Protecting Children and Respecting the Rule of Law

7 May 2009

An Options Paper

Prepared on behalf of the Irish Council for Civil Liberties (ICCL)
by Roisin Webb, BL

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Contents

Definitions

Mens Rea (guilty mind)	A Latin term used to describe the mental element of a crime which must be proven in order to convict a person of a particular offence.
Actus Reus (guilty act)	A Latin term which is used to describe the physical or external elements of an offence.
Absolute Liability	There is little clarity as to the meaning or definition of the terms 'strict' and 'absolute' liability resulting in considerable confusion as to what exactly is intended by these terms in the context of the defilement of a child offence. One explanation of these terms by legal scholars[1] is that absolute liability applies to offences where no proof of *mens rea* is required as to *any* aspect of the offence. By contrast, an offence of strict liability is one where *mens rea* need not be proved in respect of one or more elements of the *actus reus.* Other scholars[2] have described an offence as being one of absolute liability if it does not require proof of *mens rea* as to some aspect of the offence, and liability cannot be avoided by disproof of *mens rea*.[3] In the context of this report, the introduction of an absolute liability offence is understood to refer to the removal of the defence of mistake as to age in relation to the statutory rape offence (defilement of a child) under the Criminal Law (Sexual Offences) Act, 2006.
Strict Liability	There is no clear definition of when criminal liability can be described as strict.[4] Legal scholars have identified several different classifications and variations of strict liability[5] and indeed some scholars argue that not all such variations should be described as offences which attract the label of "strict liability".[6] The term "strict liability" tends not to appear in

[1] See Smith and Hogan, *Criminal Law*, 10th edition, Oxford, p.117.
[2] See for example R.A. Duff, "Strict Liability, Legal Presumptions, and the Presumption of Innocence", p.26 in Simester (Ed), *Appraising Strict Liability*, Oxford, 2005.
[3] While the Supreme Court decision in *CC* (discussed in section 2 of the present report) used the term 'strict liability' in relation to section 1(1) of the 1935 Act, there are some indications that the Court viewed this offence as one of 'absolute liability'. Hardiman J. highlighted the "absolute nature of the offence in question", pointing out that once the *actus reus* was established, absolutely no defence was available, regardless of how extreme the circumstances. Citing the judgment of the Canadian Supreme Court in *Sault Ste. Marie*, Hardiman J. noted that, while the question of whether a defence of due diligence would suffice to justify strict liability for a true criminal offence (as opposed to a regulatory offence) carrying a life sentence was not under consideration, there is no form of due diligence defence available in relation to section 1(1). *CC v Ireland (No. 2)*, [2006] 4 I.R. 1 at 74 and 78.
[4] See Ashworth, *Principles of Criminal Law*, 4th edition, Oxford 2003, p.164.
[5] See Husak, "Varieties of Strict Liability", *Canadian Journal of Law and Jurisprudence*, Vol. viii, No.2, 1995, p.190. See also Green, "Six Senses of Strict Liability: A Plea for Formalism", p.1-20, in Simester, *ibid.*
[6] See Green, *ibid*, p.6.

	legislation and the question of whether or not a crime is one of strict liability arises when legislation is interpreted by courts. This has led McCauley and McCutcheon to describe the imposition of strict liability as "an exercise in judicial creativity."[7] In this jurisdiction, the terms strict liability and absolute liability are often used synonymously, implying that the terms are effectively the same. However, other jurisdictions do draw a distinction between "strict liability" and "absolute liability". In *R v. City of Sault Ste. Marie*[8], the Canadian Supreme Court identifies three different classes of offences. First, there are offences which require that *mens rea*, in the form of intention, knowledge or recklessness must be proved by the prosecution. Secondly, there are offences of strict liability, where there is no necessity for the prosecution to prove the existence of *mens rea* – proof of the prohibited act is sufficient to establish criminal liability. However, the defendant can avoid liability by showing that he took all reasonable steps to avoid the act or event in question. Thirdly, there are offences of absolute liability where the accused cannot avoid conviction by showing that he was free from fault. In such offences, the accused is guilty if it is proved that the proscribed act took place. A similar approach to that of *R v. City of Sault Ste. Marie* was taken by Keane J. (later Chief Justice) in his dissenting judgment in *Shannon Regional Fisheries Board v. Cavan Co. Co.*[9] The lack of clarity in relation to the meaning of the terms 'strict' and 'absolute' liability has brought about considerable confusion as to what exactly is intended by these terms in the context of the defilement of a child offence. Depending on the variation used, strict liability offences can take various forms. For example, the offence of defilement of a child could become an offence of strict liability in any of the following ways: ▪ By removing the *mens rea* requirement in relation to the age of the complainant, which implies that there would be no availability of a defence of mistake as to age; ▪ By shifting the burden of proving that the defendant had the requisite *mens rea* from the prosecution to the defendant, so that it is presumed that the defendant knew the age of the child unless he can prove otherwise; ▪ By excluding the requirement that the prosecution must prove the defendant's *mens rea* in relation to the age of the child, while allowing the defendant to offer a defence of 'due diligence' by showing that he took all reasonable steps to ascertain the age of the child.

[7] McCauley and McCutcheon, *Criminal Liability*, Dublin, 2000, p.321.
[8] [1978] 85 D.L.R.
[9] [1996] 3 I.R. 267.

Due Diligence	This refers to a defence whereby the accused can avoid liability by showing that he or she took all reasonable steps to avoid the prohibited act. In relation to statutory rape offences, it can sometimes be a defence for the accused to show that he took all reasonable steps to ascertain the age of the child in question and therefore believed that the child was over the relevant age. While often framed as a defence due diligence can also take the form of a requirement. For example, in relation to statutory rape offences in both Canada and New Zealand, the accused cannot avail of the defence of mistaken belief as to age unless he/she took all reasonable steps to ensure that the complainant was over the age of 16.
Factual Consent and Legal Consent	Legal consent is a term used to describe the age of sexual consent, which refers to the age below which sexual contact with a child is criminalised and a child below that age will be deemed not to have given consent to such activity. The age of sexual consent in Ireland is set at 17 years.[10] Thus, the 2006 Act specifies that it is not a defence to an offence under either section 2 or section 3 to prove that the child consented to the sexual act in question. However, the law does not state that no person below the age of 17 has the capacity to consent to sexual activity. Some children, depending on their age and level of maturity and understanding, can give what Gillespie calls "factual consent" to sexual activity, even though they are below the age of consent.[11] Statutory rape offences, such as the defilement of a child offence, apply to situations where a person has sexual intercourse with a complainant who is under the age of legal consent. There is no defence of consent in relation to such offences. Where actual or "factual" consent, as well as legal consent were absent, the offence of rape has been committed against the child. However, in relation to the offence of rape, the prosecution must prove that the complainant did not consent to the sexual activity.

[10] Gillespie, *ibid*, p.14.

[11] Capacity to consent is also an issue in relation to sexual relationships for persons with an intellectual disability. Under the Criminal Law (Sexual Offences) Act 1993, it may be an offence to engage in a sexual activity with a person with an intellectual disability even if that person consents. This is because the definition of "mentally impaired" person in the Act includes a person who is "incapable of living an independent life". Furthermore, under the Act, it is a criminal offence for a "mentally impaired" person to engage in sexual activity with another "mentally impaired" person. For further discussion of this issue, see NAMHI (now Inclusion Ireland), *Who Decides and How? People with Intellectual Disabilities – Legal Capacity and Decision Making, A Discussion Document*, October 2003. www.inclusionireland.ie

1. Introduction

1.1 Introduction

This report considers the implications of the Supreme Court decision in *CC v Ireland*[12] in which section 1 of the Criminal Law Amendment Act 1935 was found unconstitutional. The Supreme Court stuck down section 1, under which it was an offence for a man to have unlawful carnal knowledge (unlawful sexual intercourse) with a girl under 15 years as it did not provide for a defence of mistaken belief as to the age of the girl in question. The 1935 Act also contained a similar offence in relation to a girl less than 17 years. Such offences, often referred to as statutory rape offences, create an age below which a child cannot give legal consent to sexual acts and they differ from the offence of rape principally because it is not necessary to prove the absence of actual consent. In ruling this law invalid, the Supreme Court was concerned that to criminalise a person who was mentally innocent for such a serious offence amounted to a failure on the part of the State to defend and vindicate the rights to liberty and to good name of the person under Article 40 of the Constitution.[13]

The Supreme Court decision in *CC* was followed by widespread public outcry[14] and considerable concern was expressed about insufficient safeguards to protect children from sexual abuse pending new legislation to re-instate an unlawful carnal knowledge offence. In this regard, the term statutory rape was unhelpful as there appeared to be confusion among the public that this was the only offence which could be apply when a child was raped.[15] However, there are a number of other offences in relation to sexual offences against children which remained in place after the *CC* decision. The offence of rape at common law, which consists of sexual intercourse by a man with a woman who does not consent to it, can be committed against a girl of any age. Similarly, the offence of Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990[16] can be committed against a male or female of any age. The offences of sexual assault and aggravated sexual assault apply to both males and females of any age.[17] Offences also exist under the Punishment of Incest Act 1908 and the Children Act 2001 created the offence of causing or encouraging a sexual offence upon a child.[18]

[12] [2005] I.E.S.C. 48 (First Judgment); [2006] I.E.S.C. 33 (Second Judgment), [2006] 4 IR 1 (both judgments).
[13] Article 40.3.2: 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, person, good name and property rights of every citizen. Article 40.4.1: No citizen shall be deprived of his personal liberty save in accordance with law.
[14] See Mary Rafferty, "Warnings Ignored By McDowell", *Irish Times*, 6 June 2006 and "Thousands Gather With White Flowers at Short Notice", *Irish Times*, 6 June 2006.
[15] See O'Malley, "Minors Protected Even After Law Struck Down", *Irish Times*, 6 June 2006.
[16] Rape under section 4 consists of s sexual assault which includes: either a) the penetration of the anus or mouth by the penis or b) the penetration of the vagina by an object held or manipulated by another person.
[17] Consent is not a defence to an offence of sexual assault against either a male or female who is under the age of 15.
[18] Section 249, Children Act, 2001.

Nonetheless as the Director of Public Prosecutions (DPP) has highlighted, the offences of unlawful carnal knowledge were a vital part of the criminal law relating to sexual offences against children. This type of legislation carries prosecutorial advantages as there is no need to prove actual lack of consent and that there can be ambiguity in relation to actual consent, particularly where alcohol is involved. Moreover, when the issue of consent is placed under scrutiny, other matters such as sexual history and the conduct of the victim could be raised. For these reasons, the DPP stated that statutory rape charges are sometimes seen as a preferable option, even where common law rape charges could have been brought.[19]

On 2 June 2006, ten days after the Supreme Court decision in *CC* and following the significant public outcry that followed, the Criminal Law (Sexual Offences) Act 2006 was enacted. This legislation introduced offences of "defilement of a child under 15" (section 3) and "defilement of a child under 17"(section 4), which are similar to the previous offences of unlawful carnal knowledge which had been struck down by the Supreme Court, but which include a defence of mistake as to age.

On 6 July 2006, an All-Party Committee on Child Protection was established. In its 2006 report, the Committee recommended that a referendum be held to amend the Constitution to enable the Oireachtas (Irish Parliament) to pass legislation providing for absolute criminal liability in respect of sexual activity with children. The Committee also recommended that the age of consent to sexual activity should be fixed at 16 and that the defence of mistake as to age should not be available. A primary reason given by the Committee for these recommendations was protection of children from cross-examination as to how they behaved and dressed as a basis for a mistake on the defendant's part in relation to the age of the child.

In February 2007, the Government introduced the Twenty-Eighth Amendment of the Constitution Bill 2007 to insert a new section under Article 42 entitled "Children". For the purposes of the present report, the provisions of relevance are:

> 42A5.2 : No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.
>
> 42A5.3: The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.

