



Proposition 5

Protection of Children from Sexual Exploitation and Sexual Abuse

The ICCL Position on the Minister for Children's
Proposals for an Amendment to the Constitution
(9 February 2007)

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Contents

About the Irish Council for Civil Liberties (ICCL)	3
1. Introduction	4
2. The Minister for Children's Proposal: Proposition 5.....	5
3. What will be the practical effect of Proposition 5?.....	6
4. What difficulties does Proposition 5 raise?	6
5. ICCL Recommendations.....	8

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, the 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.

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1. Introduction

On 30 January 2007, the Minister for Health and Children, Mr Brian Lenihan TD, circulated a first briefing document containing a number of propositions for wording to amend the Constitution in relation to children. The Minister engaged in a round of face-to-face consultations on the basis of those propositions. A delegation from the Irish Council for Civil Liberties met privately with the Minister on 5 February 2007, during which the ICCL indicated it was deeply disappointed that the propositions concerned were restricted to measures involving the protection of children. The ICCL's delegation emphasised that the propositions concerned would not effectively embed children's rights in the Constitution.

On the following day, the ICCL's views were provided to the Minister in writing, in the form of two position papers, one covering Propositions 1-4 and the other, Proposition 5 (which raises different and distinct issues). Copies of those documents were also made available to opposition spokespersons, the Ombudsman for Children, the Children's Rights Alliance, and other interested parties.

On 9 February 2007, the Minister distributed a second briefing document on proposed wording. This paper updates the ICCL's previous comments in relation to propositions 1-4, by relating them directly to the Minister's new propositions.

Overall, the Minister's second briefing document would appear to take greater cognisance of the UN Convention on the Rights of the Child, 1989 (UNCRC). This is a positive development, which the ICCL welcomes. However, his proposals still do not include any express rights for children and no rationale is provided for maintaining the primacy of the marital family, even though this has consistently caused difficulties in recognising children's rights. Therefore, in the view of the ICCL, the primary focus of this referendum remains the protection of children rather than the implementation of children's rights.

In this paper, the ICCL comments on Propositions 5 in its new form, which outlines the Minister's recommendation that the Oireachtas should be allowed to introduce strict liability offences regarding sexual activity with children and young people under 18 years. The ICCL examines this 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 redrafted. Instead, the ICCL believes that strict liability offences of this nature should only apply to people in authority over a child. The best interests of the child should also be made a primary

consideration in criminal justice proceedings and mandatory measures to protect children during court proceedings must be introduced.

2. The Minister for Children's Proposal: Proposition 5

Following the judgment in the C.C. case, the Oireachtas enacted the Criminal Law (Sexual Offences) Act, 2006. The Act takes cognisance of the C.C. judgment by allowing a defendant to argue that 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 prosecution to establish the existence, or otherwise, of 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. Legally, this will ensure that the mental element of the offence, that is, the accused's state of mind is not in issue. In practice, such a move could be seen as desirable because cross-examination of children could be avoided where the physical element of the crime was established through other evidence.

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

<p>The proposal will provide that laws which involve offences against children under 18 years may be offences of absolute or strict liability.</p>

3. What will be the practical effect 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 certain aspects of 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 sexual offences in respect of persons aged up to 18 years. By contrast, Section 1(1) of the Criminal Law (Amendment) Act, 1935 specified that it was an offence for a person to have unlawful carnal knowledge of a girl under the age of 15. 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?

Many of 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.¹ The Supreme Court made it 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 requirement to register as a sexual offender.

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 for a serious criminal offence in the absence of any requirement of mental guilt.**

¹ 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*², 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."³

Moreover, Proposition 5 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.

