

DUBLIN RAPE CRISIS CENTRE

DRCC Submission to the Law Reform Commission

The DRCC welcomes the opportunity to make this submission to the Law Reform Commission. Our submission is based on our submission to the Joint Committee on Child Protection August 2006. We also support and have contributed to the submission made by the Rape Crisis Network Ireland (RCNI).

Since our submission on the Discussion Paper on The Law on Sexual Offences 1998, we have commissioned two pieces of research, *The Legal Process and Victims of Rape*¹ and the *SAVI Report*² (enclosed). Each of these incorporated recommendations which are pertinent to the work of the Law Reform Commission. We enclose a copy of each by way of supplementing this submission. We have also taken part and contributed to the Attrition Research with RCNI.

1. Review the substantive criminal law relating to sexual offences against children:

The DRCC recommends:

- That there be a comprehensive Sexual Offences Act modelled on the UK Sexual Offences Act 2003 and that sexual offences against children and adult victims of rape and sexual assault, be dealt with within this framework.
- That if such a Sexual Offences Act is not to be enacted at this time, a Child Sexual Abuse Act should be enacted instead which would gather together all sexual offences against children into one coherent piece of legislation. (This is in line with the recommendations of the Expert Group on the Codification of Criminal Law,³ which recommended that codification be undertaken on a phased basis).
- That the Statutory Criminal Law Codification Committee should be supported in facilitating such a Codifying Act.
- The immediate implementation of the provision in the Children's Act 2001 to raise the age of criminal responsibility to 12 - as this would eliminate the issue of criminalising children under the age of 12 who engage in sexual activity.

¹ Bacik Ivana, Maunsell Catherine, Gogan Susan, *The Legal Process and Victims of Rape* Pub: The Dublin Rape Crisis Centre 1998

² McGee Hannah et al: *The SAVI Report Sexual Abuse and Violence in Ireland*. Pub: The Liffey Press 2002

³ Expert Group Report: *Codifying the Criminal Law*. Pub. Nov. 2004

2. Issues in relation to the Criminal Law (Sexual Offences) Act 2006 and any legislation which might supersede it:

The DRCC recommends:

- That there be two levels of protection: one for children under 14 years and another for children under 17 years.
- That the term 'defilement', which is an archaic term, with psychological, emotional and moral implications, be replaced with the term 'sexual abuse' or 'sexual assault'.
- That while the term 'sexual act' as used in the legislation refers to "an act consisting of sexual intercourse or buggery or an act described in section 3(1) or 4(1) of the Act of 1990", the legislation should also include provision for protection against other sexual acts not currently included e.g. where a child is forced to watch sexual activity, or to proceed to masturbate him or herself in front of another person.
- The provision of lower penalties where the perpetrator is under 18. (as in Section 13 of the UK Sexual Offences Act 2003).
- That there be a provision in the legislation with regard to children over the age of 14 that sexual activity between peers of similar age is not an offence where there is no coercion or intimidation involved. We suggest that where there is an age difference of two years or less, the activities should not be covered under this legislation unless coercion or intimidation is involved.
- That where the offender is him or herself under the age of 17, that guidelines be drawn up for the DPP with regard to when and whether to prosecute. These guidelines to take into account the child protection issues with regard to the offending child as recommended in the Department of Health & Children's "*Children First*" guidelines.
- That there be equality of treatment between genders under any law with regard to sexual offences against children. Section 5 of the 2006 Act is clearly discriminatory on gender grounds. While there are very valid policy reasons surrounding the issue of the criminalisation of teenage pregnancy which led to this section being included, a mechanism which is not gender discriminatory needs to be found.

3. Examine the issues surrounding the age of consent in relation to sexual offences.

The DRCC has grave concerns about the criminalisation of young people who are involved in what is effectively consensual and non-coercive sexual activity with their peers.

The DRCC recommends:

- That a definition of 'consent' be included in any new legislation (see Sections 74-76 of the UK Sexual Offences Act 2003).
- That 17 be retained as the age of consent to sexual activity.
- That there be a provision in the legislation with regard to children over the age of 14 but under 17 that sexual activity between peers of similar age is not an offence where there is no coercion or intimidation involved. We suggest that where there is an age difference of two years or less, the activities should not be covered under this legislation unless coercion or intimidation is involved.