If this Amendment Bill were to be carried, it would permit the Oireachtas to pass legislation which would provide for strict or absolute offences committed against or in connection with children less than 18 years of age. The amendment bill is not confined to sexual offences and would allow the Oireachtas to create offences of strict or absolute

[19] Submission by the DPP to the Oireachtas Committee on Child Protection, 26 September 2006, p.6.

liability in relation to a broad range of measures. In addition, the proposed new article 42A5.3 is not restricted to offences against children.

1.2 Outline

This report discusses the proposed Articles 42A5.2 and 42A5.3 of the Twenty-Eighth Amendment to the Constitution Bill 2007. The definitional section explains some of the legal concepts contained in the report, particularly strict and absolute liability. Section 2 will provide a detailed account of the decision in *CC v. Ireland* with a view to outlining why the Supreme Court held that section 1(1) of the Criminal Law (Amendment) Act 1935 was unconstitutional.

Section 3 outlines concerns in relation to Articles 42A5.2 and 42A5.3 of the Twenty-Eighth Amendment to the Constitution Bill 2007 from a human rights and constitutional law perspective.

Section 4 reviews the provisions of the Criminal Law (Sexual Offences) Act 2006 and raises issues in relation to the differential treatment of boys under 17 years, together with the issue of consensual, non-exploitative sexual activity between young people. This section also discusses legislative options to address existing concerns in relation to the Criminal Law (Sexual Offences) Act 2006 without amending the Constitution.

Section 5 examines the need for a more comprehensive regime to protect children from sexual abuse and considers the reasons given by the DPP as to why he considered that the previous unlawful carnal knowledge provisions had significant prosecutorial advantages. In this regard, the report examines the gaps in our current law relating to sexual offences against children and the need for codification of such offences, with examples from other jurisdictions.

Section 6 addresses the child as a witness and the insufficient protections for a child victim giving evidence in a criminal trial.

Appendix A of the report provides examples of other common law jurisdictions, namely England and Wales, New Zealand and Canada. It examines the forms of strict liability in relation to statutory rape offences, for example, how the defence of mistake as to age operates in these jurisdictions and how these jurisdictions deal with the issue of non-exploitative sexual activity between young people.

2. The Supreme Court Decision in *CC v Ireland*

2.1 Introduction

The first judgment in the *CC v. Ireland*[20] decision was delivered by the Supreme Court on 12 July 2005. The application of *CC* was dismissed in part, but the Supreme Court held that it should give further consideration to the constitutional issues raised. Ten months later, on 23 May 2006, the Supreme Court reconsidered the case of *CC v. Ireland* and in this second decision the Court gave final judgment on the constitutionality of section 1(1) of the Criminal Law (Amendment) Act 1935.

CC had been charged with four offences, namely unlawful carnal knowledge of a female under the age of fifteen contrary to section 1(1) of the Criminal Law (Amendment) Act, 1935 on four separate occasions. The complainant was thirteen years and ten/eleven months at the time the offences took place. In his statement to the Gardaí, CC had stated that he had consensual sexual intercourse with the complainant. It was submitted in court that his reasonable belief in the age of the complainant would form part of his defence but for the fact that such a defence was prohibited by law. CC had first brought judicial review proceedings to the High Court seeking a declaration that reasonable belief as to age is a defence, that the exclusion of this defence is unconstitutional and that, if this is an offence of strict liability, it is inconsistent with the Constitution. Mr. Justice Smyth refused to make these declarations and the matter was appealed to the Supreme Court.

2.2 The first Supreme Court decision

The Supreme Court delivered the first judgment in *C.C. v Ireland* on 12 July 2005 (Hardiman J., Geoghegan J., Fennelly J., and McCracken J., Denham J. dissenting).[21] The main focus of the case was whether section 1(1) of the 1935 Act created an offence of strict liability or whether the requirement to prove *mens rea* could be read into the statute. Mr. Justice Geoghegan, for the majority, noted that the 1935 Act did not expressly permit the defence of mistake as to age but neither was there any provision either incorporating or excluding the principle of *mens rea* in relation to this offence. The majority were satisfied, having considered the Criminal Law Amendment Act 1885 which preceded the 1935 Act, that it was the clear intention of the Oireachtas to exclude the defence of mistake as to age in the 1935 Act. The majority, therefore, dismissed the application of CC for a declaration that reasonable belief as to age is a defence based on the interpretation of the section at issue but held that further consideration should be given as to the constitutionality of section 1(1).

[20] [2005] I.E.S.C. 48 (First Judgment); [2006] I.E.S.C. 33 (Second Judgment), [2006] 4 IR 1.

[21] In her dissenting judgement, Denham J. concluded that section 1(1) did not create an offence of strict liability as the words of the section do not expressly exclude the requirement of *mens rea* and there is a common law presumption that in order to give effect to the will of the legislature, the Court must read the section so as to require *mens rea*.

2.3 The second Supreme Court decision

The Supreme Court gave final judgment in *C.C.* on 23 May 2006 having considered the constitutionality of section 1(1) of the 1935 Act. The judgment of the Court was delivered by Hardiman J., allowing the appeal of CC and granting a declaration that section 1(1) was inconsistent with the provisions of the Constitution.

Hardiman J. emphasised the absolute nature of this section in that it affords absolutely no defence once the *actus reus* is established, no matter how extreme the circumstances. He went on to say that so absolute an offence is rare and that this was a provision capable of criminalising, and of jailing, the mentally blameless.[22] He also pointed out that such a conviction, apart from any sentence, also carries a social stigma and results in the convicted person being placed on the Sex Offender's Register.

The Court went on to consider the constitutionality of the section. Hardiman J. referred to O'Malley's book on *Sexual Offences*[23] where the author emphasised the legally unsure nature of this offence and the offence created under section 2 of the 1935 Act (unlawful carnal knowledge of a girl under 17 years). Hardiman J. stated that rather than attempting to balance two rights, the section contains no balance by removing the mental element and criminalising the mentally innocent, adding that this may not have been necessary.[24] He refers to the fact that the section could, for example, have allowed for presumptions which would have to be rebutted or disproved.

Hardiman J. then referred to the Supreme Court decision in *In the Matter of Article 26 of the Constitution and In the Matter of the Employment Equality Bill 1996,*[25] in which the President had referred the Employment Equality Bill to the Supreme Court under the provisions of Article 26 of the Constitution. Under the Bill, an employer could be held liable for the acts of an employee "whether or not it was done with the employer's knowledge or approval." In that case, the Court stated that it was a public scandal to convict a person, who was not blameworthy, of a serious charge and that such a radical change to the criminal law was not justified by the social policy of making the legislation more effective.[26] Hardiman J., pointing out that the sanctions under the Bill were much less severe than those under consideration in this case, held that it was difficult to regard the section at issue in this case as consistent with the Constitution.[27]

[22] [2006] 4 I.R.1, at 74.
[23] T. O'Malley, *Sexual Offences: Law, Policy and Punishment*, Dublin, 1996, p.97.
[24] [2006] 4 I.R. 1, at 77.
[25] [1997] 2 I.R. 321.
[26] *Ibid*, at 373.
[27] [2006] 4 I.R. 1, at 78.

Hardiman J. further pointed out that no form of due diligence (such as showing that the defendant took all reasonable steps to ascertain the age of the complainant) can give rise to a defence to the charge under this section, even where the defendant has been positively and convincingly misled by the girl in question.[28] In finding the section unconstitutional, Hardiman J. stated that to criminalise a person who is mentally innocent of a serious offence is a grave injury to a person's dignity and sense of worth and constitutes a failure, on the part of the State to respect, defend and vindicate the rights to liberty and to good name of the person, contrary to the State's obligation under Article 40 of the Constitution.[29]

Referring to a number of cases in relation to the importance of the requirement for mental guilt before conviction of a serious criminal offence, Hardiman J. stressed that this was a crucial value in a civilised system of justice.[30] He concluded that a provision which criminalises a person without mental guilt and applies a maximum sentence of life imprisonment cannot be regarded as respecting the liberty or 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 a person's good name and property rights of every citizen.

Before reaching a final conclusion, Hardiman J. went on to examine the utilitarian justification for excluding the defence of mistake as to age.[31] In doing so, the Court examined the dissenting judgment of McLachlin J. in the Supreme Court of Canada in the case of *R v. Hess*.[32] In that case, the majority of the Canadian Supreme Court invalidated a provision which was very similar to the section at issue in this case. In examining this dissenting judgment, Hardiman J. notes that McLachlin J. sees nothing wrong with convicting a person, regardless of how young they are, who has specifically considered the age of the girl and who has been shown documentation which appears to prove that she is of legal age. While McLachlin J. acknowledges the moral and constitutional difficulties of such a regime, she justifies it on a basis which Hardiman J. refers to as "crudely utilitarian".[33] The utilitarian argument allows for an injustice on a particular class of person on the basis that it has a deterrent effect. Hardiman J. states that this argument cannot be reconciled with the Constitution, as is shown by the *Employment Equality Bill* case.

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[28] *Ibid.*
[29] [2006] 4 I.R. 1, at 78.
[30] *Ibid*, at 80, referring to *The Employment Equality Bill* 1996, [1997] 2 I.R. 321, and to the English decisions of *Thomas v. The King* [1937] 59 C.L.R. 279 and *Sweet v. Parsley*, [1970] A.C. 132.
[31] Such a utilitarian argument is that the accused can avoid the risk of being convicted by refraining from having intercourse with girls of less than adult age unless he knows for certain that they are over 17 years and that strict liability rules advance the important societal goal of deterrence.
[32] [1990] 2 SCR 906.
[33] [2006] 4 I.R. 1, at 84.

The Court rejected the submission of the DPP that the offence of dangerous driving causing death is an example of an offence for which a blameless person can be convicted, as it is a defence in such cases to prove that the loss of control of the vehicle was not the fault of the accused or that he could not reasonably have safeguarded against it. However, Hardiman J used this example as a hypothesis, describing a scenario in which the law is changed to allow for the conviction of an entirely blameless person to be convicted and sentenced to up to ten years imprisonment for an offence such as dangerous driving causing death. Even if this resulted in a dramatic decline in road accidents, this would be objectionable to most people on the grounds of its injustice. He states that irrespective of any benefits of such a regime, to jail people in respect of an event over which they had no control is so complete a negation of their rights to liberty, due process, equality and respect for human dignity that it could not be contemplated no matter what the benefits. He states that this is not a balancing of the driver's rights against the rest of society, but rather a negation of those rights in the interest of the social good.[34]

The Supreme Court held that the form of absolute liability provided in Section 1(1) of the 1935 Act is unconstitutional. However, the Court alluded to the fact that a defence which left the defendant's knowledge of age to be proved by the prosecution as part of the *mens rea* of the offence would save the section from being unconstitutional. Hardiman J. continued that a defence based on presumptions would also very likely have saved the section as would perhaps other forms of defence and the Court concluded that there is more than one form of statutory rape provision which would pass constitutional muster.[35]

[34] *Ibid*, at 85.
[35] *Ibid*, at 86.

3. The Twenty-Eighth Amendment to the Constitution Bill 2007: A Human Rights Analysis

3.1 Introduction

The current wording of the proposed amendment in relation to strict and absolute liability offences is extremely broad.[36] Article 42A.5.2 allows for the introduction of a range of strict/absolute liability offences which are not connected with child protection, so long as the offences are in some way connected to children. The wording of Article 42.5.3 goes even further in that it provides for the introduction of strict/absolute liability offences generally. Providing such immunity from challenge for the introduction of strict or absolute liability offences would represent a major erosion of the fundamental principles of justice in our Constitution. Furthermore, the wording of this Article would provide complete immunity to constitutional challenge for strict or absolute liability offences in respect of a child. Even if such an offence was in breach of the Constitution for reasons other than the fact that it was an offence of strict or absolute liability, this provision seeks to prevent any constitutional challenge being brought.

