

Proposition 5 - Protection of Children from Sexual Exploitation and Sexual Abuse

The ICCL Position on the Government's
Proposed Amendment to the Constitution

February 2006

Irish Council for Civil Liberties (ICCL)

Contents

About the Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included establishing an independent Garda Síochána Ombudsman Commission, legalising the right to divorce, securing more effective protection of children's rights, decriminalising homosexuality and the introduction of multi-ground equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

What we do:

- Advocate for positive changes in the area of human rights;
- Monitor government policy to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police accountability and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

For further information contact:

Irish Council for Civil Liberties
9-13 Blackhall Place
Dublin 7
Telephone: +353 1 799 4504
Fax: +353 1 799 4512
E-mail: info@iccl.ie
Web: www.iccl.ie

1. Introduction

In 1998, the UN Committee on the Rights of the Child recommended that the Irish Government “accelerate measures to implement recommendations from the Constitutional Review Group for the inclusion of all the principles and provisions of the Convention”.¹ The Committee reiterated this recommendation in 2006² and the Government announced the intention to hold a referendum to insert children’s rights to the Constitution in November 2006.

In November 2006, the Joint Committee on Child Protection also issued its report calling for the introduction of a range of reforms to enhance child protection in Ireland.³ This Committee was originally set up after the political fallout following a decision of the Supreme Court in the C.C. case, to strike down Section 1(1) of the Criminal Law (Amendment) Act, 1935.⁴ In C.C., the Supreme Court ruled that Section 1(1), which criminalised persons for engaging in sexual activity with any girl under the age of fifteen, was unconstitutional because it did not allow for the defence of honest mistake. The Supreme Court’s decision was considered by the Joint Committee on Child Protection. However, the Committee disagreed with the Supreme Court’s reasoning and proposed an amendment to the Constitution to permit the Oireachtas to enact laws providing for absolute criminal liability in respect of sexual activity with children under 16 years.

On 30 January 2007, the Minister for Health and Children, Mr Brian Lenihan TD, distributed a briefing document on proposed wording for a referendum to amend the Constitution. In this document, the Government indicates its intention to hold a referendum to insert children’s rights into the Constitution⁵ and to amend the Constitution to allow the Oireachtas to introduce a strict liability offence regarding sexual activity with children and young people under 18 years.⁶

¹ Recommendation No. 24. Concluding Observations of the Committee on the Rights of the Child, Ireland, UN Doc. CRC/C/15/Add.85 (1998).

² Recommendation 7. Concluding Observations of the Committee on the Rights of the Child, Ireland, Doc. CRC/C/IRL/CO/2.

³ The Joint Committee on Child Protection (November 2006) *Report on Child Protection*, available from Leinster House, Dublin 2.

⁴ C.C. v Ireland & Ors [2006] IESC 33.

⁵ Minister for Health and Children (January 2007) *Briefing Document on Proposed Wording for Referendum to Amend the Constitution*, refer to propositions 1, 2, 3 and 4.

⁶ *Ibid*, refer to Proposition 5.

In the present document, the ICCL examines the latter proposal in light of the Supreme Court's judgment in the C.C. case and the report of the Joint Committee on Child Protection. It is the view of the ICCL that Proposition 5 should be withdrawn. Instead, the ICCL believes that the best interests of the child should be made a primary consideration in criminal justice proceedings and that mandatory measures to protect children during court proceedings should be introduced.

2. The Government's Proposals: Proposition 5

Following the judgment in the C.C. case, the Government enacted the Criminal Law (Sexual Offence) Act, 2006. The Act takes cognisance of the C.C. judgment and allows for the possibility of a defendant to plead he/she honestly believed the child had reached 15 years (Section 2(3)). However, the burden of proof is placed firmly on the accused and not on the child or young person to prove they made an honest mistake (Section 2(3)).

The Joint Committee on Child Protection examined this new legislation and concluded that the defence of honest mistake should not be available to persons accused of an offence involving sexual activity with a child under 16 years. The main aim of this recommendation is to ensure that the issue of consent and cross-examination of children and young people would not be permitted.

