<sup>8</sup> A 'Supporter' is defined in this provision as another person who may be present alongside the witness to support the witness while they are giving evidence'.

<sup>9</sup> "Report on Child Sexual Abuse", The Law Reform Commission, LRC 32-1990, 1990.

I understand that an intermediary scheme has recently been piloted in England and Wales and would recommend that the Committee review practice in this and other jurisdictions with a view to establishing best practice in other jurisdictions.

In my advice to the Government on the Criminal Law (Sexual Offences) Bill, 2006, I recommended that a provision be inserted into the Bill allowing for the appointment of a suitably qualified person to support a child throughout a legal process. I hope that, on this occasion, there will be time to reflect on my recommendation and that the Committee will propose the adoption of measures similar to those outlined above.

#### *D Duty to protect children in the court room – Where does this duty lie?*

In the event that the measures set out at A and C above are not adopted and a child is required to give evidence in Court, including under cross-examination, it must be clear who carries the principal duty of care in relation to that child while the child is in the Court room.

A child witness must not be left to the mercy of opposing counsel. The Court and the presiding judge must carry the duty of care to the child and act in the best interests of the Child, as per Article 3 of the CRC.

In trials, judges have the power to intervene in cross-examination to disallow questioning that is irrelevant, repetitive or harassing, but judges have a fine balance to strike between their duty to protect child witnesses and their duty to respect the fair trial rights of an accused. I recommend that judges be supported in this task by statutory provision. At a minimum, statute should prohibit questioning about the sexual history of a child witness, as is the case in Northern Ireland.<sup>10</sup> At a broader level, statute should prohibit questioning designed to trip up children.

#### *E Pre-trial preparation measures*

Should a child be required to attend a trial in court, they must be adequately prepared for such an event. Pre-trial preparation measures have been introduced or are being developed in a number of common law jurisdictions including Canada and Scotland. In Ontario, Canada, the Child Witness Project has been providing pre-trial preparation services to children and young people since its establishment in 1987. The aim of the court preparation courses are “to facilitate the conditions necessary for a witness

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<sup>10</sup> The Criminal Evidence (Northern Ireland) Order 1999, Section 28.

to provide a full and candid account of the evidence without compromising the defendant's right to a fair trial and to ensure that child witnesses are not traumatised by the legal process".<sup>11</sup>

Pre-trial preparation measures include 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 (with an absolute ban on any discussion of the case). In developing such measures, close collaboration with the police, prosecution and judiciary is essential in order to overcome any fears that such preparation could lead to the tainting of evidence. When done properly, preparation can lead to children being in a position to provide their best evidence and this can only be in the interests of justice.

In Scotland, the Victim Information and Advice Service (VIAS) provides information to victims and witnesses including court familiarisation visits. The Scottish Executive has also published a number of interesting preparatory materials including; a *Child Witness Support Pack* and *Guidance on Interviewing Child Witnesses in Scotland*.

An additional pre-trial measure is that all efforts should be undertaken to reduce as far as possible delays in cases involving children coming to trial. Such delays can cause distress to children involved in such proceedings.

## **F Training**

I recommend that all people working with children in the criminal justice system receive relevant training including in the cognitive development skills of children, communications skills and the practical implementation of children's rights, including the right of children to be heard under Article 12 of the CRC.

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<sup>11</sup> "Child Witness in Canada: Where we've been, Where we're going", Child Witness Project, May 2002, p7. For further information on the pre-trial preparation services provided by the Project, see their website: [www.lfcc.on.ca](http://www.lfcc.on.ca)

## 4. Additional implications of the CC case

I have concerns regarding additional elements of the Criminal Law (Sexual Offences) Act, 2006. These were set out in my Advice to Government of 2 June 2006 which is appended at Appendix 1. I would refer the Committee to that advice and recall here two of the major issues raised in that advice.

### 4.1 Best interests of the child

Article 3 of 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 Criminal Law (Sexual Offences) Act, 2006. A particular illustration of this is the Act's provisions in relation to prosecution.

The Act provides that no child be prosecuted under Section 3 of the Act (which concerns children aged 15-17), save with the consent of the DPP. However, there is no similar provision in relation to Section 2 of the Act (concerning children under the age of 15).

It is therefore possible that a child of 15 years of age could be prosecuted under the Act for engaging in sexual relations with a child aged 14 years.

The aim of this Act should be to prevent adults exploiting children. Children should not be prosecuted under this Act, unless such a prosecution would be in the best interests of the children concerned.

Within the confines of the scheme of the then Bill, I recommended that the provision that no child be prosecuted under Section 3 of the Act, save with the consent of the DPP, be extended to Section 2 of the Act.

While I recognise that the DPP does not normally give reasons for his decisions, in my advice I expressed the opinion 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.

### 4.2 Non – discrimination

In my advice, I welcomed the extension of protection under the Bill to both genders in the overall scheme of the Bill. However, I noted that 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 had 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.