3.2 The right to one's good name

The right to one's good name under Article 40.3.1 applies in the context of criminal proceedings. In *The State (O'Rourke and White) v.* Martin,[37] Gannon J. expressed the view that every person tried on a criminal charge had, in the protection of his good name and livelihood, the benefits of the presumption of innocence and other elements of a trial in due course of law, such as the onus of proof on the complainant to establish the charge laid beyond reasonable doubt.[38]

3.3 The right to liberty

Article 40.3.4 of the Constitution states:

> No citizen shall be deprived of his personal liberty save in accordance with law.

The phrase "in accordance with the law" does not mean that a person's right to liberty can be breached once it has been provided for in legislation. Any statute that allows for the deprivation of liberty will need to be examined on general constitutional principles rather than merely being accepted as being "in accordance with the law".[39]

[36] Articles 42(a) 5.2 and Article 42(A) 5.3.
[37] [1984] ILRM 333.
[38] *Ibid* at 338.
[39] See *The People (AG) v. O'Callaghan* [1966] IR 501. See also Hogan and Whyte, *J.M. Kelly: The Irish Constitution,* 4th edition, Dublin, 2003, p. 1540.

3.4 Trial of offences in due course of law

Article 38.1 of the Constitution states:

> No person shall be tried on any criminal charge save in due course of law.

This has been held to be 'an echo of the phrase "due process of law" in the Fifth Amendment of the US Constitution'.[40] Central to the concept of due process is that where a person is at risk of punishment under the criminal law, this must only be pursuant to a procedure which respects that person's dignity as an autonomous human being within a civilised society.[41] Before subjecting a person to punishment, their guilt must be established through procedures which are fair.

The precise content of the term "due course of law" has not been set out in the Constitution or in case law, although a number of judgements have expanded on its meaning. In *Heaney v. Ireland*,[42] Costello J. stated that Article 38.1 is a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice and the basic requirement of a fair trial. Costello J. further stated that there are rules of procedure which must be followed in order that an accused is accorded a fair trial. He stated that there are principles, such as the presumption of innocence, which are so basic to the concept of a fair trial that they obtain constitutional protection from this article.[43]

Judges have also used other constitutional provisions to shape and give force to due process values in the criminal justice system.[44] This is demonstrated by the judgment of O'Higgins C.J. in *State* (*Healy) v. Donoghue*,[45] where he states that the concept of justice implies not only fairness and fair procedures, but also regard to the dignity of the individual. According to O'Higgins C.J., Article 38.1 must be considered in conjunction with the positive obligation on the state to defend and vindicate the personal rights of the individual in Article 40.3.1 and with the right to a good name in Article 40.3.2. O'Higgins C.J. stated that when so considered, the words 'due process of law' in Article 38.1 make it mandatory for every criminal trial to be conducted in accordance with the concepts of justice, that the procedures applied are fair and that the person accused is afforded every opportunity to defend himself. Otherwise, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.[46]

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[40] See *Goodman, International v. Hamilton (No.1)* [1992] 2 IR 542 at 609. See Hogan and Whyte, *ibid*, p. 1039.
[41] Walsh, *Criminal Procedure*, Dublin, 2002, p.4.
[42] [1994] 3 IR 593.
[43] *Ibid*, at pp. 605-606.
[44] Walsh, *ibid*, p.6.
[45] [1976] I.R. 325.
[46] *Ibid* at pp.348-349.

3.5 The presumption of innocence

Although it is not specifically mentioned in the Constitution, the presumption of innocence is a cornerstone principle of Irish criminal law[47] and the Courts have found that it is implicit in Article 38.1. In *O'Leary v. A.G*,[48] the leading Irish case on the presumption of innocence, Costello J. found that Article 38.1 of the Constitution requires that all criminal trials must be conducted in accordance with the presumption of innocence which he described as a 'fundamental postulate' of the criminal law. He also noted that this principle was given express recognition in major international human rights instruments. However, Costello J. also held that this constitutional right is not absolute and that the Oireachtas is permitted in certain circumstances to restrict the exercise of the right.[49] This decision was affirmed by the Supreme Court.[50]

While the presumption of innocence in its bare form does not require that guilt must be proved beyond a reasonable doubt by the prosecution, or that guilt must involve fault as to all aspects of the offence, these requirements can be read from the values which underlie the presumption.[51] Thus, a requirement of the presumption of innocence is that a defendant should only be convicted of what the law defines as culpable wrongdoing and therefore, that *mens rea* is an essential ingredient of a crime.[52]

While there are a number of strict liability offences in Irish law, these apply to regulatory offences or quasi-criminal offences and are almost always summary offences which are tried in the District Court and do not attract a term of imprisonment.[53] There are serious ethical difficulties with attaching strict or absolute liability to crimes which are truly criminal in nature, particularly in relation to stigmatic offences which involve conviction and punishment of persons who are not at fault. This is clear from the judgment of the Supreme Court in the *CC* decision.

[47] Hamilton, *The Presumption of Innocence and Irish Criminal Law*, Dublin, 2007, p.8.
[48] [1993] 1 IR 102 (HC); [1995] 1 IR 254 (SC).
[49] *Ibid* (HC) at p.110.
[50] [1995] 1 IR 254 (SC).
[51] See Roberts, "Taking the Burden of Proof Seriously" (1995) *Criminal Law Review* 783 and Hamilton, *ibid*, p. 12.
[52] See Duff, "Strict Liability, Legal Presumptions, and the Presumption of Innocence", in Simester, *ibid.* See also Ashworth and Blake, "The Presumption of Innocence in English Criminal Law", (1996) *Criminal Law Review* 306, p.317
[53] There are some strict liability offences for immigration-related matters, however, which do attract a sentence of imprisonment. There is also an exception in relation to the offences of riot and violent disorder under sections 14 and 15 of the Public Order Act 1994, both of which are forms of strict liability offences which attract a maximum penalty of ten years imprisonment. Hamilton has stated that the Courts may well find these sections unconstitutional following the decision in the *CC* case. See Hamilton, *ibid*, p.89.

The presumption of innocence is the basis for two fundamental rules in relation to the burden of proof in a criminal case. First, the legal burden of proving all elements of the offence is placed on the prosecution. Secondly, the prosecution must prove that the defendant is guilty of the offence charged beyond a reasonable doubt.[54] The Courts have, however, allowed certain restrictions to the presumption of innocence, such as shifting the evidential burden of proof on to the accused.[55]

The following sections consider the European Convention on Human Rights (ECHR) compatibility of proposals to allow the Oireachtas to introduce strict/absolute liability for offences against children. In this respect, Articles 6 (right to fair trial) and 8 (respect for private and family life) of the ECHR may have implications where strict/absolute liability for serious criminal offences are introduced.

3.6 The right to a fair trial under the ECHR

According to Article 6(1) of the ECHR:

> In the determination…of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(2) also provides that:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The House of Lords has recently considered the compatibility of section 5 of the Sexual Offences Act 2003 Act with Article 6 of the ECHR in *R. v. G.*[56] Section 5 contains the offence of rape of a child under 13. However, this offence does not involve the offence of rape as is understood under Irish law[57] and is committed if a person 'intentionally penetrates the vagina, anus or mouth of another person with his penis' and the other person is under 13. Consent is no defence to such a charge, in that, even if the complainant has given factual consent to the act, this will not be considered as a defence. Thus, the offence is a so-called statutory rape offence and is also an offence of strict liability, as there is no defence of mistake as to age (in fact, this offence would be viewed by some commentators as an offence of absolute liability as there is no due diligence defence).

[54] McGrath, *Evidence* , Dublin, 2005, p. 17.
[55] Refer to legislative options to amend the Criminal Law (Sexual Offences) Act 2006 in section 4.9 of the present report.
[56] *R. v. G.* [2008] UKHL 37. See section on England and Wales above for details of the facts of this case.
[57] See Gillespie, *ibid*, p.46.

The House of Lords rejected the contention that section 5, as an offence of strict liability, was in breach of Article 6. Lord Hoffman stated that it is settled law that Article 6(1) guarantees fair procedures and the observance of the principle of the separation of powers but does not have any impact on any particular substantive content of the criminal or civil law. He agreed with the Court of Appeal decision in *R v. G* which held that the content and interpretation of domestic substantive law is not engaged by Article 6[58] and also agreed that it is a matter for contracting states to define essential elements of the offence with which the person has been charged.[59] In considering the case of *Salabiaku v. France*,[60] Lord Hope stated that the definition of the elements of the offence is a matter for domestic law and that while objection could be taken if the offence was incompatible with other articles of the Convention, they would not render the trial unfair under Article 6(1) or breach the presumption of innocence under Article 6(2). He also stated that Article 6 does not proscribe strict liability offences, so long as the burden of proof of all of the elements which constitute the offence remains on the prosecution.[61]

While the European Court of Human Rights has the ultimate responsibility of interpreting the rights under the ECHR, Lord Hope notes that the principles in the *Salabiaku* case are set out in general terms but that the Court has not so far attempted to enlarge on these principles. The decision has been the subject of some debate among judges and academic writers and the European Court of Human Rights has not adjudicated on the *R v. G*. However in the *Salabiaku* case, the Court stated that Article 6(2) requires states to confine strict liability offences within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[62] In this case, the French courts were genuinely allowed freedom to access any evidence that the defendant put before them to rebut the presumption.

3.7 The right to respect for private and family life

Article 8 of the ECHR provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[58] (2008) UKHL 37, Lord Hoffman at para. 4.
[59] *Ibid* at para. 27.
[60] *Salabiaku v. France* [1988] 13 EHRR 379.
[61] *Ibid* at paras. 28-30.
[62] [1988] 13 EHRR 379, paras. 27-28.

The European Court of Human Rights has held in a number of cases that private life includes sexual life. In *X and Y v. The Netherlands*,[63] the Court stated that the concept of private life "covers the physical and moral integrity of the person, including his or her sexual life." In *Bruggemann and Scheuten v. Germany*,[64] the Commission stated as follows:

> The right to respect for private life is of such scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle therefore, whenever the state sets up rules for the behaviour of the individual within this sphere, it interferes with respect for private life and such interference must be justified in light of Article 8(2).[65]

It is clearly justifiable for the law to protect those under the age of consent by prosecuting those who are over the age of consent for having sexual intercourse with them and this would not therefore amount to a breach of Article 8. However, the question remains as to whether prosecution for consensual sexual activity between older teenagers could be in breach of Article 8, particularly given the serious nature of the offence and the penalties involved. This question is of particular significance in Ireland, as our age of consent remains at 17, which is higher than our European counterparts. The potential for a breach of Article 8 would increase if the defence of mistake as to age was removed via the introduction of a strict or absolute liability offence as this would also apply to a defendant under the age of 18 who mistakenly believed that the complainant was over the age of consent.

Article 8(2) prohibits public authorities from interfering with the right to private and family life except where the grounds of the interference are: in accordance with the law; pursue a legitimate aim and are necessary and proportionate. In determining whether a measure which interferes with the right to private and family life is proportionate, the Court may consider whether the same objective could have been achieved by the State using less restrictive means.[66] This may be a relevant factor in relation to consensual sexual activity between older adolescents, as it is possible to exempt such activity from prosecution, as has been achieved in other jurisdictions, such as through the use of "age-gap" provisions.[67] Similarly, if the defence of mistake as to age is removed through the introduction of a strict or absolute liability offence, this may be found to be disproportionate, particularly in relation to young people, as the State could have achieved the same objective using less restrictive means.[68]

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[63] (1985) 8 E.H.R.R 235, at para. 22.
[64] (1977) 3 E.H.R.R. 244.
[65] *Ibid*, at para. 55.
[66] *Campbell v. United Kingdom* (1993) 15 E.H.R.R. 137.
[67] See Appendix A.
[68] Refer legislative options to amend the Criminal Law (Sexual Offences) Act 2006 in section 4.9 of the present report.