Further, the ICCL is concerned about the impact of strict liability offences on children and older teenagers. This issue has been acknowledged by child law expert and Special Rapporteur for Child Protection, Mr Geoffrey Shannon in the following terms:

Even if the interests of the child were to be regarded by the courts, an argument could be made that the strict liability regime itself actually offends against the rights of any accused who is also a child. It is arguable that children, by virtue of their greater exposure to, and interaction with fellow children, are more likely to be at risk of unwittingly engaging in sexual intercourse with a girl under the age of 15. A strict liability regime therefore would criminalise those children who have consensual sexual intercourse with other children. A simple constitutional insistence on the supremacy of the rights of the child would thus not automatically provide a solution to the C.C. situation.⁴

In reaching its decision, the Supreme Court in *C.C.* noted that the Law Reform Commission in 1990 had recommended that a defence of honest mistake "genuinely believed" on "reasonable grounds" should be available to a defendant, except in the case of a person in authority over a minor.⁵ The ICCL agrees with this recommendation.

² [1997] 2 IR 321.

³ *C.C. v Ireland & ors* [2006] IESC 33, at p.19-20

⁴ Shannon, G. (September 2006) *Submission to the Joint Committee on Child Protection*, at p. 12-13.

⁵ Refer to Law Reform Commission (1990) *Report on Child Sex Abuse*, Law Reform Commission: Dublin.
www.lawreform.ie

Finally, in his briefing paper the Minister reveals that during his consultations, **the issue of exchange of information concerning the risk of sexual abuse of children** was raised. He also indicates that there are legislative proposals on this subject in the context of implementing the recommendations of the Ferns Report. Apparently the Minister is seeking advice from the Attorney General on whether constitutional change is necessary on the exchange of such information.

The Ferns Inquiry Report uncovers an appalling and indefensible catalogue of abuse perpetrated against children by priests, and subsequent inaction by Catholic authorities in the Ferns dioceses. The Report makes many recommendations concerning the protection of children which the ICCL is in agreement with. The issue of exchange of information is one particular recommendation which the ICCL supports. However, the ICCL does not believe that a constitutional amendment is required for this measure so long as certain safeguards are provided. Although the measure could potentially infringe on the right to a fair trial and privacy rights⁶ we believe that any measure must satisfy the norms of constitutional justice and the ECHR⁷ test i.e. the test of legality; be in response to a pressing social need; necessary in a democratic society; proportionate and non-discriminatory.

5. ICCL Recommendations

As stated above, the ICCL believes that Proposition 5 should be redrafted. However, the ICCL considers it acceptable to legislate for strict liability offences against persons who are in authority over children, given that they are in a position to know the age of the child or young person in their charge.

Like the Joint Committee on Child Protection, the ICCL is 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 the nature of the adversarial system of justice are the main reasons why criminal procedures are potentially traumatising for young people. The ICCL therefore supports many of the Joint Committee's recommendations on the criminal investigation phase and on adapting the criminal justice process to protect the welfare of children. The ICCL considers that the Criminal Evidence Act, 1992 should be amended to include

⁶ The right to a trial is protected under Article 38 of the Irish Constitution and Article 6 of the European Convention on Human Rights (ECHR). The right to privacy is recognised as an unenumerated right and under Article 8 of the ECHR.

⁷ The ECHR was given further effect through

additional provisions such as the possibility of a court appointing a commissioner to take evidence from vulnerable child witnesses.⁸

Further, 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 so as to ensure that at least some special protection measures for witnesses be automatically applied to all child complainants [...].⁹

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. It is important to remember that Proposition 5 will only protect a certain cohort of children from cross-examination. The ICCL is concerned that if these measures are not made mandatory, other children will still be forced to undergo a traumatising experience.

Lastly, the ICCL notes that the Minister has legislative proposals on the exchange of information and the Attorney General is considering whether they require a constitutional amendment. The ICCL does not believe that a constitutional amendment is required for this measure so long as these legislative proposals are accompanied by certain safeguards as mentioned above.

⁸ A similar provision exists in Scotland, refer to Section 271I of the Vulnerable Witnesses (Scotland) Act, 2004. In practice, the commissioner is videotaped taking evidence from child witnesses.

⁹ Joint Committee on Child Protection, *ibid*, at p. 71.