The Government has included Proposition 5 in response to the Joint's Committee's recommendation. It reads:

<p>The Minister proposes to have a clear statement of a requirement on the State to provide for laws which create offences related to sexual exploitation and sexual abuse. Specifically, the amendment would also provide that laws which involve such offences against children under the age of 18, may provide that these offences are of absolute or strict liability. The legislative power of the Oireachtas could not be limited by any of the provision of the newly drafted section.</p>
--

3. What will the practical effect be of Proposition 5?

The main effect of Proposition 5 is that certain provisions of the Constitution will require the State to enact laws relating to sexual exploitation and sexual abuse. In particular, the Oireachtas will be empowered to enact legislation imposing absolute or strict liability for sexual offences against persons under 18 years. With this Proposition, the Government is seeking to restore the law to its position prior to the C.C. case and eliminate the possibility of defendants pleading honest mistake. However, in reality, this constitutional amendment goes much further because it empowers the Oireachtas to introduce absolute/strict liability offences in respect of persons aged up to 18 years. For example, Section 1(1) of the Criminal Law (Amendment) Act, 1935 specified that it was an offence for a person to have unlawful and carnal knowledge of a girl under the age of fifteen. Moreover, the Joint Committee on Child Protection only recommended that the defence of honest mistake should not be available to persons involved in sexual activity with a child under 16 years.

4. What difficulties does Proposition 5 raise?

The difficulties associated with Proposition 5 have already been identified by the Supreme Court in the C.C. case. In considering the constitutionality of this provision, the Supreme Court focused on the absolute nature of the offence and the fact that it fails to afford a defence no matter how extreme the circumstances.⁷ The Supreme Court made clear that Section 1(1) is capable of criminalising and jailing the morally blameless. Conviction for such an offence carries a social stigma for the individual and their family and this is compounded by the consequential enrolment on the Sex Offender's Register.

The Supreme Court did consider the alternative view, that this provision is necessary to deter individuals from engaging in sexual activity with minors. However, the Court held that this could be achieved by legitimate means without the manifest injustice of permitting conviction of a serious criminal offence without any requirement of mental guilt.

⁷ The Court cited *R v Prince* [1875] LR 2 CCR where the jury found that the girl in question appeared to be well over the relevant age of 16 years, had told the defendant believably that she was over 18 years and that this belief was reasonable on his behalf. However, no defence was permitted. The main issue with this is that it fails to take account of one of the basic principles underpinning criminal liability, *mens rea*, which refers to the guilty mind.

After considering jurisprudence from other jurisdictions on similar types of offences and the Supreme Court's decision in *Re: Employment Equality Bill*⁸, Hardiman J concluded:

I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life of person's good name and property rights of every citizen."⁹

Thus, it is apparent from the Supreme Court's judgment that the main difficulty arising from Proposition 5 is that it opens the possibility of a morally blameless person being criminally sanctioned, deprived of their liberty and labelled with a lifelong stigma of being a sex offender. In addition, Proposition 5 is even more worrying because it will permit the Oireachtas to enact absolute/strict liability legislation for persons who engage in sexual activity with persons under 18 years. Therefore, the likelihood of someone making a genuine mistake as to age will increase.

In reaching its decision the Supreme Court in *C.C.* noted that the Law Reform Commission in 1990 had recommended that the law should include a defence of honest mistake "genuinely believed" on "reasonable grounds" should be available to a defendant, except a person in authority over a minor. The ICCL agrees with this recommendation.

⁸ [1997] 2 IR 321.

⁹ *C.C. v Ireland & ors* [2006] IESC 33, at pp.19-20

5. ICCL Recommendations

As stated above, the ICCL believes that Proposition 5 should be withdrawn. However, like the Joint Committee on Child Protection, the ICCL is also concerned about the effect of cross-examination of young people. It is the view of the ICCL that a failure to adopt a child centred approach in criminal justice proceedings and nature of the adversarial system of justice are the main reasons why criminal procedures are so traumatising for young people. The ICCL therefore supports many of the Joint Committee's recommendations on the criminal investigation phase such as: the establishment of regional protection units within An Garda Síochána; the provision of comfortable and non-threatening facilities, including video-recording facilities in Garda stations. The ICCL also endorses the Joint Committee's recommendations on adapting the criminal trial process to protect the welfare of child complainants and witnesses, such as the establishment of a child witness support service; training for lawyers to perform their functions in the manner least traumatic for child complainants and witnesses.

However, the ICCL believes that the Joint Committee's recommendations do not go far enough in two respects. First, the Joint Committee failed to recommend that the best interests of the child should be a primary consideration in all criminal justice proceedings and second, that measures aimed at protecting children in courts must be mandatory. On the latter point, the Joint Committee recommended that: "subject to the necessary resources and facilities being put in place... consideration should be given to amending the Criminal Evidence Act, 1992 as to ensure that at least some special protection measures for witnesses be automatically applied to all child complainants [...]".¹⁰ The ICCL is surprised that the Joint Committee qualified its recommendation based on resources. If the State is truly committed to providing absolute protection to young people in sex abuse cases, then protections in criminal justice proceedings must be mandatory. In practice, this would mean that the Government would have to prioritise resources to protect the welfare of child complainants and witnesses in criminal justice proceedings.

¹⁰ Joint Committee on Child Protection, at pp. 71.