The decision in *R v. G,* discussed above, also considered whether the prosecution of an adolescent for consensual behaviour might amount to a disproportionate interference with Article 8. The House of Lords held, by a majority of 3-2 that no breach of Article 8 had occurred. However, the judgment is unclear as to whether the selection of charges, including the decision to prosecute, could ever amount to a breach of Article 8. The argument in this case was that the defendant's right to respect for private life was breached because of the decision to prosecute him under section 5 of the Sexual Offences Act 2003, rather than under section 13, which deals with offences committed by persons under 18 and carries a lower penalty. However, it appears from the judgments in this case that Article 8 could be engaged by the decision to prosecute and the selection of charges, in that the defendant could have been prosecuted for a less serious offence. The judgment is therefore very pertinent to the issue of whether Article 8 could be breached in relation to decisions to prosecute older adolescents for consensual sexual activity.[69]

Lord Hope stated that he was not of the view that the prosecution of a child under 15 for committing a sexual act with a child under 13 would be, of itself, disproportionate. He referred to the need for children to be protected from each other as well as their need to be protected against themselves.[70] Similarly, Baroness Hale emphasised the need to protect children from the danger of under-age sex and the need to protect children from premature sexual activity of all kind.[71] The facts of this case concerned a 15 year old boy and a 12 year old girl. In addition, the introduction of strict or absolute liability in relation to older adolescents in particular, could amount to a breach of Article 8 where the complainant is an older adolescent and reasonably believed that the complainant was over the age of consent.

[69] See Gillespie, *ibid*, p.48.
[70] [2008] UKHL 37, para. 36.
[71] *Ibid*, paras. 44 – 48.

4. The Criminal Law (Sexual Offences) Act 2006 and Legislative Options to Enhance Protection for Children

4.1 Introduction

The following sections concern the introduction of new offences in the Criminal Law (Sexual Offences) Act 2006 which provide for a defence of honest belief as to age.

4.2 Defilement of a child under 15 years of age

Section 2 of the Act creates a new offence, called defilement of a child, of engaging or attempting to engage in a sexual act[72] with a child who is under 15 years of age.[73] Section 2 also contains an offence of attempted defilement of a child. Both offences carry a maximum penalty of life imprisonment

4.3 Defilement of a child under 17 years of age

Section 3[74]creates an offence of defilement of a child under the age of 17 years, namely, engaging or attempting to engage in a sexual act, as defined, with a child under 17 years of age. Section 3 also contains the offence of attempted defilement of a child which is committed when a person attempts to engage in a sexual act with a child who is under the age of 17. The maximum penalties in respect of section 3 offences were amended by section 5 of the Criminal Law (Sexual Offences) (Amendment) Act 2007. A first conviction for an offence under either section 3(1) or 3(2) now carries a maximum penalty of five years imprisonment, unless the offender is a person in authority, in which case the maximum sentence is raised to 10 years' imprisonment.[75] The offence of attempted defilement of a child under 17 now carries the same penalty as defilement of a child under 17. Under Section 4, the maximum penalty increases to 10 years, or 15 years

[72] Section 1 of the Act defines "sexual act" as consisting of sexual intercourse and buggery between persons who are not married to each other. The term "sexual act" also includes any act described in section 3(1) or 4(1) of the Criminal Law Rape (Amendment) Act 1990. Section 3(1) governs aggravated sexual assault, which is defined as sexual assault that involves serious violence or the threat of serious violence, or is such as to cause injury, humiliation, or degradation of a grave nature to the person assaulted. Section 4(1) is known as section 4 rape, which is defined under the 1990 Act as penetration (however slight) of the anus or mouth by the penis or penetration (however slight) of the vagina by any object held or manipulated by another person.

[73] This offence replaces section 1of the Criminal Law Amendment Act 1935 which criminalised unlawful carnal knowledge of a girl under 15 years of age and section 3(a) and (b) of the Criminal Law (Sexual Offences) Act 1993 which criminalised buggery of persons under 15 years of age.

[74] Section 3 replaces section 2 of the 1935 Act and sections 3(c) and (d) of the 1993 Act.

[75] Under the 2006 Act, the maximum penalty for section 3(2) had been two years imprisonment or four years where the offender is a person in authority.

for a person in authority, where the offender has committed offences under this section in the past.[76]

Offences under the Criminal Law (Sexual Offences) Act 2006 are also subject to the notification requirements under the Sex Offenders Act 2001.[77] Section 3(10) of the 2006 Act states that a person convicted of an offence under section 3 shall not be subject to the provisions of the Sex Offenders Act 2001 if that person is not more than 24 months older than the child against whom the offence was committed.

4.4 Defence of mistake as to age

Both sections 2 and 3 allow for a defence of honest belief that the child in question had reached the relevant age: 15 in respect of section 2 (defilement of a child under 15 years) and 17 in respect of section 3 (defilement of a child under 17 years). The presence of such honest belief is to be judged subjectively, however, the Act provides that the Court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.

4.5 Position of responsibility

As noted above, there is an increased penalty for the offence of defilement of a child under 17 where the perpetrator is in a position of responsibility over the child. This does not apply to the offence of defilement of a child under 15 as the maximum penalty is life imprisonment although this should be treated as an aggravating factor at the sentencing stage.[78] Section 1 defines the term position of responsibility as:

> (a) a parent, step-parent, guardian, grandparent, uncle or aunt of the victim,
> (b) any person who is, for the time being, in loco parentis to the victim, or
> (c) any person who is, for the time being, responsible for the education, supervision or welfare of the victim.

4.6 Differential treatment for females

Defilement can be committed by either a male or a female defendant. Although the Act appears to be gender-neutral in this regard, section 5 provides as follows:

> 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.

[76] As amended by the Criminal Law (Sexual Offences) (Amendment) Act 2007. The previous maximum penalties under section 4 of the 2006 Act in respect of a subsequent conviction were four years or seven years for a person in authority.
[77] The Offences which are subject to the notification requirements are listed in the Schedule to the Sex Offenders Act 2001.
[78] See Gillespie, *ibid*, p. 88

Thus, in practical terms, this section of the Act is not gender-neutral as it only allows for the prosecution of a boy under 17 for engaging in an act of sexual intercourse, whereas girls under 17 are exempt from prosecution. Under the Children Act 2001, as amended, the age of criminal responsibility is as low as ten for sexual assault, including offences under the 2006 Act. Thus, boys as young as 10 could be convicted of an offence under the 2006 Act, whereas girls under 17 will be immune from prosecution. While section 5 ensures that girls under 17 are immune from prosecution for an act of sexual intercourse, a girl under 17 may be charged with offence under section 2 (defilement of a child under 15), or section 3 (defilement of a child under 17) where she has committed a 'sexual act' which does not amount to sexual intercourse.

4.7 Human rights analysis

The discriminatory effect of section 5 raises issues in relation to its compatibility under the ECHR. The European Convention on Human Rights Act 2003 gives further effect to ECHR in Irish law and places an obligation on organs of the State to act in a manner which is compatible with the Convention.[79] While the 2003 Act does not require the Oireachtas to legislate in a manner which complies with the Convention, the Act does require the Courts to interpret and apply statutory provisions or rules of law in a Convention compatible manner.[80] The Act also requires the Courts to take judicial notice of the Convention provisions and the case law of the European Court of Human Rights, and to take due account of the principles laid down in those decisions and judgments when interpreting and applying Convention provisions.[81]

Article 14 of the ECHR provides that the enjoyment of the Convention rights shall be secured without discrimination on any ground such as sex, religion, language, birth or other status. In relation to the differential treatment of boys and girls under the 2006 Act, this appears to breach Article 14 of the Convention as it discriminates on grounds of gender. Kilkelly argues that the discriminatory treatment of boys under the Act is in breach of Article 14 of the ECHR when considered together with Article 6 (right to fair trial) and article 8 (right to respect for private life).[82]

In considering whether there has been a breach of Article 14, it is necessary to establish if the difference in treatment can be justified by objective and reasonable grounds. The Court must consider whether the legitimate aim which the measure seeks to achieve is proportionate to the impact of the measure. The Explanatory memorandum to the

[79] See section 3(1) of the Act
[80] See Section 2(1) of the Act.
[81] See Section 4 of the Act.
82 See Kilkelly, *ibid*, p. 268. The discriminatory effect of section 5 was also recognised by the Joint Committee on Child Protection and in examining this provision. The Committee concluded that it was potentially incompatible with the Constitution and in breach of the ECHR. The Committee's recommendation was thus to repeal section 5. Report of the Joint Committee on Child Protection PRN A6/2024, November 2006, paras 8.5.9-8.5.18.

Criminal Law (Sexual Offences) Bill 2006 states that the purpose of section 5 is as follows:

> This is being introduced primarily to protect females in that age group who might be pregnant although it has wider scope. It will be clear to such females that they have nothing to fear from the criminal law.

While this can be regarded as a legitimate aim, given the seriousness of the offence as it relates to boys under 17, it is difficult to see how this will provide sufficient justification for the substantial difference in treatment on the grounds of gender. Kilkelly argues that such difference in treatment appears incapable of justification.[83] The European Court of Human Rights have found differences in treatment based on some grounds of discrimination, including gender, are more "weighty" than others and differential treatment under these grounds will require substantial justification. In *Abdulaziz v. United Kingdom*[84], for example, the European Court of Human Rights stated as follows:

> [T]he advancement of the equality of the sexes is today a major goal in the member states of the Council of Europe. This means that very weighty reasons would have to be advanced before difference in treatment on the ground of sex could be regarded as compatible with the Convention.[85]

4.8 Sexual activity between young people

There is no provision in the Act to prevent criminalising young people of a similar age in consenting sexual relationships. The Act makes it an offence for all children under the age of 17 to engage in sexual activities with each other, although girls will not be guilty of an offence in this situation, pursuant to section 5 of the Act.

