

Irish Association for the Study of Delinquency

Submission to the Oireachtas Joint Committee on Child Protection

Introduction

The Irish Association for the Study of Delinquency Ltd. (IASD) is an independent organisation that exists to promote reform, development and effective operation of the criminal justice system. It has been invited to make submissions to the Joint Committee on Child Protection. This paper outlines the perspective of the IASD on the issues of section 1 of the Committee's terms of reference.

The IASD is of the view that the critical question before the Committee is to produce measures that will balance the effective protection of children from sexual abuse with a mature approach to the shifting cultural and social mores in Irish society.

This paper will take a logical approach of analysis through the existing procedures, the concepts behind the question of protection of children and then concrete recommendations for the Committee and its work in the future. As such there are five key areas to be addressed:

1. Providing for the equal treatment of young males and females under new legislation
2. Reviewing the concept of statutory rape
3. Reviewing the age of consent
4. Constitutional protection of children
5. Investigative Procedures

1. Equality of Treatment

With respect to the exiting legislation, the IASD is very concerned about section 5 of the Criminal Law (Sexual Offences) 2006 Act which states that "A female child under the

age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.”

This section provides different treatment for males and females engaging in the same activity. It is discriminatory and unhelpful and may not withstand a Constitutional challenge or reference to the European Court of Human Rights. The IASD advocates its deletion or amendment in future legislation.

2. “Statutory Rape”

The second matter is the concept of statutory rape. The IASD contends that the term “statutory rape” is outmoded, irrelevant and unhelpful. Where there is no consent to a sexual act, irrespective of the ages of the parties it is rape.

In cases of sexual activity involving a minor, which are investigated purely because one of the parties is in fact a minor, the IASD believes there should be options available to the investigative authorities before coming to a final position. We advocate a humane approach.

It may be

- that a rape has occurred
- an aggravated sexual assault by a young male on a young female has occurred,
- that both parties were experimenting without understanding what they were doing or the consequences of their actions
- that the young people were under the influence of peer pressure, alcohol or drugs.

What is clear is that there is no absolute solution applicable to all of the above possible circumstances and the legislative and investigative options should be sophisticated enough to reflect that. The current position whereby a young male can be prosecuted for engaging in a sexual act where his partner is not prosecuted does not take cognisance of the equality legislation and is not what we envisage as progressive.

3. Age of Consent

The IASD believes that there are two possible approaches for determining an appropriate age of consent. The first is a universal, catch-all approach which would apply to all genders and sexual orientations. To differentiate between these would be unacceptably discriminatory and subject to challenge either domestically or in the European court of Human Rights. The second possible approach is to develop a new concept of sexual capacity to be applied on a case by case basis.

Universal Approach to Age of Consent

Should the Committee choose to adopt the universal approach, the IASD believes that the age of consent in Ireland should be set at 16 for male-female intercourse and 16 for male-male sex and female-female sex. This is consistent with the average age in Europe, the U.S. and Australia.

However, we believe that there is room for flexibility on a single age of consent. This is an opportunity to produce genuinely reflective and appropriate legislation for a difficult and personal question for Irish citizens. There is no doubt that children mature at different stages between the ages of 14 and 18. What is appropriate for one teenager may not be for the next one. This legislation is doubly important – because it deals with an inherently personal matter and because of the necessity to provide rigorous protection for those that cannot protect themselves.

Sexual Capacity:

The concept of sexual capacity operates in much the same way as the concept of criminal responsibility. There could be an absolute age below which sex cannot be deemed consensual – perhaps 14 would be appropriate. This could be termed the age of capacity (along the lines of capacity to commit a criminal act). Below this age sexual activity cannot be deemed consensual. Between the age of 14 and 16 (or 17) there could be a presumption that the child is not of sexual capacity and that sexual activity could not have been consented to. However, this presumption may be rebutted.