4. Examine criminal justice procedures relating to the evidence of children in abuse cases.

The DRCC Recommends:

- The establishment of separate court facilities for hearing cases involving offences against children.
- The provision of proper court facilities within existing court structures, to include separate waiting and rest rooms.
- Video linking to be made available for all evidence given by children.
- The provision of adequate facilities so that victims do not meet accused persons and their families and supporters in the court and its environs.
- **That these facilities be provided for adult victims of sexual violence also.**
- That the child (and in the case of adults, the victim/witness) has a right to separate legal representation, or some type of independent advocacy or representation during the court proceedings.

- That good practice guidelines on cross examination of a victim be developed and adherence to these guidelines be closely monitored by the presiding judge.
- That there be judicial education on hearing sexual violence cases in all cases and in particular for those involving children. This education to be a compulsory prerequisite to hearing such cases.
- That all those legal professionals involved in prosecuting cases of sexual offences and in particular sexual offences committed against children, in particular employees of the Chief Prosecution Solicitor and DPP, and counsel instructed by the state, should receive training prior to prosecuting such cases. This training should be a compulsory prerequisite to prosecuting such cases.
- That the victim be consulted by the Office of the Director of Public Prosecutions where consideration is being given by the prosecution to accepting a plea of guilty to particular charges by the accused person, and not proceeding with the prosecution of more serious charges. Where the victim is still a young child, relevant members of their family should be consulted. In fact, many victims will be adults at the time of prosecution, and can find that the crime for which the accused person is convicted following a guilty plea does not reflect the seriousness of the crimes they believe were perpetrated against them. We believe the views of the victim should be taken into account in the DPP's decision to accept a plea of guilty in these circumstances.
- That Gardaí should inform the victim of the availability of Free Legal Aid.
- That the sentencing outcome should reflect the seriousness of the crime and the sentence be based on non-statutory sentencing guidelines.
- That the right of the defendant to represent him or herself in court should be curtailed in such a way as to prevent the cross-examination of a child witness directly by the person accused of a sexual offence against that child. **N.B. this should also be extended to adult witnesses – because many of the complainants will be adults by the time the case comes to court.**
- In every case of a sexual offence, including those committed against children, a Liaison Garda should be appointed, whose role would be similar to the role of an SOIT (Sexual Offences Investigative Techniques) trained Officer instituted in the London Metropolitan Police. This officer would be the main link between the victim and the police investigation. The role would include supporting the victim and family by remaining in contact and keeping them informed on a prescribed regular basis. This

officer would explain the investigation and criminal justice process and keep the victim updated on all court proceedings, dates, and times of hearings and changes in times and notification of imminent release. They would work with other agencies in supporting the victim. The Liaison Garda would be responsible for all communication and notifications with the victim in relation to the case.

- Investigation of all crimes of sexual violence including those against children to be carried out by Gardai who have received in depth specialist training. This should include specific training in the interviewing of children and adults who have experienced sexual abuse. Currently it can happen that Gardai with little or no specialist training are involved in interviewing and investigation. The training should also include the impact of trauma, and the needs and sensitivities of the person who has experienced sexual abuse.
- A comfortable, non-threatening interviewing environment should be provided in all Garda stations. Such facilities are available in a small number of stations, and should be replicated in every station.
- Legal advice should be made available to potential complainants by a duty solicitor prior to making their statement to the Gardai where sexual abuse is alleged. The Civil Legal Act should be amended to cover this as it covered the relevant offences under the 1935 Act.
- The victim's lawyer should have responsibility for providing information to the victim about the progress of the investigation, and should act as a channel of communication between the victim and the authorities. In particular, the victim's lawyer should ensure that the victim is informed whether the accused has made a statement, whether he has pleaded guilty or not guilty, and whether it has been decided to proceed with the prosecution or not. The victim should also have access through his or her lawyer to the contents of the pre-trial book of evidence.
- Unnecessary delay between the reporting of the sexual offence and the trial date should be avoided, and attempts should be made to 'fast-track' cases of sexual violence, even where the accused is not detained in custody.
- The presumption should exist that evidence of the victim's prior sexual experience is inadmissible at trial.