The age of sexual consent in Ireland is set at 17, which, as Gillespie describes, "sets a minimum age below which sexual contact with a child is criminalised, regardless of whether the child purports to give consent."[86] Thus, the 2006 Act specifies that it is not a defence to an offence under either section 2 or section 3 to prove that the child consented to the sexual act in question. However, the law does not state that no child has the capacity to consent to sexual activity. Some children, depending on their age and level of maturity and understanding, can give what Gillespie calls "factual consent" to sexual activity, even though they are below the age of consent.[87]

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[83] See Kilkelly, *ibid*, p. 268.
[84] [1986] 9 E.H.R.R. 555. The Court has stressed this point in a number of other cases of sex discrimination,, see *Schuler-Zgraggen v. Switzerland* (1993) 16 E.H.R.R. 405, at para. 67 and *Ünal Tekeli v Turkey* (2006) 42 E.H.R.R., at para.53.
[85] [1986] 9 E.H.R.R. 555 at para. 78.
[86] Gillespie, *ibid*, p.14.
[87] Capacity to consent is also an issue in relation to sexual relationships for persons with an intellectual disability. Under the Criminal Law (Sexual Offences) Act 1993, it may be an offence to engage in a sexual activity with a person with an intellectual disability even if that person consents. This is because the definition of "mentally impaired" person in the Act includes a person who is "incapable of living an independent life". Furthermore, under the Act, it is a criminal offence for a "mentally impaired" person to

In fact, there appears to be widespread belief among the public that the age of consent in Ireland is 16.[88] While there is limited research in Ireland in relation to the average age at which young people begin to engage in sexual activity, there have been some useful studies in this regard. For example, a 1997 survey of 2,754 pupils aged 15-18 years in Galway found that approximately 21% of pupils had already had sexual intercourse and that the average age for first intercourse was 15.5 years.[89] A recent study by the Crisis Pregnancy Agency found that 31% of men and 22% of women aged 18-24 had first experienced vaginal intercourse before the age of 17.[90] This study also found that people with less education are more likely to experience vaginal sex before the age of 17.[91]

It is desirable to set an age of consent below which adults should not engage in sexual activity with a child, regardless of whether there may have been "factual consent". However, the law should distinguish between consensual sexual activity between teenagers and abuse by an adult. Such distinctions have been made in other jurisdictions such as Canada.[92] The absence of a provision to exempt older teenagers from engaging in non-exploitative consensual sexual activity may be found to breach article 8 of the ECHR.[93] While section 3(9) of the 2006 Act requires that the consent of the DPP be obtained before a prosecution can be brought against a person under 17 for offences committed under the Act, this discretion is not sufficient to ensure that young people will not be prosecuted. While girls under 17 are exempt from prosecution for engaging in an act of sexual intercourse under Section 5 of the 2006 Act, the act does allow for a girl under 17 to be prosecuted where she has committed a "sexual act" which does not amount to intercourse. The significant prosecutorial discretion given to the DPP in this regard could lead to selective prosecution where some young people may not be prosecuted for engaging in consensual sexual activity, while others may still be prosecuted, which goes against the principles of equality and fairness.

engage in sexual activity with another "mentally impaired" person. For further discussion of this issue, see NAMHI (now Inclusion Ireland), *ibid*.

[88] See Submission of the DPP to the Oireachtas Committee on Child Protection, 26 September 2006, p.8.

[89] McCale and Newell, "Sexual behaviour and sex education in Irish school-going teenagers", *International Journal of STD and Aids*, 1997 (8) pp.196-200.

[90] Crisis Pregnancy Agency, *Irish Study of Sexual Health and Relationships*, October 2006, Summary Report, pp.25-26.

[91] *Ibid.*

[92] See Appendix A of this report in relation to Canadian provisions.

[93] See discussion on *R v. G* [2008] UKHL 37 in section 3.4 of the present report.

Criminalising peer-to-peer non-exploitative consensual sexual activity is also contrary to the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007[94], which recommends that non-exploitative sexual relations between minors should be exempt from prosecution. [95] This Convention was adopted by the Council of Europe in October 2007. It has been signed by 27 countries, including Ireland, but must be ratified by five states before coming into force, which has not yet occurred. The explanatory report accompanying the Convention states as follows:

> It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity. For this reason, paragraph 3 states that the Convention does not aim to govern consensual sexual activities between minors, even if they are below the legal age for sexual activities as provided in internal law. It is left to Parties to define what a "minor" is.[96]

While the United Nations Convention on the Rights of the Child (UNCRC) contains rights to protection from harm, it also contains participation rights which recognise the child as an independent rights holder. Ireland ratified the UNCRC in 1992 and is legally bound to follow policies which conform with the obligations set out in the Convention. The Irish Government must make periodic reports to the Committee on the Rights of the Child in relation to measures it has taken to give effect to the rights in the UNCRC. Article 19 requires States to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Article 3 requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 12(1) requires States to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' While the Convention defines a child as every human being below the age of 18, it also recognises that majority may be reached earlier. These articles are relevant to setting an age of consent to sexual activity in that a balance should be struck between protecting the child and recognising the child's evolving capacity having regard to their age and maturity. The UNCRC is generally silent on the issue of sexual activity. However, there is some guidance from the UN Committee on the Rights of the Child in its General Comment on adolescent health which recommends a minimum age of sexual

[94] CETS No 201. See article 18(1) of the Convention, which sets out conduct relating to sexual abuse of children which should be criminalised. Article 18(1)(a) states that engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal aid for sexual activities, should be criminalised. However, Article 18(3) states that the provisions of paragraph (1)(a) are not intended to govern consensual sexual activity between minors.

[95] See Kilkelly, *ibid*, p. 271. See also Kilkelly, O'Mahony and O'Sullivan, Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork, *Submission to the Joint Committee on the Constitutional Amendment on Children*, 31 January 2008.

[96] *Explanatory Note on the Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, CM (2007), 112 add., para. 129.

consent that closely reflects recognition of the status of human beings under the ages of 18 as rights holders in accordance with their evolving capacity age and maturity.[97]

4.9 Legislative options to amend the Criminal Law (Sexual Offences) Act 2006

The proposals to amend the Constitution have arisen from concerns that the mistake as to age defence weakens the protection of children from sexual abuse. The *Joint Committee on Child Protection* has recommended the reintroduction of a strict liability offence, but also recommended that the age of consent should be lowered to 16.

In the *CC* decision, the Supreme Court remarked at the end its judgment that a defence which left the defendant's knowledge of age to be proved by the prosecution as part of the *mens rea* of the offence would save the section from being unconstitutional. However, the Supreme Court also remarked that there were many forms of statutory rape provisions which would pass constitutional muster. The Court indicated that a defence based on presumptions would also very likely have saved the section as would perhaps other forms of defence. There remains the option, therefore, of introducing a law that will protect children from sexual exploitation in a more robust way than the current law, while at the same time ensuring that fundamental principles of justice and fairness are complied with. This could be achieved by altering the way in which the defence as to age mistake operates using a combination of the following options.

Option 1 – Honest and reasonable belief

The current offence of defilement of a child contains a defence that the person charged honestly believed that the child in question had reached the relevant age, 15 in respect of section 2 (defilement of a child under 15 years of age) and 17 in respect of section 3 (defilement of a child under 17 years of age). The presence of such honest belief is to be judged subjectively. Where a subjective test is applied, the jury must establish what the defendant was thinking at the time of the alleged offence, whether the defendant honestly believed that the young person was over the age of 17. By contrast, where an objective test is applied, the jury must consider whether a reasonable person would have held this belief. While the Act does provide that the Court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances, this is not as strong as providing an objective test. This defence could be amended to provide for such an objective test, which would require that the defendant's belief was both honest and reasonable.

[97] Committee on the Rights of the Child, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4.

Option 2 – Shifting the burden of proof

The wording of the 2006 Act states that it is a defence for the defendant "to prove" his honest belief. It is unclear whether this shifts the legal burden of proof, or merely the evidential burden of proof. The general rule, in accordance with the presumption of innocence, is that the prosecution has to prove every element of an offence beyond a reasonable doubt, including any defences raised. With the exception of the defence of insanity, once any evidence is raised to support a defence, the prosecution must disprove the defence. Where the defendant is obliged to prove an element of his defence, or to disprove at least one element of the offence, this is referred to as shifting the legal burden onto the defendant. Where a statutory defence places a legal burden on the defendant, the standard of proof to be met by the accused is to establish the defence on the balance of probabilities. In other cases, where the evidential burden rests on the defendant, if the defendant presents some evidence on which to base his defence and then the prosecution must disprove the defence beyond a reasonable doubt.

While placing the evidential burden of proof on the accused is constitutionally acceptable, the case law is not clear as to whether shifting the legal burden of proof onto the defendant is unconstitutional.[98] While shifting the legal burden of proof onto the defendant may be seen as a violation of the presumption of innocence, it can be argued that such an infringement is proportionate to the child protection aim of the offence of defilement of a child. In relation to ECHR caselaw on this issue,[99] Article 6 requires that such reverse onus provisions are reasonably proportionate to the legitimate aim being sought by the provision, which provides States with some room to manoeuvre.[100] The Oireachtas could therefore amend the 2006 Act to make it clear that both the legal and evidential burden rests on the defendant to prove the defence of mistake as to age.

Option 3 – Due diligence requirement

A due diligence requirement could be introduced so as to ensure that the person charged could not rely on the defence of mistake as to age unless they could show that they took all reasonable steps to ascertain the age of the child. Similar clauses have been introduced in Canada and New Zealand, as outlined in Appendix A of this report. In the *CC* case, the Supreme Court referred to the absence of a due diligence defence in relation to the previous law of unlawful carnal knowledge. Judge Hardiman referred to the dissenting judgment of Keane J. in *Shannon Regional Fisheries Board v Cavan Co. Council*, and the judgment of the Canadian Supreme Court in *R. v. City of Sault Sainte Marie* and stated that a defence of due diligence may suffice to justify a regulatory offence of strict liability. While Hardiman J. stated that it was not under consideration in

[98] See *Hardy v. Ireland* (1994) 2 IR 550 and *O'Leary v. Attorney General* (1995) 1 IR 254. See Declan McGrath, *Evidence*, Dublin, 2005, p.25.
[99] *Janosevic v* Sweden, [2004] 38 EHRR 473.
[100] See Una Ni Raifeartaigh, "The Convention and Irish Criminal Law: Selected Topics", pp.259-261, in Kilkelly, (Ed), *ECHR and Irish Law*, 2nd edition, 2009.

the *CC* case as to whether such a defence would suffice for a true criminal offence carrying a sentence of life imprisonment, this may well qualify as one of the "other forms of defence" which Hardiman alluded to as being capable of passing constitutional muster. However, it is possible that there may be constitutional difficulties in introducing a due diligence requirement in that, in addition to shifting the legal burden of proof, this would require the defendant to satisfy a more onerous standard of proof than the balance of probabilities, which is usually the standard of proof to be discharged where the legal burden shifts to the defendant.

Option 4 – Differing age groups

The Oireachtas could consider altering the age categories in relation to the defence of defilement of a child and create offences in relation to children under 13 or 14 and offences relating to children under 16 (lowering the age of consent) or 17. While English law contains an offence of strict liability in relation to children under 13 years, it may be difficult to introduce such legislation here. Given that the complainant in the *CC* case was 13 years and 10/11 months, the exclusion of any defence of mistake as to age in relation to under 14 year olds would certainly be unconstitutional. A strict liability offence of this nature in relation to under 13 year olds or under 12 year olds may still be held to be unconstitutional. However, the Oireachtas could introduce a defence as to mistake as to age in relation to a younger category of complainants which is far more onerous for the defendant to satisfy.

Altering the age brackets would also allow for provision to be made for consensual, non-exploitative sexual activities to be exempt from prosecution in relation to the older category of children. So-called age gap provisions which exist in other jurisdictions such as Canada could be considered in this regard.

Option 5 - Persons in authority

Consideration should be given by the Oireachtas to introducing a new law offence for a person in authority to engage in a sexual act with a young person of either sex following the recommendation made by DPP in his submission to the Oireachtas Committee on Child Protection. The DPP submission stated:

> Such a law could deal with a wide range of authority relationships, including those between teachers and pupils, doctors (and other medical personnel) and patients, youth leaders, workers in children's homes, clergy, sporting coaches and trainers, and other persons *in loco parentis* towards children.[101]

The Oireachtas could consider creating strict liability offences in such cases, given that such persons would be in a position to know the age of the young person concerned. However, given that it would be very difficult for this category of persons to show that they honestly believed the young person was over the age of 17, it may be unnecessary to remove the defence of mistake as to age in relation to such an offence.

[101] Submission by the DPP to Oireachtas Joint Committee on Child Protection, 26 September 2006, p.17.

5. The Need for a more Comprehensive Regime to Protect Children

5.1 Introduction

This section will look at the principal laws relating to the sexual abuse of children. It is beyond the remit of this report to offer a comprehensive review of all forms of offences against children, such as the laws on grooming, child pornography and commercial sexual exploitation. The main purpose of this section is to examine the reasons why the offence of defilement of a child (and formerly the offence of unlawful carnal knowledge) is used to cover a range of situations where a person has sexual intercourse with or sexually assaults a child. In this regard, the section will examine the difficulties with our current law and practice, particularly in relation to the offences of rape, sexual assault and aggravated sexual assault where the victim is a child. This section will discuss the fact that there are no child specific offences in this regard, which may result in the offence of defilement of a child being preferred by the DPP in circumstances where there was an additional abusive element other than the fact of the child's age, in that there was an absence of factual consent. The benefits of carrying out a review of the law of sexual offences will be discussed, with reference to other jurisdictions which have codified sexual offences against children in a more comprehensive way.