Flexible approaches to the age of consent and the prosecution of underage sexual activity such as this are used in the following countries:

- In Brazil, authorities may not choose to prosecute if the younger partner is aged 14 to 17 and does not lodge a complaint.
- In Canada, consensual activity with those over 12 may not be an offence if the accused is under 16 and less than two years older than the complainant.
- In Finland, sex with someone under 16 is not deemed sexual abuse of a child if "there is no great difference in the ages or the mental and physical maturity of the persons involved."
- In Germany, sexual intercourse is legal from the age of 14 provided the older partner is aged under 18 and provided they are not "exploiting a coercive situation" or offering compensation. In addition, sex between one partner aged 14-15 and another aged under 21 is legal unless the older partner "exploits the victim's lack of capacity for sexual self-determination".
- In Portugal it is illegal to perform vaginal intercourse with a minor between 14 and 16 years old "by taking advantage of their inexperience".

The IASD strongly recommends to the Committee that consideration be given to this flexible approach both to the age of consent and to the question of investigation of complaints and prosecution of young people engaging in sexual activity.

4. Constitutional Protection of Children

The IASD believes that the protection of children is of utmost importance and serious consideration should be given by the Committee to proposing a constitutional amendment in respect of same. The IASD fully supports the recommendations of the Law Society Law Reform Committee¹ in respect of a Constitutional amendment to the Irish Constitution to formally safeguard the rights of children in this jurisdiction. This report

¹ Law Society Law Reform Committee (2006) *"Rights Based Child Law: The Case for Reform"* (Blackhall Place) pp. 61

recommends the insertion after referendum of a provision similar to Chapter 2, Section 28 of the South African Constitution as follows:

“Every child has a right

- a. to a name and nationality from birth;**
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;**
- c. to basic nutrition, shelter, basic health care and social services;**
- d. to be protected from maltreatment, neglect, abuse or degradation;**
- e. to be protected from exploitative labour practices;**
- f. not to be required or permitted to perform work or provide services that:
 - a. are inappropriate for a person of that child’s age**
 - b. place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development****
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 (freedom and security of the person) and 35 (arrested, detained and accused persons), the child may be detained only for the shortest appropriate period of time, and has the right to be
 - a. kept separately from detained persons over the age of 18 years; and**
 - b. treated in a manner, and kept in conditions, that take into account the child’s age;****
- h. to have a legal practitioner assigned to the child by the state, and at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result; and**
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.**

A child’s best interests are of paramount importance in every matter concerning the child.”

5. Investigative Procedures:

The IASD believes that many of the situations involving underage sexual activity are not cases best dealt with by the justice system. It would be prudent to ask whether in fact an offence had been committed or whether the real issue to be addressed is nothing to do with criminal law. It may be that the best response, from which all parties would benefit most, would be one which considered all circumstances such as education, adult

supervision, social services assistance and other resources. This highlights again the need for the constitutional protection of children.

The IASD proposes that cases involving underage sexual activity be dealt with in the following manner. We recommend that an independent office be established, attached but separate to the DPP, to conduct a preliminary investigation into complaints of sexual activity of minors. This investigation should determine whether the act was a normal consensual act, whether one or both parties in fact understood what they seemingly consented to or whether it was a case of abuse or manipulation. Before a decision is made to prosecute an assessment should be done on both young people to determine their understanding of consent and the nature of their consent or otherwise. It would be the responsibility of this office to advise the relevant state agencies as to whether or not a crime may have been committed and recommend a criminal investigation where appropriate

Conclusion:

Over the past number of years the IASD provided a forum for debate which challenged a number of areas including whether or not the state was providing adequate protection for the children, particularly those from disadvantaged families. A full list of our reports, programme of activities and research findings can be found on our website www.iasd.ie.

We as an organisation, through its membership, research and publications, is totally committed to contributing to the positive and promising reform of legislation and procedures in respect of the resources and support for young people and their families. We appreciate the invitation to make submissions to the Committee and hope this brief submission will be useful.