5. Consider the implications arising from the consequences of the Supreme Court decision of the 23rd May 2006, in the 'C.C.' case.

The DRCC recommends that:

- There should be no provision for the defence of mistake as to the age of the victim of child sexual abuse. The Supreme Court judgment in the 'C.C.' case established that such a defence should be allowed in respect of offences committed against victims under 15. However, this judgment must be read in the light of the subsequent Supreme Court judgments in the A case, which place considerable emphasis on the interests of the common good and which limit the impact of the C.C. judgment.
- If legislation is passed which does not allow for this defence in respect of any sexual offence committed against children, it is likely that such legislation would be referred to the Supreme Court by the President under Article 26 of the Constitution. In the light of the Supreme Court judgments in the A case, such legislation might not be found to be in breach of the constitution.
- If this recommendation is not acceptable, we recommend instead that the defence of mistake should not be permitted, at least in respect of offences committed against children under the age of 14. Legislation precluding such a defence in respect of offences committed against children under 14 would be more likely to pass constitutional scrutiny. (In the UK Sexual Offences Act 2003, no defence of mistake is provided in respect of an offence committed against children under 13; see sections 5 – 12 of the UK Act).
- If a defence of mistake is to be allowed, (either in respect of offences committed against all children under 17, or just in respect of children aged between 14 or 15 and 17,) we recommend that such a defence would involve a purely objective test; we recommend the replacement of an 'honest mistake' defence, with a 'reasonable mistake' defence, as in the UK legislation (see sections 10 – 12 of the UK Act). This would reduce the circumstances in which a child might be cross examined, and also reduce the scope of that cross examination where it occurs.
- In the interests of child protection, we emphasise that the Oireachtas should aim to minimise the possibility of a child being cross examined. (The DRCC's experience is that, even for a mature adult, such cross examination in sexual offence cases is a highly traumatic experience.)
- Whether the defence of mistake is objective or subjective, the burden of proof should be placed on the person accused of sexual offences alleged

to have been committed against a child, to prove either that their mistake was reasonable, or, in the case of a subjective defence, to prove how they arrived at their 'honest belief'.

6. Examine the desirability or otherwise of amending the Constitution to deal with the outcome of the 'C.C.' case and/or to provide a general right of protection for children

The DRCC recommends:

- The enshrining of the rights of the child in the Constitution. (Ireland has ratified the UN convention on the Rights of the Child but to date has not incorporated this into our Constitution or our Legislation.)
- That the right of the child to be protected from sexual abuse and exploitation be specifically named and included in this provision.
- That the inclusion of such a Constitutional provision would provide a clear yardstick against which any future legislation on child sexual abuse could be measured. Currently, where legislation deals with sex offences against children, no provision expressly provides for the rights of the child to be weighed against those of the accused person.

7. Further recommendations

The DRCC recommends:

- Revision, resourcing and full compulsory implementation in all primary schools of the Stay Safe Programme.
- Resources provided to support the operation of "*Children First*" are in our experience seriously inadequate. Detailed recommendations need to be made about the provision of resources for the protection of children e.g. family support services; emergency services; treatment programmes.
- That the current vetting process for adults (employees or volunteers) working with children should be greatly widened in its availability and application.
- A national advertising campaign to raise awareness about the services, both statutory and voluntary, that are available for children and their families and for adult victims of rape and sexual abuse.

- Awareness raising campaigns to change attitudes and to inform the public about the rights of children and issues regarding their protection.
- That the judicial process and the courts should be widened to include adult victims also.
- Treatment programmes for all sex offenders should be made available in prisons.
- Pre release assessment and post release supervision of all perpetrators of sexual crimes.
- Community based treatment programmes should be provided for all children and adolescents who have sexually offended.
- The victims should be informed when the offender is due to be released from prison.

**Dublin Rape Crisis Centre
July 2007**