5.2 Rape

The offence of rape is defined at common law and by statue in Section 2(1) of the Criminal Law (Rape) Act 1981. The *actus reus* of the offence of rape is that sexual intercourse took place and the woman did not consent. Gillespie notes that while it is less common in relation to rape of an adult for the defendant to argue that sexual intercourse did not occur, it is more likely that an argument may be made in relation to rape of a child that penetration did not take place.[102] Sexual intercourse in the context of this offence means penetration of the vagina by the penis and therefore the offence is not gender neutral. Penetration will be found to have occurred if the penis is proved to have entered the opening of the vagina.[103] The *mens rea* of the offence is that the man intended to penetrate the woman and that he either knew at the time of the intercourse that the woman was not consenting or he was reckless as to whether she was consenting.

[102] Gillespie, *ibid*, p. 55.
[103] See *People (AG) v Dermody* (1956) I.R. 307, where Maguire C.J. stated at p. 312: "If the male organ is proved to have entered the opening of the vagina this amounts to penetration even if there is no emission…proof of rupture of the hymen is unnecessary."

Proving the offence of rape in relation to a child therefore presents a number of difficulties. As discussed earlier in this report,[104] the age of consent, which is set at 17, refers to "legal consent". However, the law does not state that no person below the age of 17 is capable of giving "factual consent" to sexual activity. Therefore, where the offence of rape relates to a child victim, the issue of whether the child actually consented to the sexual intercourse can be raised. It is for this reason that the DPP has stated that it is sometimes preferable to bring statutory rape charges, even if common law rape could have been an alternative.[105] However, one of the difficulties with this approach is that it does not differentiate between the crime of statutory rape (defilement of a child, or previously unlawful carnal knowledge) and the crime of rape. Where actual consent as well as legal consent was absent, a more serious offence has been perpetrated against the child and this should be acknowledged through the criminal justice process. As the English Law Commission has stated, 'non-consensual sexual intercourse with a child is more serious than consensual sexual intercourse, and so should be both marked by a more serious offence-label, and sentenced more severely.'[106]

Irish legislation dealing with sexual offences contains no definition of consent. The Law Reform Commission has recommended the introduction of a statutory definition of consent.[107] Apart from the statement in section 9 of the Criminal Law (Rape) (Amendment) Act 1990,[108] there has been no attempt to provide a statutory definition of consent. When prosecuting an offence of rape against a child of any age, there is a requirement to prove beyond reasonable doubt that the child did not consent. The law does not assume that a child cannot consent to sexual intercourse. There is no Irish decision in relation to the age below which a child is deemed incapable of giving consent.[109] A further difficulty in relation to the issue of consent is raised by the *mens rea* for rape. It is a defence to a charge of rape if the jury believes that the defendant honestly, however unreasonably, believed that the victim was consenting. This subjective approach is largely the result of the House of Lords decision in *R v. Morgan*[110] and has attracted much criticism. While section 2(2) of the Criminal Law (Rape) Act 1981

[104] Refer to the definitional section of the present report.
[105] See DPP Submission to Joint Oireachtas Committee On Child Protection, September 2006, pp.6-7 and also DPP submission to Oireachtas Joint Committee on the Constitutional Amendment on Children, (revised version) February 2009, pp. 1-2.
[106] Law Commission Policy Paper, *Consent in Sex Offences*, London, 2000, para. 3.18.
[107] Law Reform Commission, Report on Rape and Allied Offences, 1988, para.16. O'Malley expresses some doubt that the definition suggested by the Law Reform Commission would have provided clarity in that it is merely a restatement of existing common law principles. O'Malley, *ibid*, p. 37.
[108] It is hereby declared that in relation to an offence that consists or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act.
[109] The Law Commission in England, *ibid*, has recommended in its policy paper that the law should set an age limit below which there is an irrebuttable presumption that a child does not have the capacity to consent to sexual intercourse for the purpose of a charge of rape. The report states that determining what this age limit should be is a matter for experts in child development and for this with a wider social policy remit. For children above this age, the Law Commission proposed a test to be applied in relation to whether the child had the capacity to consent (para 3.16).
[110] [1975] All ER 347.

requires the jury to consider the presence or absence of reasonable grounds for the defendant's belief in consent, the test remains a subjective one.

Section 2 of the 1981 Act also provides that the defendant in a rape case will be guilty if he was reckless as to whether or not the complainant was consenting. Whether recklessness is to be judged as subjective or objective has been the subject of some debate, particularly in English law.[111] In Ireland, the test for recklessness,[112] particularly as applied to rape cases, appears to be a subjective test, although case law has provided little clarity as to what exactly this test entails.[113] The issue of reckless rape is particularly relevant where the victim is a child, particularly if the child has not demonstrated that she does not consent because she lacks the capacity to understand the nature or significance of the act.[114] If the defendant knows that the victim lacks understanding of the nature of the act or was aware that she may not have sufficient understanding, he will have the mens rea to the offence as he knew, or was reckless as to whether she consented. In another scenario, if the defendant gave some consideration to the possibility that the victim did not have the capacity to consent and dismissed it from his mind, even though the risk was obvious, the defendant is likely to be guilty, as he was reckless as to the issue of consent (and his recklessness was subjective). However, where it did not occur to the defendant that the victim might lack the capacity to consent, even though this risk was obvious, the defendant may be found guilty under an objective test for recklessness, but not a subjective test.

Clearly, there is a need to further examine the issue of consent in relation to rape cases. From the point of view of a child victim, this need is even more pronounced if it is to become possible to prosecute individuals who are alleged to have committed rape of a child, where factual consent, and not merely legal consent, is absent. Another concern in relation to prosecuting a rape offence where the victim is a child is that the focus will be placed in the victim as to whether or not she consented, as opposed to the focus being placed on the conduct of the defendant. A review of the offence of rape and of the issue of consent should take account of these concerns with a view to addressing them in the criminal trial process. For example, in the case of a child victim, a direction could be sought from the trial judge to hear evidence in the absence of the jury on whether the child lacked the capacity to consent, with expert evidence being heard on this issue.

[111] See O'Malley, *ibid*, pp. 59-60.
[112] O'Malley describes the distinction between subjective and objective recklessness as follows: "In the case of rape, therefore, objective recklessness means that a man is guilty even if he gives no thought to the possibility that the woman may not be consenting but continues to have intercourse with her regardless, though if he had given thought to the matter it would be obvious that she might not be consenting. Under the subjective test, he would not be guilty unless he had adverted to the possibility that she might not be consenting but continued to have intercourse nonetheless." O'Malley, *ibid*, p.59.
[113] O'Malley, *ibid*, p.60.
[114] See Temkin, *Rape and the Legal Process*, Oxford, 2002, p.136.

5.3 Sexual assault

The offences of sexual assault and aggravated sexual assault apply to both adults and children. While these are essentially common law offences, they were given statutory effect by sections 2 and 3 of the Criminal Law (Rape) (Amendment) Act 1990. The maximum penalty for sexual assault is five years imprisonment.[115] The main distinction in relation to how this offence applies to children as opposed to adults is that consent is no defence to a charge of sexual assault on a person under 15 years, as provided by section 14 of the Criminal Law (Amendment) Act 1935.[116]

Thus, as Gillespie notes, although the age of legal consent in Ireland is 17, the "irrelevance of consent applies to someone under the age of 15."[117] Consent is a defence to a charge of sexual assault in relation to a child between the age of 15 and 17. O'Malley refers to this as a 'fiction of assault' since the assault may have taken place with the consent of the young person and the defendant may have been in the same age group.[118] Therefore, theoretically, kissing or 'petting' between teenagers under 15 could be regarded as sexual assault. A further difficulty with this offence is that, because there must be an act which constitutes an assault, it may not apply where a child touches the sexual organs of an adult, or where there is sexual conduct in the absence of touching. This was noted by the Law Reform Commission in its 1990 Report, which recommended the introduction of an offence of sexual exploitation or child sexual abuse, which would remove the technical requirement for an assault and instead focus on the abusive or exploitative nature of the acts (see below).

It should be noted that since the Supreme Court decision of *PG v. Ireland*[119], which was heard at the same time as *CC v. Ireland*, also addressed the issue of the defence of mistake as to age, but in the context of sexual assault. The defendant had been charged with sexual assault of a 13 year old girl and argued that he believed the girl was at least 15 years. The Supreme Court held that since sexual assault was essentially a common law crime, the presumption of *mens rea* applied and could only be removed by statute,[120] which had not occurred. Therefore the defence of honest mistake also applies to the offence of sexual assault.[121]

[115] Section 2(2) of the Criminal Law (Rape) (Amendment) Act 1990.
[116] Section 14 provides: It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such a person consented to the act alleged to constitute such indecent assault.
[117] Gillespie, *ibid*, p. 74.
[118] See O'Malley, *ibid*, p. 101.
[119] [2005] I.E.S.C. 47.
[120] *Ibid*, at para. 60.
[121] *Ibid*, at para. 60.

5.4 Aggravated sexual assault

This offence is provided for under section 3(1) of the Criminal Law (Rape) (Amendment) Act 1990 which states that the offence consists of a sexual assault involving serious violence or the threat of violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted. While technically, a person between the ages of 15 and 17 years can consent to such an offence, this is unlikely given the nature of the offence and what it involves.[122] However, as noted in Section 3 of this report, the offences of defilement of a child under sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006 include the offence of aggravated sexual assault within the definition of that offence. This broadens the scope of what was previously the offence of unlawful carnal knowledge, to include offences where factual consent may have been absent, and also offences that involve serious violence or the threat of serious violence. The offences of defilement of a child also include the offence of section 4 rape within its definition. Statutory rape offences generally address offences where a person has sexual intercourse with a young person who was below the age of legal consent. Where possible, this should be distinguished from more serious offences where, in addition to the absence of legal consent, there is also an absence of factual consent. This highlights the need for the issue of consent to be examined with a view to reforming the law to take account of situations where children do not have the capacity to give factual consent.

5.5 Offence of child sexual abuse

As mentioned above, the Law Reform Commission recommended the introduction of a specific offence of child sexual abuse in 1990.[123] The Joint Oireachtas Committee has also recommended the introduction of such an offence,[124] as has the Special Rapporteur on Child Protection, Geoffrey Shannon.[125] While the offence of 'causing or encouraging sexual offence upon a child' was introduced by section 249(1) of the Children Act 2001, Shannon points out that this offence is inadequate and points to the advantages of introducing an offence of child sexual abuse. The flexibility of the definition proposed by the Law Reform Commission covers almost every conceivable type of sexual interference with children. Furthermore, the inclusion of sexual gratification as the *mens rea* for the offence allows for a distinction between predatory paedophilia and reckless sexual assault, a distinction can only be made through differential sentencing at present.[126]

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[122] See Gillespie, *ibid*, pp 80-84. Gillespie also raises the possibility that, if recent English decisions were followed in Ireland, a person over 15 may be able to consent to certain forms of sadomasochistic behaviour. However, the cases referred to relate to adults and Gillespie argues that a different standard should be applied to children. This again highlights the need to clarify the law in relation to the capacity of children to consent to sexual activity.

[123] Law Reform Commission, *Report on Child Sex Abuse,* 1990 (LRC 32-1990), p.8.