## 5. Constitutional amendment

In my submission to the All-Party Oireachtas Committee on the Constitution in January 2005, I recommended an amendment to the Constitution to grant express rights to children. In defining these express rights, I recommended that the Committee on the Constitution consider the rights enumerated in the CRC.

The ruling in the Supreme Court case of *CC v Ireland* and others and the implications arising both from that case and from the provisions of the Criminal Law (Sexual Offences) Act, 2006 (in particular as regards child witnesses) are a clear illustration of why express rights for children must be set out in the Constitution.

If anything, the *CC* case may have re-drawn the constitutional balance further away from the protection of children's rights and an amendment is required in order to redress this balance and place the protection of the rights of children at the heart of our Constitution.

When the the All-Party Oireachtas Committee on the Constitution reported in January 2006, I expressed my disappointment that the Committee had not recommended that express rights for children be included in the Constitution.

As the Committee is aware, the concept of enshrining children's rights in the Constitution is not a new one. As far back as 1993, the Kilkenny Investigation Committee made this recommendation in the Kilkenny Incest Report. Ten years ago, the Constitution Review Group recommended that an express guarantee of certain rights of the child and an express requirement that in all actions concerning children the best interests of the child must be the paramount consideration should be added into the Constitution. Notwithstanding these recommendations, the All-Party Committee settled for a proposal that fell far short of this mark. Not only was this a disappointing move, it was also a retrograde step.

At present, children and young people are not recognised as individual rights holders under the Constitution despite the provisions of the CRC to which Ireland is a party. In 1998, the UN Committee on the Rights of the Child called on the Government to accelerate the implementation of the Constitutional Review Group's recommendations of 1996. It also called on the Government to take steps to ensure that the UN Convention is fully incorporated into domestic law. No progress has been achieved in respect of either of these calls.

The work of this Committee adds fresh impetus to the need for a constitutional amendment. The special protection measures for child witness outlined at paragraph 3.2 above may be subject to constitutional challenge. A constitutional amendment providing for express rights for children and, in particular, that the best interests of the child be a primary consideration in all actions concerning children, would help to secure such measures. I note that, at the first public meeting of the Committee on 19 July the Ministers present noted their willingness to consider a constitutional amendment should the Committee conclude that such a measure would be required in order to deal with the implications of the CC case.

The work of the Committee presents a second opportunity this year for an Oireachtas Committee to recommend a constitutional amendment aimed at enshrining children's rights in the Constitution. I trust that the Committee will seize this opportunity in an effort to shore up protection for children and to avoid a recurrence of any further CC case type events.

## 6. Conclusion

In conclusion, the core of my submission focuses both on the need to ensure that the voice of the child is respected within criminal proceedings, as is required under Article 12 of the CRC and on the need to protect children against any further trauma which may result from participation in court proceedings. In seeking to ensure compliance with the requirements of the CRC, I recommend that the Committee look to other common law jurisdictions with a view to bringing best practice home. I would also encourage the Committee to give serious consideration to recommending an amendment to the Constitution enshrining express protection for children's rights in the Constitution.

# Appendix 1

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

### 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.

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

2.1 I welcome the extension of protection to both genders.

2.3 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.

2.4 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.

### 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 interest of both children. The decision of the DPP shall be made public.

### 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.

### 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 CRC.

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 interest 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 interest 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 have also recommended 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 2

### Joint Committee on Child Protection Orders of Reference

#### Dáil Éireann on 6 July 2006 ordered:

- 1) That a Select Committee consisting of seven members of Dáil Éireann be joined with a Select Committee to be appointed by Seanad Éireann to form the Joint Committee on Child Protection to:
  - review the substantive criminal law relating to sexual offences against children;
  - examine the issues surrounding the age of consent in relation to sexual offences;
  - examine criminal justice procedures relating to the evidence of children in abuse cases;
  - consider the implications arising from and the consequences of the Supreme Court decision of the 23rd May, 2006, in the CC case;
  - examine the desirability or otherwise of amending the Constitution to deal with the outcome of the CC case and/or to provide for a general right of protection for children;
  - make such other recommendations on the protection of children as shall to the committee seem appropriate; and
  - the Committee shall report back to each House with recommendations in a final report by 30th November, 2006.
- 2) The Minister for Justice, Equality and Law Reform and the Minister of State at the Department of Justice, Equality and Law Reform, the Department of Health and Children and the Department of Education and Science (with special responsibility for children) shall be *ex-officio* members of the Committee and shall be entitled to vote.
- 3) The quorum of the Joint Committee shall be four, of whom at least one shall be a Member of Dáil Éireann and one a Member of Seanad Éireann.
- 4) The Joint Committee shall have the powers defined in Standing Orders 81(1) to (8) inclusive and 91(2).
- 5) The Chairperson of the Joint Committee shall be a Member of Dáil Éireann.