[124] *Report of the Joint Oireachtas Committee on Child Protection,* November 2006, para.4.6.10-4.6.12

[125] Geoffrey Shannon, *Report of the Special Rapporteur on Child Protection,* November 2007, pp.33-34.

[126] *Ibid*

5.6 Incest

The Report of the Special Rapporteur on Child Protection also makes a number of recommendations[127] in relation to necessary reform of the law on incest, which is governed by the Punishment of Incest Act, 1908 and the Criminal Law (Incest Proceedings) Act, 1995. The report recommends the inclusion of acts which fall short of intercourse within the scope of the offence of incest so that all forms of sexual contact are covered and that the relationships to which incest applies should be broadened to include uncles, aunts, step-parents and adopted children. It also recommends that the offence should be gender neutral to take account of female familial abusers.[128]

5.7 Grooming

The Criminal Law (Sexual Offences)(Amendment) Act, while introducing stricter penalties for the offences of soliciting and importuning children for sexual purposes, did not introduce the offence of 'grooming'. This act governs sexual offences which follow the act of 'grooming', which describes the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others.[129] However, it does not prohibit the act of grooming itself, thus applying to situations where exploitation has already occurred, but not to the behaviour which was designed to bring about the exploitation.[130] Furthermore, section 6 does not provide for a defence of mistake as to age, which may leave it vulnerable to constitutional challenge. The Report of the Special Rapporteur on Child Protection recommends the enactment of a specific offence of 'grooming' to address these difficulties. Gillespie points out that it is difficult to identify the stage at which the criminal law could intervene to prevent abuse from happening in this way. He states that 'the law may only act where it is certain (implicit within Article 38.1 of the Constitution) a person must know what acts are illegal.' It may be difficult to decide where the criminal law can intervene, given that much of the behaviour at issue in relation to 'grooming' could ostensibly be innocent.[131]

[127] *Ibid*, pp. 30-32.
[128] This element of the existing law was criticised recently by Judge Miriam Reynolds in the Roscommon Circuit Court when sentencing a mother of six children for charges of incest, sexual assault and neglect and ill-treatment of her children. When imposing sentence, Judge Reynolds commented that the maximum sentence for incest by a female is seven years (see section 2 of the Punishment of Incest Act, 1908), whereas the maximum sentence for incest by a man is life imprisonment. See McDonagh, "Mother gets seven years in jail for abuse of children", *Irish Times*, 23 January 2009.
[129] Shannon, *ibid*, p. 51. See also Gillespie, *ibid*, chapter 5 for a detailed discussion of the issue of 'grooming'.
[130] See Kilkelly, *ibid*, p. 270.
[131] Gillespie, *ibid*, p. 108.

5.8 Abuse of position of trust

The introduction of a specific new offence to restrict sexual activity between a child and a person in position of trust or responsibility has been recommended by the Joint Committee on Child Protection[132] and by the DPP.[133] The Committee's Report states that a specific new offence of committing a sexual act with a child in a position of trust should include situations where a child is over the age of legal consent, even where the behaviour is consensual.[134] Gillespie notes that factual consent in such offences would be considered irrelevant since the person in a position of trust should know that sexual activity with a child under its care or responsibility is inappropriate and also points out that it is questionable as to whether any such consent would have been freely given in the circumstances of the relationship.[135] The DPP has suggested that persons in authority should include relationships between teachers and pupils, doctors (and other medical personnel) and patients, youth leaders, workers in children's homes, clergy, sporting coaches and trainers, and other persons *in loco parentis* towards children.[136]

The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse provides that a criminal sanction should apply where abuse is made of a recognised position of trust, authority or influence over a child.[137] While these terms are not defined in the Convention, the explanatory report to the Convention states that this refers to situations 'where a relationship of trust has been established with a child, where the relationship occurs within the context of a professional activity (care providers in institutions, teachers, doctors etc) or to other relationships, such as where there is unequal physical, economic, religious or social power.'[138]

5.9 The need for a review of sexual offences and codification

Given the issues discussed above and the complex nature of the area of sexual offences, from both a policy and legal point of view, it is desirable that a comprehensive review of sexual offences should take, with a view to codifying this area of law. The DPP has stated that he is in favour of such a review and of the codification of sexual offences, pointing to the 'sheer volume' of relevant legislation covering sexual offences in our jurisdiction. The DPP notes that accessibility and comprehensibility are among the advantages of such codification and that this is particularly relevant in relation to sexual

[132] See *Report of the Joint Oireachtas Committee on Child Protection*, November 2006, para.5.6.2.
[133] See Submission by the DPP to the Oireachtas Joint Committee on Child Protection,, 26 September 2006, p.17 and Submission by the DPP to the Oireachtas Joint Committee on the Constitutional Amendment on Children (revised version), February 2009, p.7.
[134] *Report of the Joint Oireachtas Committee on Child Protection*, November 2006, para.5.6.2.
[135] Gillespie, *ibid*, pp. 97-98.
[136] See Submission by the Director of Public Prosecutions to the Oireachtas Joint Committee on Child Protection, 26 September 2006, p.17.
[137] Article 18(1) (b).
[138] Explanatory Note on the Convention on the Protection of Children Against Sexual Exploitation and Abuse, CM (2007) 112 add., para. 123.

offences as 'an area of law which universally impinges on such intimate and private aspects of our humanity.'[139]

One of the benefits of such a review of sexual offences would be to allow for reform in relation to the issue of consent, discussed above. Temkin points to a number of strategies that should be considered in the context of reforming the issue of consent. She suggests that, in certain cases, such as where there is evidence of serious injury, the use of weapons, or where sexual intercourse takes place in the context of another grave offence, there may be a case for shifting the evidential burden of establishing consent onto the defendant. Where the defence fails to provide evidence of a factual basis for consent, the issue of consent would not be left to the jury. This option could be considered in situations where the victim is a child.[140] Another option is to provide a statutory definition of consent with a non-exhaustive list of situations in which consent will be negatived, and as list could also address particular issues relating to child victims.[141]

In England and Wales, the codification of sexual offences relating to children has been criticised as 'legislative overkill'[142] in that the Sexual Offences Act 2003 covers not only sexual acts between children and adults, but all forms of sexual behaviour between consenting children. Spencer argues that the act should have excluded any consensual act between persons of the same or similar age. He also argues that the prosecutorial discretion in relation to such consensual behaviour 'runs contrary to the notion of the rule of law, and also ignores the risk of private prosecutions.'[143] He criticises the Sexual Offences Review which took place before legislation was introduced for not obtaining 'any solid information about what is normal in the sex lives of children and young people' and for not conducting a wide consultation with young people on this issue.[144]

The Scottish Government is currently in the process of reviewing its law in relation to sexual offences. The Sexual Offences (Scotland) Bill was introduced in the Scottish Parliament on 17 June 2008. The process which led to the publication of this Bill highlights the valuable nature of such a review and the consultation process it entails.[145] The Bill provides for a statutory framework for sexual offences in Scots law. It creates new "protective offences" which criminalise sexual activity with a person whose capacity to consent to sexual activity it either entirely absent or not fully formed either because of

[139] Submission by the Director of Public Prosecutions to the Oireachtas Joint Committee on the Constitutional Amendment on Children (revised version), February 2009, p.6.
[140] Temkin, *Rape and the Legal Process*, 2nd ed, Oxford, 2002.
[141] The issue of consent has been reviewed in other jurisdictions. Both Canada and Australia have a non-exhaustive statutory list situations where consent is absent. In England and Wales, the Sexual Offences Act 2003 contains new provisions relating to the issue of consent in sections 74-76, although they have attracted criticism for being vague and for leaving too much uncertainty to a range of familiar situations. See Temkin and Ashworth, *The Sexual Offences Act 2003 (1) Rape, Sexual Assault and the Problems of Consent*, 2004, Criminal Law Review 328, at p.334.
[142] Spencer, *The Sexual Offences Act 2003, (2) Child and Family Offences*, 2004, Criminal Law Review 347, p.354.
[143] *Ibid.*
[144] *Ibid*, p. 360.
[145] See Sexual Offences Scotland Bill, Policy Memorandum.

their age or because of a mental disorder.[146] In addition, the Bill makes it an offence for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person. The Bill distinguishes between "young children", aged under 13, whom the Scottish Law Commission consider to have no capacity to consent to sexual activity and "older children" aged between 13 and 15 whom they consider to have only a very limited capacity to consent to sexual activity. The age at which a person is considered to be capable of exercising sexual autonomy is 16. The offences in respect of older children can only be committed by a person aged 16 or over. Thus, while penetrative sexual activity between 13 to 15 year olds is an offence under the act, they are dealt with separately to offences where an adult has sexual intercourse with a person in this age category. Other forms of consensual sexual activity between young people in this age category are not offences under the Bill.[147]

The DPP has stated that a review of sexual offences should be informed by 'solid, empirical research valid in the Irish context'. This is undoubtedly true and in the context of child sexual offences, such a review should include extensive consultation with young people as well as up-to-date research and statistics in relation to sexual activity among young people. The benefits of such a review of sexual offences is that it could address issues in relation to the capacity of children to consent to sexual activity and the protection of a child complainant in relation to sexual offences. It could also address issues in relation to the capacity of persons with an intellectual disability to consent to sexual activity. It could also carry out research and consultation in relation to the issue of how to deal with consensual sexual activity between young people and also how to deal with the issue of exploitative or abusive sexual activity between young people. In this regard, other jurisdictions provide interesting examples of 'age-gap' provisions, where consensual sexual activity is not criminalized where the young people are a certain number of years apart (usually two years in relation to younger age groups and sometimes up to five years in relation to older children.)[148]

[146] Separate "protective" offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15).

[147] The SLC's report had proposed that any consensual sexual activity between older children should not constitute a criminal offence and should instead be grounds for referral to the Children's Reporter, where there are concerns about the child's welfare. The Scottish Government felt that this would have the effect of decriminalizing consensual underage sexual activity between children over the age of 13 and did not agree that this approach 'strikes the right balance between the freedom of young people to make decisions and protecting them from activity which could give rise to longer term adverse consequences.' See Sexual Offences Scotland Bill, Policy Memorandum, para.115.

[148] See Appendix A

6. The child as a Witness: the Need for Protective Measures for the Child Victim giving evidence in a Criminal Trial

6.1 Introduction

This section considers the lack of protection for a child victim giving evidence in a criminal trial for an offence of sexual abuse. One of the main reasons for the proposed re-introduction of a strict or absolute liability offence in relation to statutory rape is to protect the child witness from cross-examination in the event that the defence of mistake as to age is raised, particularly in light of the inadequacy of existing protective measures. However, there are examples of best practice from other jurisdictions in this regard and many recommendations have already been made, in particular by the Joint Oireachtas Committee on Child Protection, which remain unimplemented. Such measures, if prioritised and properly resourced, could have a positive impact for all children who have to engage with the court process, not only in the area of child sexual abuse, but in a wide range of areas.

The treatment of a child witness can be particularly controversial in criminal cases, as an appropriate balance must be struck between the child's right to be protected from harm, particularly where the child is a victim, and the right of the defendant to due process.[149] This is particularly true in relation to cases of child sexual abuse, as the testimony of a child will often form the basis of the prosecution of the offence. Notwithstanding these difficulties, it is crucial that measures are put in place to protect the child witness in the criminal justice process generally.

6.2 Recommendations from the Joint Oireachtas Committee on Child Protection

The Report of the Joint Oireachtas Committee on Child Protection made a significant number of recommendations in relation to measures which could help to alleviate the harshness of the criminal trial process for a child victim.[150] These include recommendations at the investigative stage of an offence of child sexual abuse, such as the establishment of specialist child protection units within An Garda Síochána who would take responsibility for the investigation, and the improvement of facilities at Garda Stations to accommodate child witnesses. It also recommended further study in relation to the proposal that social workers participate in Garda interviews of child complainants. The Report recommends training and education for Gardaí, officers of the DPP, prosecuting solicitors/counsel and judges on child psychology, child development and the reaction of children to incidents of child sexual abuse.

[149] Kilkelly, *ibid.*
[150] *Report of the Joint Oireachtas Committee on Child Protection*, November 2006, part iv, para. 9.1-para.11.10.9.

In relation to the trial process itself, the Report recommends that a fully-funded and resourced programme is introduced to improve facilities for the video-recording of evidence and the use of video-link in order to give full effect to the existing legislative provisions. While the Criminal Evidence Act, 1992 provides for certain protective measures in relation to a child witness, such as the use of audio-visual link, the Committee noted that these provisions are not mandatory, unlike some other jurisdictions, and recommended that the law is amended to ensure that at least some special protective measures for witnesses be automatically applied to all child complainants unless they prefer otherwise.

The Report recommends the introduction of measures to allow the child witness to give evidence in hearing but not in sight of the defendant, such as behind a screen and that wigs and gowns by counsel in the event of any child victim or witness giving evidence, and not just when evidence is given by live television link, which is the current practice. The Report also recommends that Part III of the Criminal Evidence Act, 1992 should be amended to apply a single age limit of 18 years for all special protective measures for child witnesses.

6.3 Cross-examination

The issue of cross-examination of a child victim to a sexual offence is particularly relevant to the present report. One of the principle reasons for supporting the re-introduction of a pre *CC* case type offence in relation to statutory rape, which would not include a defence of mistake as to age, is that the scope for cross-examination of the injured party was limited. It is argued that the introduction of the defence of mistake as to age will involve the cross-examination of the complainant in relation to issues such as her dress, appearance and conduct. In this regard, it is essential that measures are introduced to ensure that the child victim is protected throughout this process as far as possible. In this regard, the Committee, while ultimately recommending the removal of the defence of mistake as to age, also makes a number of recommendations in relation to the cross-examination.

The Committee's Report recommends that personal cross-examination of child complainants and of child witnesses to the offence by the accused be prohibited in the case of a sexual offence against a child, and that the necessary ancillary provisions be made in legislation and/or rules of court along the lines of those made in other jurisdictions. The Committee also looked at other ways in which to ensure that cross-examination of child witnesses and complainants is properly and fairly conducted. In this regard, the Irish Centre for Human Rights has highlighted the child's right to privacy in accordance with human rights law. It recommends that where children are witnesses in trials for sexual offences, limits should be introduced in relation to the types of evidence permissible at trial, as well as the extent of questioning during cross-examination, such as history of sexual activity, clothing etc.[151] The Committee also suggest that specialist

[151] Irish Centre for Human Rights, NUIG, *Submission to the Joint Committee on Child Protection*, 2006, p.6.

training is required for lawyers and judges who are involved in cases of child sexual abuse, to include good practice guidelines for cross-examination.

While the Committee has made very valuable recommendations which should be implemented as a matter of priority, there are other measures which could alleviate some of the concerns in relation to the examination and cross-examination of child witnesses in trials for sexual offences (discussed below).

6.4 Pre-trial video recorded testimony

There are significant advantages to the introduction of pre-trial video recording of both examination-in-chief and cross examination of a child witness, particularly where the child is the complainant in a trial for a sexual offence.[152] This procedure could take place relatively shortly after the offence was reported and capture the child's evidence while still quite fresh and under less-stressful conditions than at a criminal trial. This also has the potential to improve the quality of the evidence and alleviate concerns on delays in the trial process which often results in the jury seeing an older child giving testimony, who may be more mature in appearance and cognitive ability.

The procedure would also facilitate pre-trial decisions and preparation by the prosecution and defence, since issues in relation to admissibility of parts of the child's evidence or manner of questioning could be resolved before the trial. Issues regarding a child's testimonial competence could also be dealt with prior to the trial. Most importantly, this procedure could eliminate much of the additional stress associated with a criminal trial for a child witness. The child can deal with the process at an earlier stage which will allow them to put it behind them and they would not have to come into contact with the accused. While there has also been criticism of these measures from defence lawyers, these are outweighed by the potential advantages for both the prosecution and defence. The procedure is particularly valuable in relation to very young children.

In England and Wales, Section 27 of the Youth Justice and Criminal Evidence Act, 1999 allows for the video evidence in chief of a child witness to be admitted by the court, unless the Court is of the opinion that, in the interests of justice, the recording, or part of it, should not be admitted.[153] Section 28 of the Act allows for the admission of video-recorded cross-examination or re-examination, also allowing for the tape to be excluded if rules of evidence have not been followed.

[152] For a detailed examination of this and other procedures for the testimony of child witnesses see Hoyano and Keenan, *ibid*, pp. 614-687.
[153] Section 27(2) Youth Justice and Criminal Evidence Act, 1999.

In Western Australia, a statutory framework to reform the criminal trial process to accommodate the needs of child witnesses came into operation in 1992 and was revised in 2000 and 2002.[154] The legislation allows for pre-trial video-taped examination in chief and supplemental questioning by prosecution counsel. The video-tape, if admitted, is played at a pre-trial hearing to allow for supplemental questions by the prosecution which are then followed by cross-examination by video-tape. Allowing for situations where children may still be required to appear at trial for further questioning (this has rarely been required),[155] the regime applies to children who are under 18 years on the date of the complaint in criminal proceedings involving sexual offences or offences involving serious physical harm. Studies have shown that there is widespread support for the measure, which is seen as hugely successful, mainly due to the supporting structures set up to implement the regimes, such as the Child Witness Service.[156]

6.5 Examination of a witness through an intermediary

In England and Wales, Section 29 of the Youth Justice and Criminal Evidence Act, 1999 enables the Court to appoint an interpreter or other person to assist the witness in giving evidence in court. An intermediary can also be appointed for the investigative interviews and for pre-recorded testimony. Under section 29(2), the intermediary is authorized to explain the questions and answers so far as necessary to enable them to be understood by the witness or questioner. These measures have only been implemented since 2008. However, an evaluation of pilot schemes in six areas of England and Wales found that the feedback of those who had experience of this measure has been extremely positive. It is particularly useful in respect of witnesses with communication difficulties. Intermediary interventions at court have been described by the judiciary and lawyers on both sides as appropriate and both prosecuting and defence lawyers were positive about the measure.[157]

[154] Acts Amendment (Evidence of Children and Others) Act 1992.
[155] Hoyano and Keenan, *ibid*, p. 645.
[156] *Ibid.*
[157] See Plontnikoff and Woolfson, "The Go-Between: how intermediaries help young witnesses in the criminal justice system', *ChildRIGHT* 245 April 2008, pp.18-21.

6.6 Human rights analysis

Article 6 of the ECHR has been held by the European Court of Human Rights to require that, in accordance with the principle of equality of arms, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, Article 6(3) does not specify when or how a witness must be available for examination by the defence, leaving considerable discretion to State Parties with regard to procedures for taking evidence.[158] The House of Lords have upheld special measures directions under the Youth Justice and Criminal Evidence Act 1999 as being incompliance with article 6 of the ECHR.[159] In respect of pre-trial video evidence it was held that there is no guaranteed right to face-to-face confrontation at English common law or under Article 6(3)(d) of the ECHR.[160] The requirements of the ECHR are satisfied if the defence has an adequate and proper opportunity to challenge and question the witness either at the time the witness was giving the testimony or at some later stage in the proceedings.[161] In *S.N. v. Sweden*,[162] the European Court of Human Rights held that there was no violation of Article 6(1) and 6(3)(d) where videotaped evidence provided by the complainant provided the main basis for the conviction of a school teacher for sexual assault.[163] Jurisprudence from the European Commission of Human Rights has also held that the use of intermediaries does not breach Article 6(3)(d), as long as the demeanour of the witnesses can be directly observed by the Court.[164]

[158] *Kostovski v Netherlands* (1989) 12 EHRR 434. Hoyano and Keenan, *ibid*, p.675.
[159] *R v. Camberwell Green Youth Court, ex p D, R v. Camberwell Green youth Court ex p DPP (G, FC)* [2005] UKHL 4, [2005] 1 WLR 393.
[160] *Ibid*, para. 33 and para. 45-46.
[161] *Ibid*, paras. 12-15 and 49-53.
[162] Application No. 34209/62, judgment, 2 July 2002.
[163] See ICCL, *A Better Deal: The Human Rights of Victims on the Criminal Justice System*, 2008, pp. 30-32 for further discussion on the use of videotaped evidence. www.iccl.ie
[164] Hoyano and Keenan, *ibid*, p.678.
See *Baegen v. Netherlands*, unreported, Application No 16696/90, 20 October 1994.

Appendix A: Comparison of Ireland with other Jurisdictions

	Ireland	England and Wales	Canada	New Zealand
Age of Consent	17 years	16 years	Recently increased from 14 to 16 years in February 2008, though exceptions in relation to peer relationships remain. It is18 years for exploitative sexual activity, including where there is a relationship of trust.	16 years
Age at which Strict Liability applies	Does not apply at present.	No defence of consent or mistake as to age in relation to children under the age of 13 years.	It does not apply, although a due diligence requirement applies to defence of mistake as to age.	No defence of consent or mistake as to age in relation to children under 12 years.
Sexual Activity Between Young People	No provision to exempt consensual non-exploitative sexual activity. Girls under 17 are exempt from prosecution for engaging in sexual intercourse. The consent of the Director of Public Prosecutions is required before a prosecution can be brought against a person under 17.	Consensual sexual activity between young people is not exempt from prosecution. However, a defendant who is less than 18 is dealt with under section 13, which creates a less serious offence with a maximum sentence of five years imprisonment.	If complainant is between 12 and 14 years, the defence of consent is available if defendant is less than two years older and is not in a position of trust, authority, or in a relationship of dependency or an exploitative relationship with the complainant. If the complainant is between 14 and 16 years, the defence of consent is available if the defendant is less than five years older and the above conditions are met.	No provision to exempt consensual sexual activity between young people from prosecution.

	Ireland	England and Wales	Canada	New Zealand
Defence of Mistake as to Age	Applies in relation to both offences committed in relation to children under 15 and children under 17. Honest belief that the child had reached the relevant age is to be judged subjectively, although the Court will have regard to the presence or absence of reasonable grounds. The evidential burden shifts to the defendant.	Does not apply where complainant is under 13. Where complainant is over 13, prosecution must prove that the defendant did not reasonably believe that the complainant was over 16. The evidential and legal burden rests with the prosecution	Applies where the defendant believed the complainant was 16 years or older. There are other offences where the defence is available if the defendant believed the complainant was 18 years or over. The evidential and legal burden shifts to the defendant to prove the defence.	Applies where the complainant is between 12 and 16 years and the young person consented The evidential and legal burden shifts to the defendant to prove the defence.
Due Diligence	No due diligence requirement.	No due diligence requirement.	To rely on the defence of mistake as to age, defendant must have taken all reasonable steps to ascertain the age of the complainant. The complainant must show what steps were taken and that those steps were all that could have been required in the circumstances.	To rely on the defence of mistake as to age, the defendant must prove: a) that all reasonable steps had been taken to find out whether the complainant was 16 years or above; b) that he or she had reasonable grounds to believe the complainant was 16 years or above and c) that the complainant consented.
Relevant Legislation	Criminal Law (Sexual Offences) Act 2006.	Sexual Offences Act 2003 Sections 5-8: offences against children under 13 Sections 9-16, offences against children under 16.	Criminal Code – sections 150, 150.1, 151, 152, 173(2), 271. Act to Amend the Criminal Code (age of protection) and to Make Consequential amendments to the Criminal Records Act (Bill C-22), passed in February 2008.	Section 132-134 of the Crimes Act 2005, as amended by the Crimes Amendment Act 2005.